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Justice Eidsvik
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COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	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 DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC AND DOMINION FINCO INC.
DOCUMENT	**BENCH BRIEF OF DIAVIK DIAMOND MINES (2012) INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Sean Collins / Walker W. MacLeod / Pantelis Kyriakakis / Nathan Stewart Tel: 403-260-3531 / 3710 / 3536 / 3534 Fax: 403-260-3501 Email: scollins@mccarthy.ca / wmacleod@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca

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BENCH BRIEF OF DIAVIK DIAMOND MINES (2012) INC.

IN SUPPORT OF THE APPLICATION TO APPROVE THE SALE OF THE DIAVIK MINE INTEREST TO BE HEARD BY THE HONOURABLE MADAM JUSTICE K.M. EIDSVIK

October 15, 2021 at 10:00 a.m.

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I. INTRODUCTION

1. This bench brief of Diavik Diamond Mines (2012) Inc. ("**DDMI**") is submitted in support of the application (the "**Application**") by FTI Consulting Canada Inc., in its capacity as the court-appointed monitor (the "**Monitor**") of Dominion Diamond Mines ULC ("**Dominion**"), seeking, *inter alia*, advice and directions with respect to the Discontinuance Issue (as defined below), and an order (the "**AVO**") approving the proposed Asset Purchase Agreement (the "**AVO Agreement**") to be entered into between Dominion, by the Monitor, in its capacity as the court-appointed Monitor of Dominion, and not in its personal capacity, as vendor, and DDMI, as purchaser, and the transactions (collectively, the "**AVO Transaction**") contemplated thereunder, pursuant to section 36 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"). Capitalized terms used herein and not otherwise defined shall have the same meaning as ascribed to such terms in the Sixteenth Report of the Monitor, dated October 6, 2021 (the "**Sixteenth Monitor's Report**").

2. These CCAA proceedings (the "**CCAA Proceedings**") were commenced in April 2020 and have been contentious. The AVO Transaction represents an opportunity to bring this case to a definitive conclusion with the support of DDMI and Credit Suisse AG, Cayman Islands Branch (the "**1L Agent**"), in its capacity as administrative agent to Dominion's first-lien lenders (collectively, the "**1L Lenders**"), who are Dominion's most significant remaining senior secured creditors. Since the commencement of these CCAA Proceedings, Dominion has not paid obligations associated with its 40% participating interest (the "**40% Interest**") under the JVA (as defined below), its most significant remaining asset, and no offer to purchase this asset has ever been received. The proposed AVO Transaction contemplates an acquisition by DDMI, pursuant to which DDMI will acquire the 40% Interest for total consideration in excess of $300 million. The AVO Transaction is the best available transaction for the Acquired Assets (as defined below) and will resolve these CCAA Proceedings, which have had, and continue to have, a disruptive effect on the business of the Diavik Mine (as defined below). The AVO Transaction is in the best interests of Dominion's stakeholders as a whole, including creditors, Northern communities, and the environment.

3. The 40% Interest was exposed to the market for approximately five (5) months pursuant to the previous sale and investment solicitation process (the "**SISP**") approved by this Honourable Court on June 19, 2020. The SISP followed three prior strategic review processes undertaken in the five years prior to the commencement of the CCAA Proceedings, two of which failed to result

in any bids. The sole pre-filing sales process which resulted in an indirect bid for the Diavik Mine was the acquisition of Dominion by The Washington Companies ("**Washington**") in 2017. The SISP failed to generate any transactions with respect to the 40% Interest, and the subsequent sale of Dominion's interest in the Ekati mine site (the "**Ekati Sale**" and the "**Ekati Mine**", respectively) to a group of its second-lien creditors (the "**Ad Hoc Group**") excluded the 40% Interest.

4. Since the closing of the Ekati Sale, Dominion has had no management and minimal operations. Pursuant to the Order (Expansion of Monitor's Powers), granted on January 27, 2021 (the "**EMP Order**"), the Monitor has had the sole and exclusive authorization to take various actions and steps on behalf of Dominion, including the marketing and sale of Dominion's assets. Three arm's-length, commercially sophisticated parties - DDMI, the 1L Agent, and Dominion, by and through the Monitor - have engaged in extensive negotiations since the issuance of the EMP Order, ultimately resulting in the AVO Agreement and the AVO Transaction.

5. The AVO Agreement is conditional upon, among other things, the approval of this Honourable Court. The AVO Agreement and the AVO Transaction are supported by the Monitor, DDMI, the 1L Agent, and the holders of private royalty interests affecting the Diavik Mine. The AVO Transaction is commercially reasonable and the best available transaction for the Acquired Assets (as defined below), and should therefore be approved by this Court.

II. FACTS

A. Background, Cover Payment Indebtedness, and DDMI Security

6. These CCAA Proceedings were commenced when Dominion and certain related corporations (collectively, the "**CCAA Applicants**") sought and obtained the Initial Order on April 22, 2020. The Monitor was appointed as monitor of the CCAA Applicants pursuant to the Initial Order.

CCAA Initial Order, granted on April 22, 2020, by the Honourable Madam Justice K.M. Eidsvik, at para. 19.

7. The Initial Order was subsequently amended and restated, most recently pursuant to the Second Amended and Restated Initial Order, granted by the Honourable Madam Justice K.M. Eidsvik on June 19, 2020 (as so amended and restated, the "**SARIO**").

Second Amended and Restated Initial Order, granted by the Honourable Madam Justice K.M. Eidsvik on June 19, 2020 ["SARIO"].

8. Dominion and DDMI are successors in interest (when referred to in such capacity, each a "**Participant**") to the Diavik Joint Venture Agreement, dated as of March 23, 1995 between Kennecott Canada Inc. and Aber Resources Limited, as subsequently amended (as so amended, the "**JVA**"). Pursuant to the JVA, DDMI holds a sixty percent (60%) interest in, and Dominion holds a forty percent (40%) interest in, the Diavik diamond mine site and various surrounding properties in the Northwest Territories (collectively, the "**Diavik Mine**").

Affidavit #6 of Thomas Croese, sworn on December 10, 2020, at paras. 2-3 ["Croese Affidavit #6"]; a copy of the JVA is attached to the Affidavit of Thomas Croese, sworn on April 30, 2020 ["Croese Affidavit #1"], as Confidential Exhibit "1" thereto ["JVA"].

9. DDMI is the manager (when referred to in such capacity, the "**Manager**") under the JVA. In its capacity as Manager, DDMI is responsible for the payment of 100% of all Costs (as defined in the JVA). As a result, DDMI remits full payment, to all vendors, on behalf of the Participants and then collects Dominion's 40% share of such obligations through a cash call and invoicing arrangement. Pursuant to Article 9.4 of the JVA, if there is a payment default following the making of a cash call, the non-defaulting Participant may elect to satisfy such obligation by making a payment in the amount of the default (each a "**Cover Payment**"). As is well known to this Honourable Court, Dominion has failed to satisfy cash calls since the commencement of these proceedings and DDMI has funded Dominion's obligations by way of Cover Payments. DDMI is an involuntary creditor.

Croese Affidavit #1, *supra* at paras. 14-18; JVA at Art. 9.4.

10. Pursuant to Article 9.4(b) of the JVA, the amount of any Cover Payment shall: (i) constitute indebtedness due from the defaulting Participant to the non-defaulting Participant; and, (ii) be secured by a mortgage of and security interest in such Participant's right, title and interest in, to, and under, whenever acquired or arising, its Participating Interest and the Assets (each as defined in the JVA).

JVA, supra at ss. 1.5, 1.6, 1.8, 1.26, 1.27, 1.28, 9.2, 9.4(a)-(c). An excerpt of the relevant JVA provisions is appended to the Bench Brief of Diavik Diamond Mines (2012) Inc., filed October 21, 2020, as Tab "1" thereto

11. This Court has ordered that DDMI is entitled to make Cover Payments notwithstanding the stay of proceedings established pursuant to the Initial Order. As at August 31, 2021, the

outstanding Cover Payment balance was approximately $243.0 million (collectively, with all accrued interest, legal fees, costs, and expenses, the "**DDMI Indebtedness**"), while the DICAN value of diamond collateral held by DDMI was approximately $178.2 million, resulting in a current net collateral shortfall for DDMI of approximately $64.8 million.

Sixteenth Report of the Monitor, dated October 6, 2021, at paras. 35, 53(e) ["Sixteenth Monitor's Report"].

12. Pursuant to the SARIO and certain related orders and endorsements, DDMI is required to release excess diamonds to Dominion in the event that the DICAN value of the diamond collateral exceeds the outstanding quantum of the Cover Payments.

SARIO, *supra* at para. 16; Order (Dismissal of Continuation of September 25 Order), granted by the Honourable Madam Justice K.M. Eidsvik on November 4, 2020; *Dominion Diamond Mines ULC (Re)*, 2021 ABQB 47; Endorsement of the Honourable Madam Justice K.M. Eidsvik, filed on November 10, 2020.

13. Pursuant to paragraph 15 of the Approval and Vesting Order, granted on December 11, 2020 (the "**Ekati AVO**"), the DDMI Encumbrances (as defined in the Ekati AVO) are vested from those diamonds that it is required to release to Dominion; however, all DDMI Encumbrances (as defined in the Ekati AVO) continued to attach to the Undelivered DDM Diamonds (as defined in the Ekati AVO).

Approval and Vesting Order, granted on December 11, 2020, at para. 15 ["Ekati AVO"].

14. Dominion's obligations and liabilities to the 1L Lenders arise from certain letters of credit (the "**LC Indebtedness**" and the "**LCs**", respectively) which Dominion is required to post with the Manager, pursuant to the JVA and certain related agreements addressing Diavik Mine closure security requirements. Dominion also has certain obligations and liabilities pursuant to a trust indenture agreement (the "**2L Indebtedness**") which (excluding the DDMI Indebtedness) ranks in a general second-lien position, behind the LC Indebtedness.

Affidavit of Kristal Kaye, sworn on April 21, 2020, at paras. 66-73 ["First Kaye Affidavit"].

15. The priority as between the DDMI Indebtedness, the LC Indebtedness, and the 2L Indebtedness is governed by, *inter alia*, certain intercreditor agreements (collectively, the "**Intercreditor Agreements**").

First Kaye Affidavit, *supra* at paras. 74-76; Supplemental Affidavit of Thomas Croese, sworn on May 7, 2020 ["Supplemental Croese Affidavit"], at para. 13.

16. DDMI's security interest for the Cover Payments is first-ranking as against DDMI's collateral, including the 40% Interest, including under and pursuant to the Intercreditor Agreements. It is undisputed that, with respect to the Undelivered DDM Diamonds and the Diavik Mine itself, DDMI's security interest is first-ranking.

Copies of the Intercreditor Agreements are attached to the Supplemental Croese Affidavit as Exhibits "A" and "B" thereto.

B. Prior Sales Processes

17. Dominion's interest in the Diavik Mine: (i) has been subject to three (3) strategic review processes prior to the commencement of the CCAA Proceedings, only one (1) of which resulted in a transaction; (ii) was included in the SISP and, contingently, in the Stalking Horse Bid (as defined below) contemplated thereunder; and, (iii) was ultimately excluded from the Stalking Horse Bid, prior to its withdrawal, and the Ekati Sale after the Stalking Horse Bid was withdrawn.

(i) Pre-Filing Strategic Review Processes

18. Prior to the commencement of the CCAA Proceedings, three (3) strategic review processes were undertaken in respect of Dominion to, among other things, solicit the sale of Dominion's business and assets to a third-party. The first two (2) strategic processes were undertaken with the assistance of a bank-owned financial advisor in each of 2015 and 2016 and did not produce a buyer. The third such process was undertaken in 2017 and resulted in one (1) formal offer to acquire Dominion, which ultimately led to the acquisition of Dominion by Washington.

Affidavit of Brendan Bell, sworn on December 7, 2020 at para. 7 ["December Bell Affidavit"]; Sixteenth Monitor's Report, *supra* at para. 4.

(ii) SISP and Stalking Horse Bid

19. On April 22, 2020, upon the granting of the Initial Order, Dominion issued a press release advising the public and interested parties of the commencement of these CCAA Proceedings. In the press release, Dominion disclosed that it had received and was considering a proposal from a Washington affiliate to provide debtor-in-possession financing which would be conditional upon Dominion agreeing to: (a) a memorandum of understanding regarding a possible sale of Dominion's assets to an affiliate of Washington (the "**Stalking Horse Bidder**"), as a stalking horse

bidder; and, (b) bidding procedures for the solicitation of competing offers to such asset sale, either to purchase Dominion's assets or to make an investment in the company.

December Bell Affidavit, *supra* at para. 12.

20. After the commencement of the CCAA Proceedings, but prior to the approval of the SISP by this Honourable Court, Dominion's financial advisor, Evercore Group LLC ("**Evercore**"), commenced steps to advance a market solicitation process. Such steps included Evercore contacting thirty-eight (38) potential bidders (including Washington) in the relatively limited pool of potential purchasers for Dominion's business and assets. As a result, the marketing process for Dominion's assets had been underway for nearly two (2) months prior to the formal commencement of the SISP, which occurred on June 19, 2020, as described below.

December Bell Affidavit, *supra* at para. 13; Affidavit of John Startin, sworn on October 5, 2020 at paras. 24-25 ["October Startin Affidavit"].

21. Following several weeks of discussions and negotiations among the Stalking Horse Bidder and its legal and financial advisors, and Dominion and its legal and financial advisors (including Evercore), the Stalking Horse Bidder delivered a definitive letter of intent to Dominion on May 21, 2020 (the "**LOI**"). The LOI set out and described a proposal including three (3) interconnected components: (i) a term sheet which formed the basis for the Stalking Horse Bid (the "**Stalking Horse Term Sheet**"); (ii) the terms of the SISP to identify potentially higher and better offers than provided for in the Stalking Horse Bid; and, (iii) the interim financing term sheet to provide funding for the CCAA Applicants to meet their operational and administrative expenses through to the completion of the SISP.

Affidavit of John Startin, sworn on May 21, 2020 at para. 9 and Exhibit "B" ["May Startin Affidavit"].

22. The Stalking Horse Term Sheet included provisions referred to as the "**Rio Condition**" and the "**Ex-Rio Toggle**". Pursuant to the Rio Condition, the closing of the transaction contemplated by the Stalking Horse Term Sheet was subject to reaching an agreement between the Stalking Horse Bidder, DDMI and the Government of the Northwest Territories ("**GNWT**") in relation to the timing and quantum of capital calls and reclamation liabilities at the Diavik Mine. Pursuant to the Ex-Rio Toggle, if the Rio Condition was not satisfied or waived by July 21, 2020, the parties were to proceed with the transaction contemplated by the Stalking Horse Term Sheet,

without any reduction in the cash purchase price thereunder, but the Stalking Horse Bidder would not acquire or assume any rights or obligations with respect to the Diavik Mine or JVA.

May Startin Affidavit, *supra* at para. 14 and Exhibit "B" at pp. 7-8.

23. On July 31, 2020, the Stalking Horse Bidder provided notice to the CCAA Applicants that, among other things, it would not acquire or assume any rights or liabilities with respect to the Diavik Mine or JVA, pursuant to the Ex-Rio Toggle.

Sixth Report of the Monitor, dated September 22, 2020, at para. 13(a).

24. No third-party alternative stalking horse bids were put forward in the approximately two (2) months between the commencement of the CCAA Proceedings in April 2020 and the formal start of the SISP in June 2020, despite the public nature of the restructuring process and Dominion's April 22, 2020 press release.

December Bell Affidavit, *supra* at para. 15.

25. On June 19, 2020, upon the CCAA Applicants' application, the SARIO was granted. Among other things, the SARIO: (i) provided formal court approval of the SISP, including certain timelines established thereunder; and, (ii) approved the stalking horse bid (the "**Stalking Horse Bid**") by the Stalking Horse Bidder pursuant to an Asset Purchase Agreement based upon the Stalking Horse Term Sheet. The SARIO also approved an interim financing term sheet between the CCAA Applicants, as borrowers, and Washington Diamond Lending, LLC and such other lenders as may become party thereto (the "**DIP Lenders**"), as lenders.

SARIO, *supra*, at paras. 31-33, 38-46 and Schedules "A"-"C"; Fourth Report of the Monitor, dated May 26, 2020 at para. 32(i); Affidavit of John Startin, sworn on June 12, 2020, at para. 2(a) ["June Startin Affidavit"].

26. The SISP initially contemplated a timeline including the following key dates, among others:

(a) July 20, 2020 - Phase 1 Bid Deadline for delivery of non-binding letters of intent;

(b) August 31, 2020 - Phase 2 Bid Deadline for delivery of definitive offers. Among other things, such definitive offers were required to: (i) have waived or satisfied any financing conditions by September 3, 2020; and, (ii) clearly indicate whether the 40% Interest would be included in the proposed transaction;

(c) September 7, 2020, or such later date as the Applicants (in consultation with the Monitor, Evercore, and certain other stakeholders) deem appropriate - Deadline for the selection of the final successful bid;

(d) September 28, 2020 - Deadline for closing of the Stalking Horse Bid in the event that no other Phase 1 Successful Bids were received; and,

(e) October 31, 2020 - Outside date by which the Successful Bid must close.

SARIO, *supra* at Schedule "B", paras. 5, 14(g), 18 ["SISP"].

27. The Ad Hoc Group submitted a non-compliant bid on August 31, 2020 (the "**Original Ad Hoc Group Bid**"), the terms of which did not require the Ad Hoc Group to purchase the 40% Interest. The Original Ad Hoc Group Bid contained a financing closing condition and was not accompanied by a deposit, as required by the SISP, although a partial deposit of $7.9 million USD (of the $13.2 million USD required by the terms of the SISP) was subsequently provided to counsel to the Monitor. Accordingly, the SISP advanced to its second phase.

Affidavit of Brendan Bell, sworn on October 4, 2020 at paras. 63(b), 64 ["October 4 Bell Affidavit"].

28. Two (2) extensions to the SISP timelines were subsequently granted, with the consent of the 1L Agent, the Stalking Horse Bidder, and the DIP Lenders, to accommodate requests made by the members of the Ad Hoc Group. The first extension involved a waiver of certain requirements under the SISP until September 8, 2020; specifically, the requirements to remove financing conditionality and to determine whether the 40% Interest would be purchased were extended from August 31, 2020 to and until September 8, 2020. The outside date for the completion of a transaction under the SISP was also moved back by one week, to November 7, 2020, to provide a buffer for closing. The purpose of such extension was twofold: first, to provide the Ad Hoc Group with sufficient time to put forward an alternative bid; and second, to determine whether the Ad Hoc Group would purchase the 40% Interest. The Original Ad Hoc Group Bid was subsequently withdrawn on September 8, 2020.

October 4 Bell Affidavit, *supra* at paras. 25-26, 51-57, 65.

29. On September 9, 2020, Dominion, with the applicable consents, granted a second extension to the SISP timelines so that any new bid by the Ad Hoc Group could be submitted by September 15, 2020 (the "**Second SISP Extension**"). The Ad Hoc Group did not submit a second

bid within the timeline set out in the Second SISP Extension, and the SISP did not result in a qualified bid, other than that of the Stalking Horse Bidder. Accordingly, the Stalking Horse Bid was selected as the Successful Bid under the SISP.

October 4 Bell Affidavit, *supra* at paras. 69, 75; December Bell Affidavit, *supra* at para. 15.

30. As of early October 2020, a number of workstreams remained to be completed to permit the closing of the transaction contemplated by the Stalking Horse Bid. Among other things, the Stalking Horse Bidder and Dominion were engaged in negotiations with Dominion's sureties to satisfy the closing condition that the Stalking Horse Bidder come to satisfactory arrangements with respect to reclamation security obligations for the Ekati Mine (the "**Surety Condition**").

October 4 Bell Affidavit, *supra* at paras. 80-81(a).

31. The negotiations regarding the Surety Condition broke down, and on or around October 9, 2020, Dominion issued a press release announcing that its application for approval of the transaction contemplated by the Stalking Horse Bid would not be proceeding. As a result, the Stalking Horse Bid was no longer an option and Dominion began to seek out potential alternative transactions, including through further discussions with the Ad Hoc Group.

Affidavit of Brendan Bell, sworn on October 23, 2020, at paras. 7, 10, 14-24 ["October 23 Bell Affidavit"]; December Bell Affidavit, *supra* at para. 19; Ninth Report of the Monitor, dated November 15, 2020, at paras. 11-12 ["Ninth Monitor's Report"].

32. As of November 13, 2020, the Ad Hoc Group and the 1L Lenders had agreed in principle to a restructuring transaction in respect of the Ekati Mine, which excluded the Diavik Mine and did not provide for the assumption of liabilities associated with the 40% Interest.

December Bell Affidavit, *supra* at paras. 25-26, 34; Ninth Monitor's Report, *supra* at para. 13.

33. The negotiations between the Ad Hoc Group, the 1L Lenders, and Dominion evolved into the Asset Purchase Agreement, dated as of December 6, 2020 (the "**Ekati APA**"), between certain CCAA Applicants, as vendors, and DDJ Capital Management, LLC and Brigade Capital Management, LP, as purchasers (along with their nominee, the "**Ekati Purchasers**"). The Ekati APA was approved by this Honourable Court on December 11, 2020, pursuant to the Ekati AVO, and the transaction contemplated thereunder closed on or around February 3, 2020.

Ekati AVO, *supra* at para. 3; Monitor's Certificate, filed on February 04, 2021.

34. Arctic Canadian Diamond Company Ltd. ("**ACDC**") was designated as the nominee of the Ekati Purchasers pursuant to the Ekati APA.

Thirteenth Report of the Monitor, dated January 25, 2021, at para. 5.

35. The Ekati APA contemplated the sale of substantially all of Dominion's assets, but excluded the 40% Interest. Specifically, pursuant to the Ekati APA: (i) the "Excluded Assets" (as defined in the Ekati APA) included the "Diavik Joint Venture Agreement", *i.e.* the JVA; and, (ii) the "Excluded Liabilities" (as defined in the Ekati APA) included "…(g) any and all Liabilities of any Seller in respect of the Diavik Joint Venture Agreement, the Diavik Joint Venture, the Diavik Joint Venture Interest, the Diavik Diamond Mine and the Diavik Realization Assets, …".

Ekati AVO, *supra* at Schedule "A", at ss. 1.1, .3.2(a), 3.4(g) ["Ekati APA"].

36. Sections 3.1(b) and 3.1(n) of the Ekati APA state:

> "3.1 Acquired Assets. Subject to the terms and conditions set forth in this Agreement, at the Closing, Sellers shall sell, assign, transfer and deliver to Purchaser, and Purchaser shall purchase, acquire and take assignment and delivery of, all of the Sellers' right, title and interest in the assets and properties of Sellers other than the Excluded Assets (the "Acquired Assets") subject to Section 3.6, free and clear of all Claims and Encumbrances of whatever kind or nature (other than Permitted Encumbrances), including the following: **[…]**
>
> (b) assignment of all of Sellers' rights and interests in relation to the receipt of realizations and recoveries from or in respect of the Diavik Joint Venture Interest (including, without limitation, all receivables, diamond production entitlements, claims, sales proceeds, cash and other collateral given for the benefit of the First Lien Lenders or other persons, and other assets realized or realizable by or on behalf of Sellers) (collectively, the "Diavik Realization Assets"), which shall be assigned to Purchaser subject only to the continuing liens and charges of the First Lien Lenders pursuant to the Pre-filing Credit Agreement until such time as all letters of credit issued by the First Lien Lenders in respect of the Diavik Diamond Mine shall have been cash collateralized or cancelled and all related fees shall have been paid; **[…]**
>
> (n) all rights, options, Claims or causes of action of any Seller or other applicant against any party arising out of events occurring prior to the Closing, including and, for the avoidance of doubt, arising out of events occurring prior to the Filing Date, and including (i) any rights under or pursuant to any and all warranties, representations and Guarantees made by suppliers, manufacturers and contractors relating to products sold, or services provided, to Sellers, and (ii) any and all causes of action under applicable Law;"

Ekati APA, *supra* at ss. 3.1(b), (n).

C. Proposed AVO Transaction

37. Following the SISP, the closing of the Ekati APA, and the granting of the EMP Order, DDMI, the Monitor on behalf of Dominion, and the 1L Agent subsequently entered into negotiations for the purchase and sale of the 40% Interest, which culminated in the proposed AVO Transaction.

Sixteenth Monitor's Report, *supra* at para. 20.

38. On September 16, 2021, DDMI and the 1L Agent entered into a Support Agreement (the "**Support Agreement**") with respect to the proposed AVO Transaction. Pursuant to the Support Agreement, it was agreed that the 1L Agent would support the AVO Transaction, including the acquisition by DDMI of the Diavik Joint Venture Interest, the Dominion Production and the Cash Collateral (each as defined in the Support Agreement, being the 40% Interest, all unsold diamond production, and the cash collateral held by the 1L Lenders as security for the LCs), free and clear of all claims and encumbrances and subject to permitted deductions. The Support Agreement set out the material terms of the AVO Transaction which have now been incorporated into the proposed AVO Agreement.

Sixteenth Monitor's Report, *supra* at paras. 18, 43 and Appendix "A" ["Support Agreement"]; Support Agreement, *supra* at Recitals, Schedule "A", and Schedule "B".

39. The AVO Agreement contemplates a credit bid pursuant to which DDMI will acquire Dominion's 40% Interest and certain assets related to or associated with the 40% Interest. Specifically, in exchange for the payment of the Purchase Price[1] and the assumption of the Assumed Liabilities (each as defined in the AVO Agreement) by DDMI, DDMI shall purchase and acquire all of Dominion's right, title, and interest in and to the Acquired Assets (as defined in the AVO Agreement), subject to and upon the conditions set out in the AVO Agreement.

A copy of the AVO Agreement is appended to the Sixteenth Monitor's Report as Appendix "B" thereto ["AVO Agreement"].

40. The Acquired Assets, as defined in the AVO Agreement, include all of Dominion's right, title and interest in the following:

[1] Defined in the AVO Agreement as the aggregate of the "Assumed Liabilities", including both the DDMI Indebtedness and the LC Indebtedness as defined herein.

(i) "Diavik Joint Venture", being the unincorporated joint venture arrangement established pursuant to the purposes set out in the JVA in relation to the Diavik Mine;

(ii) "Diavik Joint Venture Interest", being the 40% Interest held by Dominion pursuant to the JVA;

(iii) "Diavik Diamond Mine", being the Diavik Mine;

(iv) "Royalty Agreements", being, collectively, (a) the royalty agreement between Dominion, DDMI, and Sandstorm Gold Ltd. (each as successors in interest), dated as of September 30, 2003, as amended, and (b) the royalty agreement between Dominion, DDMI, and Christopher Jennings dated as of September 30, 2003, as amended;

(v) "Assigned Contracts", being certain agreements to which Dominion is a party and which were entered into in connection with the Diavik Mine;

(vi) "Cash Collateral", being all cash and cash equivalents held by the 1L Agent as security for any LC where DDMI is the beneficiary;

(vii) All rights under non-disclosure, confidentiality or similar arrangements with (or for the benefit of) third parties related to the Acquired Assets; and,

(viii) All other rights and benefits pursuant to or arising from the foregoing,

(collectively, the "**Acquired Assets**").

AVO Agreement, *supra* at ss. 1 - 2.1.

41. Upon closing of the AVO Transaction, DDMI shall assume, and agree to pay, perform, fulfill and discharge the Assumed Liabilities, which include all Liabilities (as defined in the AVO Agreement) and obligations of Dominion: (i) pursuant to or arising from the JVA, the 40% Interest and the Diavik Mine (which includes both the DDMI Indebtedness and the LC Indebtedness, as well as closure and rehabilitation liabilities); (ii) under the Royalty Agreements (as defined in the AVO Agreement) arising on or after the Filing Date; (iii) under the Assigned Contracts (as defined

in the AVO Agreement); and, (iv) to the GNWT for any royalty payments owing to the GNWT that relate to or arise from the Acquired Assets.

AVO Agreement, *supra* at section 2.2.

42. The AVO Agreement further contemplates that DDMI shall not assume, and shall not be obligated to pay, perform, or otherwise discharge any liability of Dominion that is not an Assumed Liability.

AVO Agreement, *supra* at section 2.3.

43. The AVO Agreement provides that the obligations of DDMI to consummate the closing are subject to the waiver or satisfaction of certain conditions precedent on or before the Closing Date (as defined in the AVO Agreement), including, among other things: (i) the approval of this Honourable Court, and the AVO becoming a final and non-appealable order; (ii) arrangements being made to transfer all Cash Collateral (as defined in the AVO Agreement), excluding Permitted Deductions (as defined in the AVO Agreement) to DDMI concurrently with the closing of the AVO Transaction; and, (iii) various customary closing conditions.

AVO Agreement, *supra* at sections 7.1-7.7.

44. Pursuant to sub-sections 9.2(e) and 9.2(i) of the AVO Agreement, the deliverables at or prior to closing of the AVO Transaction include: (i) an executed and fileable discontinuance of the BC Civil Claim (as defined below), which shall be releasable upon the closing of the AVO Transaction; and, (ii) formal releases from Dominion with respect to the full and final settlement of all outstanding claims among Dominion, the Monitor, DDMI, the 1L Agent, and the 1L Lenders, including the release of any royalty claims under the JVA (collectively, the "**Discontinuance and Release**").

AVO Agreement, *supra* at sections 9.2(e), (i).

D. <u>BC Civil Claim</u>

45. On June 16, 2020, Dominion commenced a Civil Claim against DDMI in the Supreme Court of British Columbia, under Vancouver Registry No. S-206419 (the "**BC Civil Claim**"). The only step taken in the BC Civil Claim, after the exchange of pleadings, was DDMI's application seeking security for costs against Dominion. DDMI's security for costs application has been

adjourned *sine die* and further steps have been stayed by court order, with leave for DDMI to bring its security for costs application on for re-hearing if such stay was lifted by further order of the court or by the agreement of Dominion and DDMI.

Sixteenth Monitor's Report, *supra* at paras. 44(i), 59-60, Appendices "E"-"G".

46. A copy of the BC Civil Claim is attached to the Monitor's Sixteenth Report as Appendix "E" thereto. The subject matter of the BC Civil Claim relates to allegations made by Dominion that DDMI has breached the JVA.

Sixteenth Monitor's Report, *supra* at Appendix "E"; see, in particular, para. 20.

47. ACDC has advised the Monitor that it takes the position that "certain of the Acquired Assets included in the AVO Transaction have been assigned to ACDC pursuant to the ACDC Transaction and accordingly cannot be conveyed by Dominion or released by Dominion. These assets include all causes of action …" (the "**Discontinuance Issue**").

Sixteenth Monitor's Report, *supra* at para. 50(c); see also para. 61.

III. ISSUES

48. The issues to be determined by this Honourable Court on the within Application are: (i) whether the Monitor may deliver and execute the Discontinuance and Release to and in favour of DDMI, as required pursuant to the terms of the AVO Agreement; and, (ii) whether the AVO Transaction contemplated by the AVO Agreement should be approved.

IV. LAW

49. Section 36 of the CCAA authorizes this Court to approve the sale and vesting of a debtor company's assets outside of the ordinary course of business.

50. Section 36(3) of the CCAA states:

> **Factors to be considered**
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> > (a) whether the process leading up to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading up to the proposed sale or disposition;

(c) whether the monitor filed with a court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is fair, taking into account their market value.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 at s. 36(3) ["CCAA"] [TAB 19].**

51. Section 36(6) of the CCAA states:

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

CCAA, *supra* at s. 36(6) [TAB 19].

52. Courts tasked with reviewing a sale of assets within CCAA proceedings frequently refer to the following factors adopted by the Ontario Court of Appeal in *Royal Bank of Canada v. Soundair Corp.*:

(i) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

(ii) the interests of all parties;

(iii) the efficacy and integrity of the process by which offers have been obtained; and

(iv) whether there has been any unfairness in the working out of the process.

***Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA), 1991 CarswellOnt 205 at para. 16 [TAB 14].**

53. Section 11 of the CCAA states:

> "11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances."

CCAA, *supra* at s. 11 [TAB 19].

V. ARGUMENT

A. The Delivery of the Discontinuance and Release to DDMI Should Be Authorized and Approved

54. The Discontinuance Issue should not be an obstacle to the approval and authorization of the AVO Agreement, because: (i) ACDC has not purchased the BC Civil Claim, and has no interest thereunder, or in the alternative, has at most obtained an interest in the proceeds of such litigation, if any, and in either case the Monitor can therefore deal with the BC Civil Claim as it sees fit; and, (ii) ACDC's interest in the BC Civil Claim (if any such interest has been acquired, which is denied) is an unsecured and contingent contractual obligation that may be vested pursuant to this Honourable Court's jurisdiction under sections 11 and 36 of the CCAA.

(i) ACDC Did Not Purchase the BC Civil Claim

55. In interpreting a contract, the overriding concern of the courts is to determine "the intent of the parties and the scope of their understanding". To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

***Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 at para. 47 [TAB 15]; *BG Checo International Ltd. v British Columbia Hydro and Power Authorities*, [1993] 1 SCR 12 at pp. 23-24 [TAB 5].**

56. It is also a well-established principle of contractual interpretation that the specific overrides the general; and further, that where two terms of a contract may conflict, the Court should endeavor to give them a harmonious interpretation. For instance, in *550 Capital Corp. v David S. Cheetham Architect Ltd.*, the Alberta Court of Appeal stated:

> "***Where there is apparent conflict or inconsistency between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question***: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, 1993 CanLII 145

> (SCC), [1993] 1 S.C.R. 12 at para. 9. ***Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective***: *BG Checo* at para. 9 citing *Chitty on Contracts* (26th ed., 1989) at 526; Lewison, *The Interpretation of Contracts* (1989) at 206; *Git v. Forbes* (1921), 1921 CanLII 579 (SCC), 62 S.C.R. 1 per Duff J. (as he then was), dissenting, at 10, rev'd, 1921 CanLII 406 (UK JCPC), [1922] 1 A.C. 256; *Hassard v. Peace River Co-operative Seed Growers Association Ltd.*, 1953 CanLII 402 (SCC), [1954] 2 D.L.R. 50 at 54 (S.C.C.). ***In seeking reasonable consistency between terms, they will, if reasonably possible, be reconciled by construing one term as a qualification of the other term; frequently, the general terms of a contract will be seen to be qualified by specific terms***: *BG Checo* at para. 9, citing *Forbes v. Git*, [1922] 1 A.C. 256; *Cotter v. General Petroleums Ltd.*. But if "an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails.": *Alberta Power Ltd. v. McIntyre Porcupine Mines Ltd.* (1975), 1975 CanLII 942 (AB CA), 58 D.L.R. (3d) 303; [1975] 5 W.W.R. 632 (Alta.S.C.A.D.), quoting *Forbes v. Git* at 259 (A.C.)." [emphasis added].
>
> ***550 Capital Corp. v David S. Cheetham Architect Ltd.*, 2009 ABCA 219 at para. 28 [TAB 2].**

57. In light of the above, the most plausible interpretation of the Ekati APA is that ACDC did not acquire any interest whatsoever in the BC Civil Claim, and the Monitor may therefore execute and deliver the Release and Discontinuance to DDMI. The following factors indicate that the parties' intention was not to transfer the BC Civil Claim to ACDC:

(a) The definition of Acquired Assets in section 3.1 of the Ekati APA includes "…all of the Sellers' right, title and interest in the assets and properties of Sellers other than the Excluded Assets…";

(b) The Excluded Assets under the Ekati APA include the "Diavik Joint Venture Agreement", which in light of the definition of Acquired Assets above, necessarily entails that all of Dominion's right, title, and interest in the Diavik Joint Venture Agreement was excluded from the Ekati Sale. Relatedly, the Excluded Liabilities include both "any and all Liabilities of any Seller in respect of the Excluded Contracts" and "any and all Liabilities of any Seller in respect of the Diavik Joint Venture Agreement, the Diavik Joint Venture, the Diavik Joint Venture Interest, the Diavik Diamond Mine and the Diavik Realization Assets";

(c) In this context, care was taken to ensure that specific parameters were established regarding what assets and liabilities were acquired with respect to the Diavik Mine;

(d) The BC Civil Claim is not referred to anywhere in the Ekati APA, and any liability in connection with the pursuit of the BC Civil Claim was excluded from the Ekati APA by operation of the Excluded Liabilities clause;

(e) The "Diavik Realization Assets" which were acquired by ACDC are limited to realizations and recoveries, *i.e.* accounts receivable; and,

(f) As a result of the aforementioned factors, the parties' intention in agreeing to the transfer of the Diavik Realization Assets was to carve out a narrow exception to the broader exclusion of any and all right, title and interest in the Diavik Joint Venture Agreement. As the BC Civil Claim was not included within that carve-out, it was not transferred to ACDC, and the Monitor may deliver the Discontinuance and Release to DDMI.

58. In the alternative, if ACDC acquired an interest in the BC Civil Claim under the Ekati APA (which is denied), that interest is limited to a contingent, subordinate interest in proceeds.

59. Two provisions of the Ekati APA, Section 3.1(b) and Section 3.1(n), address similar subject matters and could potentially refer to the BC Civil Claim, given their ordinary and grammatical meanings. The definition of "Diavik Realization Assets" in Section 3.1(b), as set out above, includes "…**all of Sellers' rights and interests in relation to the receipt of realizations and recoveries from or in respect of the Diavik Joint Venture Interest (including, without limitation, all** receivables, diamond production entitlements, **claims**, sales proceeds, cash and other collateral given for the benefit of the First Lien Lenders or other persons, **and other assets realized or realizable by or on behalf of Sellers**) (collectively, the "Diavik Realization Assets")…" [emphasis added]. Section 3.1(n) of the Ekati APA more generally states that the Acquired Assets include "all **[…]** Claims or causes of action of any Seller or other applicant against any party arising out of events prior to Closing **[…]**".

60. The specific provision regarding the Diavik Realization Assets should be taken to override the general provision with respect to causes of action generally, as it applies to the BC Civil Claim, particularly given that the BC Civil Claim relates directly to recoveries from or in respect of the Diavik Mine, and is a "claim" with respect to same. Thus, if this Honourable Court determines that the sale of an interest in the BC Civil Claim is contemplated by the Ekati APA, then the BC

Civil Claim (and the theoretical proceeds arising from the BC Civil Claim) was addressed within the Diavik Realization Assets clause with the effect that the BC Civil Claim could not also be transferred through the operation of section 3.1(n) of the Ekati APA.

61. This interpretation is commercially reasonable. The Diavik Joint Venture Agreement is an Excluded Asset and was retained by Dominion. As a consequence, the parties had to turn their minds to creating contractual provisions which would address circumstances where Dominion was in receipt of proceeds from the Diavik Joint Venture and required to distribute such proceeds to Dominion's stakeholders.

62. For example, Dominion retains title to its interest in the diamond production, subject to the security interests held by DDMI and the 1L Lenders, and ACDC has only a contingent and subordinate interest in the proceeds thereof. There is no reason to distinguish between the treatment of the BC Civil Claim proceeds (to the extent that they were included in the Ekati APA, which is denied) and the treatment of the Diavik Mine diamond production; both are Diavik Realization Assets which were created in the context of a commercial arrangement where Dominion was to retain its interest in the Diavik Joint Venture Agreement and the Diavik Mine, while providing for commercial arrangements to govern the process of distributing Diavik Joint Venture Agreement proceeds to Dominion's relevant stakeholders. ACDC has at most acquired an interest in the proceeds of the BC Civil Claim as a Diavik Realization Asset, but ACDC did not acquire nor does it have the legal or beneficial interest in the BC Civil Claim.

63. Further, the circumstances surrounding the formation of a contract must be considered even where there is no ambiguity in the plain meaning of the words, including with respect to the context in which the words are used.

***IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157 at paras. 80-84 ["*IFP Technologies*"] [TAB 8], leave to appeal to SCC denied 37712; *Dumbrell v Regional Group of Companies Inc.*, [2007] OJ No. 298, 2007 ONCA 59 (CanLII) (Ont. CA) at para. 52 [TAB 7].**

64. If a contract is ambiguous, extrinsic evidence may be admitted to resolve the ambiguity, and the interpretation promoting business efficacy is to be preferred so long as it is supported by the text.

***IFP Technologies*, *supra* at para. 86 [TAB 8].**

65. The interpretation outlined above is harmonious with the facts known to the parties at the time that the Ekati APA was entered into. Of particular note are representations made by counsel during the sale approval hearing with respect to the Ekati AVO. This background may be given additional weight given potential ambiguity in and conflict between sections 3.1(b) and 3.1(n) of the Ekati APA arising under ACDC's proposed interpretation of the Ekati APA. In particular, for instance, in explaining that certain changes to the Ekati AVO requested by DDMI were unnecessary, then counsel to Dominion stated:

> "So what this is, is essentially the purchasers purchasing a receivable. If DDMI is obligation [sic] to and does return diamonds to Dominion and deliver those diamonds to Dominion as per your prior orders then that will be a receivable that the purchaser is purchasing. **[…]**
>
> What we are seeking in order today is that this purchase agreement and the order be approved and what the purchaser is buying are those receivables, if and when, Dominion is required to deliver them to -- if DDMI is required to deliver them to Dominion pursuant to your prior orders. ***That's all this is. They're buying a receivable. If there's no receivable, if there's no obligation on DDMI to deliver diamonds or proceeds thereof, then their purchasing a receivable but there is no receivable.*** So that's why this is just simply a receivable. If DMMI owes and must deliver diamonds, they're being purchased. **[…]**
>
> And so these again we're on page 22 of the APA or page 46 of CaseLines, so these are the acquired assets. **[…]** And you can see that, you know, this is -- you know on paragraph (c) they're buying Ekati, which is not Diavik, joint venture interest. You can see in (g) that they're buying cash and cash equivalents and you can see in (h) that they're buying accounts receivable, again trade and non-trade accounts receivable that is essentially what they're buying from -- with respect to Diavik and DDMI, as well. **[…]** ***And 3.2, so this is what's excluded and the very first thing that's excluded is the Diavik joint venture agreement.*** So the agreement is clear that the purchaser is not purchasing the Diavik joint venture agreement, the purchaser is not stepping into to -- well let just say this -- ***they're not purchasing a joint venture agreement, what they're purchasing as I already said, are the receivables to the extent there are any receivables that are paid to Dominion by DDMI***." [emphasis added].

Transcript of Proceedings, Action No. 2001-05630, December 11, 2020 at 9:22 - 9:24, 10:18 - 10:25, 12:9 - 12:10, 12:14 - 12:18, 12:35 - 12:40 [TAB 1].

66. Certain other provisions of the Ekati APA indicate that the BC Civil Claim was not acquired by ACDC. The Ekati APA: (i) expressly lists the right, title and interest to the Diavik Joint Venture Agreement as an excluded asset; and, (ii) includes provisions where ACDC agreed that it would not assume liabilities associated with Excluded Contracts (including the JVA) or the Diavik Mine, which is inconsistent with an intention to assume responsibility for adverse costs awards in the

BC Civil Claim. The aforementioned demonstrates an apparent disconnect between ACDC's recently-stated position that it acquired the BC Civil Claim, and ACDC's clearly-stated intention to avoid any liability whatsoever in connection with the Diavik Mine and the JVA.

Ekati APA, *supra* at *e.g.* sections 3.2(a), 3.3(e), 3.4(g), among others.

67. Finally, the conduct of the BC Civil Claim would become excessively complex, if ACDC obtained the full interest in the BC Civil Claim rather than an interest in its proceeds. Dominion's liability for the DDMI Indebtedness is undisputed. DDMI thus has a significant, liquidated counterclaim against Dominion which may be asserted within the BC Civil Litigation and is *prima facie* suitable for summary judgment. If ACDC's interpretation of the Ekati APA is accepted, so that ACDC has somehow purchased the BC Civil Claim without the associated liabilities, then in the event that DDMI obtains judgment on its counterclaim, there would be no person against whom that judgment could be enforced. ACDC and the Ad Hoc Group are well aware of these CCAA Proceedings and the existence of the DDMI Indebtedness. However, ACDC has not assumed liability for the BC Civil Claim (instead expressly excluding same); nor has it provided any indemnity for judgment, or even notice of assignment of the claim, or otherwise addressed these complexities in the Ekati APA. This is further evidence that the BC Civil Claim itself was never intended to be transferred to ACDC under the Ekati APA, but it is entirely consistent with what would be expected if the parties' intention was to transfer an interest in the proceeds only.

(ii) ACDC's Interest In the BC Civil Claim (If Any) May Be Vested

68. If ACDC acquired an interest in the BC Civil Claim (which is denied), then ACDC's financial interest in the BC Civil Claim, as well as ACDC's other interests acquired as part of the Diavik Realization Assets, may be vested out of the Acquired Assets and discharged as against same, pursuant to sections 11 and 36 of the CCAA. Section 36 of the CCAA permits this Honourable Court to "…authorize a sale or disposition free and clear of any security, charge or other restriction…".

69. In *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.* ("***Dianor***"), the Ontario Court of Appeal recently considered whether an interest in land - which is undoubtedly a stronger property interest than a mere receivable claim - may be vested pursuant to a sale approval and vesting order. Although *Dianor* was a receivership decision, the CCAA

provides a broad jurisdiction under section 11 and the case has been applied in CCAA proceedings.

***Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 ["*Dianor*"] [TAB 18]. See also, *e.g.*, *Accel Canada Holdings Limited (Re)*, 2020 ABQB 182 at para. 93, citing *Dianor* [TAB 3], leave to appeal granted on other grounds 2020 ABCA 160 [TAB 17].**

70. In *Dianor*, the Court made the following comments regarding the appropriateness of vesting orders as against different types of interests:

> "[103] ***First, the court should assess the nature and strength of the interest that is proposed to be extinguished***. The answer to this question may be determinative thus obviating the need to consider other factors. […] [105] Rather, in my view, ***a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple*** that is in substance an ownership interest in some ascertainable feature of the property itself. […] [106] Another factor to consider is ***whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement***. […] ***The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider*** in the analysis of whether an interest in land is capable of being vested out. […] [110] ***If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include***: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; ***whether, based on evidence of value, there is any equity in the property***; **[…]**" [emphasis added].

***Dianor*, *supra* at paras. 103, 104, 105, 106, 108, 110 [TAB 18].**

71. The Diavik Realization Assets: (i) are a receivables claim rather than a proprietary interest; (ii) are expressly subordinate to the LC Indebtedness, which is itself a security interest that is capable of vesting; (iii) have no value or "equity" given that the 1L Lenders will likely suffer a shortfall outside of the AVO Transaction; and, (iv) as a result of the foregoing, may be vested out of the Acquired Assets.

72. As a result of the aforementioned, ACDC's interest in the BC Civil Claim may be vested out pursuant to the AVO. The Monitor, for and on behalf of the plaintiff Dominion, should therefore be authorized to deliver the Discontinuance and Release to DDMI upon closing of the AVO Transaction.

(iii) Alternatively, This Honourable Court Has Jurisdiction to Release DDMI From Any Liability Under the BC Civil Litigation

73. In the further alternative, if the BC Civil Claim was purchased by ACDC under the Ekati APA, it would be appropriate for this Honourable Court to release DDMI from liability thereunder because DDMI is making a significant contribution to Dominion's estate to bring these CCAA Proceedings to a conclusion.

74. The CCAA does not contain any restrictions on granting releases to any party on an application made within the CCAA proceedings. CCAA courts have frequently released third-parties from liability in CCAA proceedings, including in circumstances where no plan of arrangement will be put forward by the debtor company.

75. In *Metcalfe & Mansfield Alternative Investments II Corp., (Re)* ("***Metcalfe***"), the Ontario Court of Appeal confirmed that a CCAA court may approve a release as part of a plan of compromise or arrangement, stating that "[t]he release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan."

***Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 at para. 70 ["*Metcalfe*"] [TAB 10].**

76. Since *Metcalfe* was decided, CCAA courts have affirmed that the court may also grant releases in the absence of a plan of compromise or arrangement, if circumstances exist which make the release appropriate.

77. For instance, in *Nelson Education Limited (Re)*, the Ontario Superior Court of Justice considered an application seeking a release as part of a sale approval and vesting order. Although the Court determined that a release would be inappropriate on the facts of that case, given that the proposed beneficiaries did not contribute anything in exchange for the release, it also affirmed that a plan of arrangement is not a necessary prerequisite to a release:

> "While there is no CCAA plan in this case, I see no reason not to consider the principles established in *Metcalfe* when considering a sale such as this under the CCAA, with any necessary modifications due to the fact that it is not a sale

pursuant to a plan. The application of those principles dictates in my view that the requested release by the first lien lenders should not be ordered."

***Nelson Education Limited (Re)*, 2015 ONSC 5557 at para. 49 [TAB 11]; see also, para. 50 [TAB 11]. To similar effect, see *Re Green Relief Inc.*, 2020 ONSC 6837 at para. 27 ["*Green Relief*"] , applying the *Lydian* test (*infra*) to the approval of a release in connection with a sale approval and vesting order [TAB 13].**

78. Specifically, it has been held that courts may grant third-party releases, including in the absence of a plan of arrangement or compromise, provided that the releases:

(a) are connected to a resolution of the debtor's claims;

(b) will benefit the creditors generally; and,

(c) are not overly broad and offensive to public policy.

***Nortel Networks Corp., Re*, 2010 ONSC 1708, at paras. 79-82 ["*Nortel*"] [TAB 12]. The proposed release in *Nortel* was contained within a settlement agreement. Approval of the settlement agreement was rejected on the basis that it was uncertain and unfair in the circumstances, when considered as a whole, but the release itself was not objectionable: *Nortel*, *supra* at paras. 82, 88, 91-94, 104 [TAB 12].**

79. Third-party releases have been held to be appropriate in circumstances where the releases protect the debtor or estate against potential contribution or indemnity claims, or facilitate the successful resolution of the proceedings in an expedient manner without further depletion of the debtor's assets; provided that the release is not overly broad and that the benefit of the transaction for all stakeholders outweighs the prejudice to those who may have claims against the released parties.

See *e.g. Nortel*, *supra* at paras. 81-82 [TAB 12]; *Skylink Aviation Inc. (Re)*, 2013 ONSC 2519 at para. 33 [TAB 16]; *Cline Mining Corporation (Re)*, 2015 ONSC 622 at paras. 24, 26 [TAB 6]; *Metcalfe*, *supra* at paras. 112-113, 117 [TAB 10].

80. In considering and balancing prejudice and benefits of a proposed release, the relative strength of the claims to be released is a relevant consideration. For instance, in approving a release as part of a sale and vesting order in *Re Green Relief Inc.*, Justice Koehnen stated:

> "…***If I balance the right to the Objectors to pursue the releasees for their conduct during the CCAA proceeding against the right of creditors to maximize recovery against the Green Relief estate, there is simply no contest.*** The creditors with proven claims have legitimate, verified demands against the corporate estate. The Objectors have tenuous claims based on objections to a court supervised process that would in effect amount to a collateral attack on court orders. In those circumstances ***I am satisfied that the release benefits the debtor and creditors generally***."

***Green Relief*, *supra* at para. 57 [TAB 13].**

81. In *Lydian International Limited (Re)*, a 2020 decision of the Ontario Superior Court of Justice, Justice Morawetz summarized the following non-exhaustive list of factors to be considered in determining whether a release is appropriate, in the context of a plan of arrangement:

(a) whether the parties to be released are necessary and essential to the restructuring;

(b) whether the claims to be released are rationally connected to the purpose of the plan;

(c) whether the plan can succeed without the releases;

(d) whether the parties being released were contributing to the plan;

(e) whether the releases benefit the debtors as well as the creditors generally;

(f) whether the creditors voting on the plan have knowledge of the nature and effect of the releases; and,

(g) whether the releases are fair, reasonable and not overly-broad.

***Lydian International Limited (Re)*, 2020 ONSC 4006 at paras. 53, 54, 60, and 64 [TAB 9].**

82. The release sought in connection with the AVO Transaction is directly connected to the consummation of the AVO Transaction and will facilitate the orderly and efficient conclusion of these CCAA Proceedings and the maximization of the Dominion estate's value. The parties to be released[2] were necessary and essential to these proceedings and have made significant contributions to same. The AVO Transaction is conditional upon court approval and the delivery of the Discontinuance and Release, and the AVO Transaction stands to benefit Dominion's creditors as a whole. Furthermore, the assumption by DDMI of the DDMI Indebtedness will be a significant contribution to the Dominion estate, in addition to the contributions made to date through Cover Payment advances, and will resolve the most significant claim against Dominion (*i.e.* the DDMI Indebtedness). While Dominion's liability for the DDMI Indebtedness is uncontested, the BC Civil Claim is a contingent unliquidated claim for damages and is subject to

[2] Dominion, the Monitor, DDMI, the 1L Agent, and the 1L Lenders.

a strong counterclaim, which must be considered in balancing any potential prejudice to ACDC against the benefits of the AVO Transaction and the release. The proposed release is also fair, reasonable, and not overly-broad, particularly as the release of claims in connection with or arising under the Diavik JVA: (i) is directly related to and will facilitate the purchase of the 40% Interest by DDMI, significantly advancing these CCAA Proceedings; and, (ii) is analogous to the releases typically granted in sale approval and vesting orders with respect to claims involving the purchased assets. In the circumstances, the tests set out in the case law have been satisfied and it is appropriate for this Honourable Court to grant a release of liability under the BC Civil Claim.

B. The AVO Transaction Should Be Approved

83. The AVO Transaction contemplated by the AVO Agreement satisfies the requirements set out in section 36 of the CCAA, and the *Soundair* test, and should be approved.

(i) The Process Leading to the Proposed Sale Was Reasonable in the Circumstances

84. The process leading to the proposed AVO Transaction was reasonable in the circumstances. The circumstances at hand include the nature of the assets to be acquired under the AVO, *i.e.* the 40% Interest. The Diavik Mine is a unique asset with a limited pool of purchasers and the failure of two out of three pre-filing sales processes is indicative of the inherent difficulties in marketing and selling an interest in a diamond mine; particularly one like the Diavik Mine, which is now nearing the end of its productive life.

85. Dominion has now been under CCAA protection since April 2020, and the fulsome court-approved SISP failed to result in a bid for the 40% Interest despite approximately five (5) months of market exposure. Likewise, the 40% Interest was excluded from the Ekati Sale, which was a transaction involving parties who were already familiar with and linked to the Diavik Mine and Dominion's business as a whole. ACDC, which now opposes the approval of the AVO Transaction, could have put forward an offer for the purchase of the 40% Interest as part of the Ekati Sale, but declined to do so. As such, Dominion's interest in the Diavik Mine has been exposed to the market, on numerous occasions and for a sufficient period of time.

86. Furthermore, it must be noted that the available projections regarding the remaining mine life indicate that the Cover Payments will not be satisfied from Dominion's share of production prior to the cessation of production at the Diavik Mine. In particular, the Monitor's illustrative summary and forecast of future Cover Payments, as set out in paragraph 51(e) of the Sixteenth Monitor's Report (the "**Illustrative Cover Payment Forecast**"), indicates a cumulative Cover Payment balance of approximately $107,149,000 by the time of projected mine closure, in 2025. As any purchaser of the 40% Interest, other than DDMI, would need to satisfy the existing and outstanding net Cover Payment liabilities and any future cash calls, the number of potential purchasers for the 40% Interest is almost certainly smaller now than it was during the previous sales processes, including the SISP.

Sixteenth Monitor's Report, *supra* at paras. 51(c), 51(e), 51(h).

87. The market has been sufficiently tested and although the proposed AVO Transaction is not the result of yet another formal marketing process, it has arisen from arm's-length negotiations between the only persons with a clear financial interest in the 40% Interest, after numerous prior processes failed. Support and involvement from the Monitor and the 1L Agent have ensured that the process leading to the AVO Agreement was fair, transparent, and professionally conducted.

(ii) The Monitor Approved the Process Leading to the Proposed Sale

88. The Monitor supported both the SISP and the Ekati Sale, and has confirmed its view is that "there is limited benefit to a further marketing process of this asset". The Monitor also supports approval of the AVO Transaction before this Court, subject to the resolution of the Discontinuance Issue.

Sixteenth Monitor's Report, *supra* at paras. 51(c), 81, 84.

(iii) The Sixteenth Monitor's Report Is Clear That the Sale or Disposition Would Be More Beneficial to the Creditors than a Sale or Disposition under a Bankruptcy

89. The Monitor has opined that:

> "given that no bids were received for Dominion's share of the Diavik JVA during the SISP and the Monitor's analysis immediately above, the Monitor concluded that, absent the AVO Transaction, it is unlikely that the First Lien Lenders would receive full recovery of the amounts owed to them and that they are the most significant creditor in respect of their first lien position; **[…]**

> the AVO Transaction represents immediate recoveries on a joint venture mining asset which is nearing the end of its mine life, facing significant uncertainty with respect to future production, is encumbered by large and uncertain reclamation costs and is a minority participating interest with very limited control over operations. **[…]**
>
> The AVO Transaction and the RVO Transaction represent the best recoveries available to Dominion's creditors from its remaining assets."

Sixteenth Monitor's Report, *supra* at paras. 51(f), 51(n), 81.

90. It is clear that the AVO Transaction is not only more beneficial than a potential bankruptcy sale; it is the best available transaction for the Acquired Assets and is likely the only transaction which could materialize, in light of the uncertainty regarding future production and the significant liabilities associated with the 40% Interest.

(iv) The Key Creditors Were Extensively Consulted

91. The AVO Transaction involves Dominion's senior secured creditor, DDMI, and is supported by the 1L Agent. DDMI and the 1L Agent were both involved in negotiations regarding the AVO Agreement.

Sixteenth Monitor's Report, *supra* at para. 20.

92. The Monitor has noted that, outside of the AVO Transaction, the 1L Lenders would be unlikely to make a full recovery with respect to the LC Indebtedness.

Sixteenth Monitor's Report, *supra* at paras. 51(f), (j).

93. Accordingly, if the entire Cover Payment indebtedness is eventually satisfied (which is far from certain), then the 1L Lenders are now the fulcrum creditors in these CCAA Proceedings and their views should be given greater weight than other stakeholders. The 1L Lenders are aligned in support with DDMI in the AVO Transaction. In *Bellatrix Exploration Ltd. (Re)*, the Honourable Madam Justice Hollins stated:

> "[58] While this Court is to consider the effect of the proposed sale on all stakeholders, the primary stakeholders are obviously the company's creditors. They have financed the company to their detriment and now hold compromised security for those debts. They have only the process itself to assist them.
>
> [59] The Spartan Bid will see the first lien noteholders paid a portion of their outstanding debt but not all. The second and third lien noteholders will receive nothing. ***While some of the earlier non-binding bids would have been***

> ***sufficient to pay the first lien debt in full plus some of the second lien debt, making the second lien noteholders the fulcrum creditors, that shifted over time to the point where the only certain offer on the table no longer covered the first lien noteholders. As I understand the Monitor's argument, that meant that the first lien noteholders became the fulcrum creditors and thus their preferences took on more importance***.
>
> [60] ***Assuming that I am understanding the meaning of the term correctly, I accept the Monitor's submissions***. That does not absolve the Monitor nor the Bellatrix Board from consideration of other creditors, nor was that suggested; Soundair at para.21. Rather, it was argued that the Bellatrix Board, with assistance from BMO and the Monitor, did consider the effect on these stakeholders before accepting the Spartan Bid." [emphasis added].

***Bellatrix Exploration Ltd (Re)*, 2020 ABQB 332, at paras. 58-60 [TAB 4].**

(v) The Effects of the Proposed Sale or Disposition on the Creditors and Other Interested Parties Are Beneficial

94. It is clear that the proposed AVO Transaction will not result in any recovery to ACDC with respect to the Diavik Realization Assets. This is also the most probable outcome if the AVO Transaction does not close, as demonstrated by the Illustrative Cover Payment Forecast. The Monitor has noted that actual results may vary materially from the Illustrative Cover Payment Forecast; yet, "[t]o definitely conclude on the overall remaining mine economics, it would require ongoing participation in the Diavik JVA until the end of mine life. However, such participation would require significant cash call funding by Dominion and incurring ongoing market and operational risk." That prospect should be considered in light of the corresponding costs and drawbacks, including the continued expectation that DDMI will fund Dominion's obligations through Cover Payments. No alternative funding is proposed or available. It is categorically unfair and inequitable to expect DDMI to continue to advance credit based on the uncertain and contingent hope that a subordinate creditor might obtain some minimal recovery at some time in the distant future.

Sixteenth Monitor's Report, *supra* at paras. 42, 51(e).

95. In contrast, DDMI is the senior secured creditor, as against the Acquired Assets, followed by the 1L Lenders, and both support the AVO Transaction. DDMI and the 1L Lenders are entitled to full repayment before other creditors. The AVO Transaction will bring the proceedings to a close on a negotiated basis which is to the benefit of Dominion's stakeholders when considered

as a whole, including the parties to the AVO Agreement: Dominion through the Monitor, DDMI, and the 1L Lenders who support the AVO Transaction.

96. Finally, in considering the effects of the proposed transaction on Dominion's stakeholders, the interests of the Northern communities and environment, as well as the employees of the Diavik Mine, are directly in issue. The Diavik Mine is a major Northern employer, and DDMI makes significant investments in Northern communities. The AVO Transaction will support the continued operation of the Diavik Mine as a going concern, and will prevent the erosion through LC interest and ongoing professional fees of funds which may be put toward closure and rehabilitation costs. Accordingly, the AVO Transaction will benefit the non-creditor stakeholders.

The role of the Diavik Mine as a major employer, the significant community investments made by DDMI, and sustainability at the Diavik Mine are described in further detail in Croese Affidavit #1, *supra* at paras. 31 - 34.

(vi) The Consideration to Be Received for the Assets Is Fair, Taking into Account Their Market Value

97. The consideration to be provided for the Acquired Assets is fair and reasonable, taking into account their market value. In addition to the failure of the previous sales processes to result in a transaction for the Acquired Assets, the following factors indicate that the consideration under the AVO Agreement is fair in the circumstances: (i) the Diavik Mine is subject to significant closure and rehabilitation liabilities; (ii) any purchaser of the Acquired Assets will be required to satisfy the existing and any future Cover Payment Indebtedness, as well as future cash calls, and the Illustrative Cover Payment Forecast indicates that future production is unlikely to match the anticipated cash calls; and, (iii) the 1L Lenders are unlikely to obtain a full return, outside of the AVO Transaction, and there is no value beyond their first-lien position. The main creditors, namely, DDMI and the 1L Lenders, are at arm's-length with one another and are best placed to determine the value of Dominion's interest, especially as they have the largest interest and insight into the Diavik Mine and its operations. Based on the foregoing reasons, the consideration to be received for the assets is fair.

See Sixteenth Monitor's Report, *supra* at paras. 51(d)-(i), (n).

98. At this late stage, given the prior unsuccessful processes to obtain a transaction for the Acquired Assets, this proposed AVO Transaction will prevent a further sales process which would only add unnecessary expense and delay, including the continued expectation of funding from

DDMI. It is unnecessary to further test the market in these circumstances and doing so would materially increase the risk of further prejudice to Dominion's stakeholders, given the attendant costs.

(vii) The Soundair Test Is Satisfied

99. For the reasons set out above, the first three factors of the *Soundair* test have been met: (i) sufficient effort has been made to obtain the best price and Dominion has not acted improvidently; (ii) the interests of the stakeholders, as a whole, are best served by the completion of the AVO Transaction; and, (iii) the multiple processes by which offers for Dominion's assets were sought were conducted with efficacy and integrity. The fourth *Soundair* factor is also met as there has been no unfairness in the working out of the process. In particular, the 40% Interest was included in the SISP and the Ad Hoc Group had a fair opportunity to submit a bid, but chose not to.

100. As a result of the aforementioned factors, the AVO Transaction is fair and reasonable, and the highest and best offer available in the circumstances, and should be approved.

VI. RELIEF REQUESTED

101. DDMI respectively requests that this Honourable Court: (i) approve the AVO Agreement and the AVO Transaction; and, (ii) authorize and approve the Monitor's delivery of the Discontinuance and Release to DDMI, upon closing of the AVO Transaction.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this ____ day of October, 2021

McCarthy Tétrault LLP

Per: *"McCarthy Tétrault LLP"*
Sean Collins / Walker W. MacLeod / Pantelis Kyriakakis / Nathan Stewart
Counsel for Diavik Diamond Mines (2012) Inc.

VII. INDEX OF AUTHORITIES AND MATERIALS

Evidence

1. Transcript of Proceedings, Action No. 2001-05630, December 11, 2020;

Cases

2. *550 Capital Corp. v David S. Cheetham Architect Ltd.*, 2009 ABCA 219;
3. *Accel Canada Holdings Limited (Re)*, 2020 ABQB 182, leave to appeal granted on other grounds 2020 ABCA 160;
4. *Bellatrix Exploration Ltd (Re)*, 2020 ABQB 332;
5. *BG Checo International Ltd. v British Columbia Hydro and Power Authorities*, [1993] 1 SCR 12 at pp. 23-24;
6. *Cline Mining Corporation (Re)*, 2015 ONSC 622;
7. *Dumbrell v Regional Group of Companies Inc.*, [2007] OJ No. 298, 2007 ONCA 59 (CanLII) (Ont. CA);
8. *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157, leave to appeal to SCC denied 37712;
9. *Lydian International Limited (Re)*, 2020 ONSC 4006;
10. *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587;
11. *Nelson Education Limited (Re)*, 2015 ONSC 5557;
12. *Nortel Networks Corp., Re*, 2010 ONSC 1708;
13. *Re Green Relief Inc.*, 2020 ONSC 6837;
14. *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON CA), 1991 CarswellOnt 205;
15. *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53;
16. *Skylink Aviation Inc. (Re)*, 2013 ONSC 2519;
17. *Third Eye Capital Corporation v. B.E.S.T. Active 365 Fund*, 2020 ABCA 160;
18. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508;

Legislation

19. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (excerpts).

TAB 1

Action No. 2001-05630
E-File Name: CVQ20DOMINION
Appeal No._____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

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 DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY, LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC AND DOMINION FINCO INC., and DOMINION DIAMOND MARKETING CORPORATION

P R O C E E D I N G S

Calgary, Alberta
December 11, 2020

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Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

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December 11, 2020	Afternoon Session
The Honourable Madam Justice Eidsvik (remote appearance)	Court of Queen's Bench of Alberta
P.L. Rubin (remote appearance)	For Dominion Diamond Mines UCL, Dominion Diamond Delaware Co. LLC, Dominion Diamond Canada ULC, Washington Diamond Investments LLC, Dominion Diamond Holdings LLC, Dominion Finco Inc.
M.I.A. Buttery, QC (remote appearance)	For the Government of Northwest Territories
C.D. Simard (remote appearance)	For the Monitor
K.J. Meyer (remote appearance)	For the Monitor
A. Astritis (remote appearance)	For Public Service Alliance of Canada and the Union of Northern Workers
M. Wasserman (remote appearance)	For First Lien Lenders
E. Paplawski (remote appearance)	For First Lien Lenders
K. Kashuba (remote appearance)	For Ad Hoc Group of Bondholders
T. DeMarinis (remote appearance)	For Ad Hoc Group of Bondholders
J.J. Salmas (remote appearance)	For Wilmington Trust
T.M. Warner (remote appearance)	For Dene Dyno Nobel and Dyno Novel Canada Inc.
S.F. Collins (remote appearance)	For Diavik Diamond Mines (2012) Inc.
J. Regush (remote appearance)	For Hay River Heavy Truck and Dene Aurora Mining Ltd.
J. Pawlyk (remote appearance)	For SMS Equipment Inc and Kitikmeot BBE Expediting Ltd.
J. Schultz (remote appearance)	For Procon Mining & Tunnelling Ltd.
P. Mak	Court Clerk

THE COURT: Thank you very much. All right. Good afternoon everyone. Nice to see a few of you, some of you are hidden away.

Discussion

MR. RUBIN: My Lady, it's Mr. Rubin, are you able to hear me?

THE COURT: Yes, I am. Thank you very much.

MR. RUBIN: Thank you My Lady. I just realized I'm having trouble with the video portion, but if you can hear me I will get going because I know time is short.

THE COURT: Okay. No problem. I have got the afternoon devoted to you, but it is a Friday, I am just saying.

MR. RUBIN: Yes, understood. I think we have about -- I think I counted in excess of 60 participants on -- I can go through who I think is on who maybe is making submissions, My Lady, or they can introduce themselves, whether or not they want to make submissions, I'm obviously in your hands on that.

THE COURT: Okay, why do you not go through the initial list and then we'll ask if you have missed anybody. That would probably be the best way to do it.

MR. RUBIN: Very good. So from acting for the First Lien Lenders, I believe we have Mr. Wasserman, he's on the call or on this WebEx call and I think his colleague, Ms. Paplawski, is on, as well.

On behalf of the purchaser, there's someone from the Ad Hoc Group, Mr. Kashuba is on, you've heard from Mr. Kashuba prior in previous matters and I think his colleague, Mr. DeMarinis is also on, as well.

I do see, Mr. Simard, he's on as well as Ms. Meyer. Mr. Simard and Ms. Meyer are counsel to the Monitor FTI.

I do see Ms. Buttery on the line, you've heard from her previously and Ms. Buttery is counsel to the Government of the Northwest Territories.

Mr. Salmas is on the line. Mr. Salmas is counsel to Wilmington Trust, who is the noteholder Trustee.

I presume Mr. Collins is on, I haven't heard from him -- but I think I do actually see him. Mr. Collins is on; he is counsel for DDMI.

THE COURT: Yes, I see him there.

MR. RUBIN: And he's for the 60 percent joint venture holder at Diavik.

We also have Mr. Astritis. Mr. Astritis is counsel to PSAC, which is the union of northern workers and Mr. Astritis introduced himself earlier.

THE COURT: Yes.

MR. RUBIN: We also have Mr. Warner, who is on, he is counsel to Dene Dyno, they are the largest lienholder, let me put it that way.

THE COURT: Right.

MR. RUBIN: We have a couple of other counsel for other lienholders, one is Mr. Regush, R-E-G-U-S-H, I apologize how I'm pronouncing his name wrong, but he is counsel to Hay River and Dene Aurora, who are also lienholders.

I believe Mr. Pawlyk is also on the line. Mr. Pawlyk is counsel to SMS Equipment, which is a lienholder. Mr. Pawlyk circulated an email prior to the hearing indicating that he may be opposing the application or at least would like money set aside for his client's lien claim.

Other than that, Mr. McConvey, M-C-C-O-N-V-E-Y, has introduced himself, I believe he is either counsel or an individual representing one of the bondholders, but I'm not clear, I don't know who he is an I apologize if I've mis-stated that. But Mr. McConvey, is on the line, as well.

THE COURT: Oh I see that you are for Rossport Investment Bondholders, is that right? Oh I lost you there your voice is not coming through. No still don't hear you -- oh there you go -- I heard you briefly.

MR. RUBIN: Mr. McConvey, I think you're on mute. I would appear that he's still on mute but perhaps he will figure that out if he does want to make submissions, My Lady.

THE COURT: Okay.

MR. MCCONVEY: Can you hear me now?

THE COURT: Yes, we can, yes, there we go.

MR. MCCONVEY: An individual with Rossport Investments, we are

bondholders.

THE COURT: Okay. So you are an individual, okay, right. All right.

MR. RUBIN: And My Lady, that's the list that I had and I'm sure there are others, 'cause as I said, there's in excess of 60 people here.

THE COURT: Right.

MR. RUBIN: Actually Angela our CFO is on as well.

THE COURT: Okay. All right. Well we have got, as you would say, the usual suspects. So all right, why do we not get going then. I have received quite a bit of material, hopefully everything I need for today anyways and you have got an application and the Monitor -- and you want to have this matters stayed and then you have your application for sale and DDMI has filed a brief outlining certain things that they would like to see. So maybe you can take it away, Mr. Rubin and get me caught up as to what has been going on and what you would like from me today.

Submissions by Mr. Rubin

MR. RUBIN: Yes, My Lady, and because I'm having technical problems, I will keep the -- I have my laptop on, but I apologize if I'm not looking directly on you, but I need to access CaseLines --

THE COURT: That is okay.

MR. RUBIN: -- in order to access case law at a certain point. So I apologize for that.

I guess we are seeking approval of a going concern transaction today, My Lady, and so after eight months in *CCAA* protection, I'm happy to report we have a going concern restructuring transaction that will involve a restart of the Ekati Mine by the end of January. So that is six or seven weeks from today.

This is obviously very good new. A lot of hard work has gone into getting to today and this is a very significant, it's a very positive step for the company for the Northern communities, for hundreds of employees and contractors and many other stakeholders. This transaction has the support of the first lien lenders and it also has support of the Monitor.

It obviously has the support of the two purchasing entities which are Brigade and DDJ and they're represented by the Tory's firm, that's Mr. Kashuba's client. And it also has the support of another bondholder named Western Asset Management and while not a purchaser, they are a signatory to a support agreement. And all three of those parties also are -- or happen to own second lien notes and together they hold approximately 45 percent of those second lien notes, as I understand it.

But to be clear this is not a credit bid. You've heard that before. This is not a credit bid from the second lien -- or excuse me -- from the purchasers. This is not a noteholder structured transaction and it's not a transaction that has been advanced by those noteholders qua noteholder. Rather it's a separate purchase transaction which also happens where the purchasers also happen to own or hold second lien notes.

I can also advise, My Lady, that the company has been in discussions with numerous critical trade suppliers including lien claimants with respect to settlement and resolution of their claims and there have been a number of those settlements that have been reached and those settled claims are being assumed and paid through the transaction. And that is obviously a very significant matter obviously for the benefit of the company and those trade creditors.

The purchases have agreed to make available the critical vendors and that's not just any claimants, but the critical vendors, up to US $20.5 million. This is of significant benefit to critical suppliers and as I mentioned, those trade creditors and lien claimants have, on a confidential basis, settled their claims which has assisted the company in moving forward with a going concern transaction.

It is, I will say unfortunate, but perhaps not surprising that there is no recovery for the second lien noteholders as a class. You've heard that from us before and of course, there is no recovery for unsecured creditors who are not critical vendors that are being assumed by the purchaser.

But as I started out by saying, if this transaction is approved today and there is absolute urgency to this and I will come back to it, this plan contemplates a restarting of this mine by the end of January.

I did want to mention and talk a little bit about service. There obviously are a lot of parties involved in a transaction such as this, so those -- it includes the first lien lenders and again, the first lien lenders are a consortium of financial institutions, so it's not just one party. In addition, there's obviously the purchasers and there's a group of those purchasers. The Sureties have been involved in discussions and so has Dominion, so there are a lot of

moving parts, there are a lot of people.

And those parties have been working non-stop and when I say "non-stop", I mean they have been working every, single day for weeks and to be honest it feels like months and it actually might be months. But we've got to a point now where we have a deal, we have a signed APA.

All of this, that is the signed APA happened on Sunday evening and so the asset purchase agreement or APA and the form of approval and vesting order was sent out to the service list on Sunday and obviously we couldn't send it out before we had a deal. So we are working on five days of service, not seven, but of course, there was simply nothing we could do about that. There are a lot of people working very hard and we got the material out as soon as we could.

There is an affidavit from Mr. Brendan Bell, you've seen his affidavits before. Mr. Bell in the independent director and I will take you to his affidavit briefly.

In terms of opposition today, unfortunately it looks like there may still be some oppositions. Mr. Collins' client, DDMI again appears to be opposing the relief being sought or maybe perhaps more accurately, aspects of the relief being sought, but their opposition to those aspects does put a roadblock in front of this transaction and I will obviously have more to say about their position and their opposition, as I'm sure other stakeholders will.

I also understand that there may be a lien claimant who is opposing the transaction, but we will hear from them.

I did also, My Lady, want to talk a little bit about whether there are any alternatives and I say alternatives, in respect of today's application. And I will say this; that we are at the end of this restructuring and that after eight months and a very, very comprehensive sales and investment solicitation process that you've heard about, that the Court has approved, after eight months there is only one going concern transaction and it is the one that is before the Court.

Your Ladyship has previously heard that we have a stalking horse bidder, that transaction fell away because there was an impasse reached with the Sureties and that I can report that the -- this purchasing group has come to an agreement and there are what I call, Surety Support Confirmation letters that have been sent, so that is obviously very good news.

The transaction is supported by many, many parties. I've mentioned the Monitor, I've mentioned the first lien lenders already, but I will say that as a result of this transaction, we will see the Government of the Northwest Territories paid the amounts that are owing to

them. We will also see, as I mentioned, approximately $20 million US going to critical vendors or let's call that $26 million Canadian through the assumption of obligations.

This will see the Ekati Mine reopen. This will substantially all employee jobs being saved, along with their pension and their benefits. We will see contracts being saved with those critical vendors. As a result of this, we will see impact benefit agreements being maintained. We will see tax revenues start to be generated for the benefit of the North. We will also -- because there will be no shutdown, we will see environment commitments being maintained.

And I pause here to say; that if this transaction is not approved, the only alternative at this time would appear to be liquidation. We don't have another transaction on the backburner. We're at the end of the line, so to speak. And I also say that this transaction needs to be approved today, My Lady, and there are a variety of reasons for that, one of which is the company is simply not able to absorb the very, very significant continued costs of the *CCAA* process. They need to get out of the *CCAA*. The company needs to reopen the mine and start producing diamonds.

And, in addition, the framework of this transaction is structured on an economic model that has the mine reopening because without the mine reopening the income and revenue is not being generated to support the transaction and the continued operation of the business. To put this simply, My Lady, we have a melting ice cube and we need to move forward and we need to move forward ASAP.

In addition, there are complicating matters and complicating regulatory approval mechanisms that need to be advanced ASAP in order to complete this transaction. This is not simply a lawyers get in a room; sign some documents and we close. There is consultation that is needed. There's a regulatory process through Ms. Buttery's client that needs to be undertaken and we need to try and do that by the end of January. So we need to get started today.

And then finally, in our submission, this transaction fulfills the very purpose of the *CCAA*, My Lady, this is what the goal and the purposes of the *CCAA* is, is to allow a company like this to restructure and to carry on.

I would like to take you to the -- to the asset purchase agreement and for that I will need to take you to CaseLines and I'm sorry, My Lady, I'm going to need to take a moment here because of my computer problems. I have lost my CaseLines for the time being -- here it is.

And what I would like to do is simply to take you through the APA and I would like to

start at page 17.2-45 -- 17.2-45 -- and perhaps you could let me know when you are there, My Lady.

THE COURT: 2-45?

MR. RUBIN: Yes, 17.2-45.

THE COURT: Oh -45, oh it is part of the notice of application -- cause I was actually looking up the one Mr. Collins sent, 'cause it is highlighted with changes he wants.

MR. RUBIN: Yes I will come back -- so this is attached to the APA and yes, Mr. Collins has redrafted the APA and those changes are not acceptable to the purchasers, or the first lien lenders or the company and in our submission, they are unnecessary. And I will -- and we will -- I'm sure we will discuss that.

So if you have 17.2-45, that's Article 2 of the APA.

THE COURT: I am getting there, okay that is it, I am here, yes.

MR. RUBIN: Okay. So if I could scroll down that page and start with Article 3, which is Purchase and Sale Assumption of Certain Liabilities.

THE COURT: M-hm --

MR. RUBIN: So this is the 3.1 or the acquired assets and as you can see in 3.1 it says: (as read)

> Subject to the terms and conditions set forth in this agreement at closing the seller shall assign [and so obviously Dominion, our client, is the seller] shall sell, assign, transfer and deliver to the purchaser and the purchaser shall purchase, acquire and take assignment and delivery of all of the seller's right, title and interest.

So what's being sold is Dominion's right, title and interest because of course, we can't sell what we don't own. We're selling our right, title and interest in the assets and property of the sellers, again what we own, other than excluded assets and they're being sold free and clear of claims and encumbrances, which is standard of whatever nature or kind other than permitted encumbrance.

So in paragraph 3.1 the APA recognizes that we can't sell what we don't own. You will

see that the APA and I will take you to the form of order that we're seeking, do not override -- I want to be careful on this and we'll take you to the provision -- do not override the security that's granted to Mr. Collins' client. And what the APA does is it merely transfers, what I will call, residual rights.

And if you could turn over the page to 3.1(b) in the APA

THE COURT: Sorry over to where? Paragraph what?

MR. RUBIN: The next page is which is paragraph (b) as in Bob.

THE COURT: Yes, I'm there, (b). Okay.

MR. RUBIN: And so this is, in addition, this is part of what's being acquired by the purchaser, there's an assignment of Dominion's rights and interests and again, I want to be clear, if there are no rights and interests that Dominion can assign, then the purchaser isn't purchasing them. So there's an assignment of all the seller's rights and interests in relation to the receipt of realizations and recoveries from or in respect of the Diavik joint venture interest and that's defined as the Diavik realization assets.

So what this is, is essentially the purchasers purchasing a receivable. If DDMI is obligation to and does return diamonds to Dominion and deliver those diamonds to Dominion as per your prior orders then that will be a receivable that the purchaser is purchasing. And so as Your Ladyship already ordered, you may recall on June 16th, we had a contested application with Mr. Collins and his client and then you'll recall you made an order on June 16th related to cover payments and how Mr. Collins' client is entitled to keep diamonds in an amount to cover those cover payments, according to the DICAN valuation.

THE COURT: Right.

MR. RUBIN: And then you'll recall on October 30th, Mr. Collins brought an application to vary your June 19th order and you denied that application and so as of today's date, to be clear, DDMI has not delivered any diamonds under your orders and there's a dispute between our client and DDMI as to whether they should be delivering diamonds.

Dominion believes that there's about $16 million US of excess diamonds they should be delivering, that was at the end of October, so about $20 million DDMI says they're over secured, but DMMI contests that. They disagree and that is an issue that we'll have to bring back before this Court and it's not an issue for today.

But the point is, that if and when -- so My Lady, if and when diamonds are delivered by DDMI to Dominion pursuant to your prior orders, so if and when they're delivered and hopefully they are, the purchaser is purchasing those diamonds, once they're delivered. And so that is why this is characterized as a purchase of a receivable, it is really no more complicated than that.

THE COURT: So are you saying that in terms of sorting it out, you will -- you will sort out that issue later?

MR. RUBIN: So what we'll do is, whether Mr. Collins' client is required to deliver diamonds or not, there's a dispute as to the interpretation of your order, that will have to come back before you on another day and we can't -- it's not being decided today.

THE COURT: Okay.

MR. RUBIN: What we are seeking in order today is that this purchase agreement and the order be approved and what the purchaser is buying are those receivables, if and when, Dominion is required to deliver them to -- if DDMI is required to deliver them to Dominion pursuant to your prior orders. That's all this is. They're buying a receivable. If there's no receivable, if there's no obligation on DDMI to deliver diamonds or proceeds thereof, then their purchasing a receivable but there is no receivable. So that's why this is just simply a receivable. If DMMI owes and must deliver diamonds, they're being purchased.

THE COURT: Okay, are you going to deal with -- at this point with what Mr. Collins says with respect to that or are you going to leave that for later?

MR. RUBIN: Well, I'll deal with it a general sense and then we'll let Mr. Collins make his submissions.

THE COURT: Okay. All right.

MR. RUBIN: But in our respectful view, a disproportionate amount of time has been spent dealing with DDMI issues and I fear it's going to continue today in the face of what's an urgent and critical application for this company.

And I do note DDMI's most recent affidavit complains about what they say is our late delivery of material, obviously it's not by choice, we're dealing with a number of parties trying to save this business.

THE COURT: Right.

MR. RUBIN: But I would note that Mr. Collins' client has had sufficient time to prepare an affidavit, prepare a written legal brief and in fact, prepare a revised form of APA. And so what DDMI is attempting to do is to reopen a heavily negotiated agreement amongst a syndicate of financial institutions, noteholder groups and Dominion and in our view, I want to be clear on this because I am concerned that Mr. Collins will take us into a rabbit hole that doesn't need to be undertaken today. That in our respectful view, no changes, My Lady, no changes need to be made to the APA and in our view DDMI is not adversely affected by this transaction.

If there's an impact on DDMI, and we don't say that there is, it's a result of prior orders, which they're appealing and that's fine, but this transaction does not move the needle. You will see, My Lady --

THE COURT: And what happens -- what happens with respect to those appeals in terms of these orders? Are you saying that since this is carved out they can be dealt with later?

MR. RUBIN: Well, the issues that DDMI is raising, I say will be matters for their appear if they're granted leave, but the issue today is simply again, coming back to its most basic, the purchaser is simply buying a receivable. If DDMI has to deliver diamonds to Dominion, then they're purchased assets and the purchaser is purchasing it free and clear of DDMI's security. If DDMI does not have to deliver diamonds pursuant to your order or pursuant to a different order from the Court of Appeal, well then they don't have to deliver diamonds and there's no receivable that the purchaser will be purchasing. It is no more complicated than that.

And I will take you to our approval and vesting order and in our approval and vesting order we have added an override provision to ensure that nothing in here could be interpreted as taking away DDMI's security rights in those diamonds that they hold.

THE COURT: Cause I think at base that was their problem. They also suggested I think that they wanted -- like if they were delivered that they would still have security over them if they were in your possession, right? That was also what they were saying.

MR. RUBIN: Yes and let me address that issue just right now, My Lady, since you've asked.

THE COURT: Right, we have to deal with all of this, so whenever is convenient to you.

MR. RUBIN: So why don't I come back to that, My Lady, and I'll just finish taking you through the APA.

THE COURT: Okay.

MR. RUBIN: And so these again we're on page 22 of the APA or page 46 of CaseLines, so these are the acquired assets.

THE COURT: Okay.

MR. RUBIN: And you can see that, you know, this is -- you know on paragraph (c) they're buying Ekati, which is not Diavik, joint venture interest. You can see in (g) that they're buying cash and cash equivalents and you can see in (h) that they're buying accounts receivable, again trade and non-trade accounts receivable that is essentially what they're buying from -- with respect to Diavik and DDMI, as well.

And so further down, paragraph (l) which is at the top of page 47 of CaseLines, you can see that they're purchasing essential contracts and those contracts that are set out on schedule A, and I want to be clear here, that list of assigned contracts is not complete, but what the purchaser is going to do, like the stalking horse purchaser was going to do, is decide which contracts they need to carry on the business and they will add or remove contracts according to what they need to carry on the business. And then further down in (p) you can see all assumed plans, so they are as part of the acquired assets, assuming plans and these are the employee plans, so this is the pension plan and those kinds of things, so that's what the purchaser is doing.

And then if I can scroll down to -- I'm just going to use the pages of APA, but scroll down to page 34, which is the next page.

THE COURT: Okay.

MR. RUBIN: And 3.2, so this is what's excluded and the very first thing that's excluded is the Diavik joint venture agreement. So the agreement is clear that the purchaser is not purchasing the Diavik joint venture agreement, the purchaser is not stepping into to -- well let just say this -- they're not purchasing a joint venture agreement, what they're purchasing as I already said, are the receivables to the extent there are any receivables that are paid to Dominion by DDMI.

THE COURT: And I think Mr. Collins had wanted you to make it clear that they are not purchasing anything in that mine, like just saying it out -- instead of saying, you know, the Diavik joint venture agreement.

MR. RUBIN: He does, he wants to amend the APA, but there's no need for his amendments, in fact, his amendments in our submission are just -- they simply add nothing to this transaction.

THE COURT: Okay. So are you saying that he has just put more specifically what is contained in this Diavik joint venture agreement under 3.2(a); is that what you are saying?

MR. RUBIN: Yes, what I will say, is in our view the APA is clear. Mr. Collins has attached his material and email from the Monitor which the Monitor has expressed their understanding of what the transaction is. Mr. Wasserman and I have spoken to Mr. Collins yesterday, we've included -- it's clear in the APA we're not buying the Diavik joint venture agreement. We've got an override provision in the order which I'll take you to and nothing else needs to be changed in the APA to make it clear what is occurring.

THE COURT: Okay.

MR. RUBIN: Okay. So that paragraph sets out the excluded assets and then we scroll down to the next page, page 25, these are the assumed liabilities and you can see on page 25 in 3.3 the purchaser is assuming all of the liabilities in (a) for any assigned contracts, in paragraph (b) they're assuming trade payables as defined and set out therein, in (c) they're assuming the liabilities for transferred employees; so that's all fairly standard stuff.

THE COURT: Right.

MR. RUBIN: And then what I would like to do is turn to paragraph 4.1, which is on page 30 of the APA so it's down about four or five pages.

THE COURT: Right.

MR. RUBIN: And Article 4, this is purchase price and payment, so you can see what the purchaser is doing here, is they are -- the purchase price of the aggravate of these amounts, the pre-filing indebtedness, that's the $70 million US that's owing to Mr. Wasserman's client, that is the first lien lenders, they're owed more than $70 million, but that's what this number references; (b) the amount of the indemnity

assumption, so they're assuming the obligations to the Sureties, that's the Canadian $280 million amount.

THE COURT: Sorry about that -- that is the -- that is problem with this hearing, right? It is never a good hearing if you do not hear a dog. Sorry, about that.

MR. RUBIN: So the purchase price there, these are obviously very significant amounts that are being assumed by the purchaser in 4.1. And then on the next page in 4.3, you can see that in section 4.3, that the purchaser is going to make a new working capital facility available to Dominion in the amount of US $70 million, that's in 4.3. So the purchaser is also going to fund working capital of the business going forward.

THE COURT: Right.

MR. RUBIN: Right and so then, My Lady, if I can ask you to turn to, it might be better for you to find the page for this one, 17.2-66 and 17-2.66 (sic) --

THE COURT: Sorry about that -- okay -- I am with you now, where are at now, 4.6?

MR. RUBIN: 17.2-66, so this is Article 7.1 and again it's 17.2-66.

THE COURT: Okay. Give me a second. Okay.

MR. RUBIN: And at the bottom of that page you can see there's reference, the last two paragraphs, to a wind down account and Diavik realization account. And so what is being done is there's going be $250,000 set aside to, you know, close out the *CCAA* and the estate in (iii) and in paragraph 4, there's $1 million that will be set aside and this Diavik realization account is going to be a bank account that will cover the cost to, as it says, administer the Diavik realizations assets. Someone has to monitor, you know, whether there are funds coming in from DDMI and in what amounts and so all of this has been set out.

And again, this is essentially an account in order to monitor that receivable and to ensure that that receivable makes its way to Dominion or that assignee to the extent again that it's payable pursuant to your prior orders.

Next, if I can go to page -- CaseLines page 81, so it's 17.2-81, so 17.2-81, and this is the termination provision in the APA and again, we wanted to bring this paragraph to your

attention is that at the bottom of page 57 of the APA, if you're there, My Lady?

THE COURT: Yes, almost. We need your assistant to be working the -- so we don't have to scroll so much.

MR. RUBIN: Why don't I try to use the --

THE COURT: I am there, I am there now, termination of agreement. It just is easier if you use that find function anyways -- I am there. Thank you.

MR. RUBIN: Okay. So the bottom of the page, termination by bidders and you can see here the one of the termination rights of the bidders is if the sale order has not been issued on or prior to December 11th. And again, the reason for that date is the need to get the mine operating by the end of January and because of the significant amount of money that needs to be spent and the authorizations and the process and the consultants we need to do -- that needs to occur.

THE COURT: What is that date? Oh yes, okay, termination by bidders -- by bidders the sale order shall not have been issued on or prior to December 11th.

MR. RUBIN: Yes.

THE COURT: Okay, got it.

MR. RUBIN: And the reason obviously is we're coming into Christmas --

THE COURT: Right.

MR. RUBIN: -- and again, in order to get this mine up and running in the next six to seven weeks a lot needs to occur and a lot of money needs to be spent.

THE COURT: Okay.

MR. RUBIN: Just turning over or down I guess, two page, to page 59.

THE COURT: Okay.

MR. RUBIN: And there's a break-up fee and this agreement has a break-up fee whereby the bidders would be paid $2.5 million US, which is the same break-up fee that that stalking horse bidder was going to get and which this Court already approved, in the context of the stalking horse bid, but it's only payable in certain circumstances that are set out in 12.4(a). It's only payable if the agreement is terminated, other than because of the bidder's non-compliance. There also has to be an alternate transaction within 9 months, in (ii) and importantly that alternate transaction has to result in the first lien lenders, their pre-filing credit agreement being repaid in full, in cash, which this transaction doesn't do.

There are a lot of things that would have to happen in order for that break fee to be paid, but it is something that the company has agreed to and the Monitor has supported, as well. And then in paragraph (b) there is a charge that is being sought to backstop that break-up fee and I'll take you to that in the court order.

I will also say this, when we're talking about the amount of fees here. The fees are significant, there's no doubt -- there is no doubt about that. The fees, as I said, are significant, My Lady. And there are a variety of reasons for that, they include things such as the number of parties that are involved, you know, we have the company, we have the first lien lenders, we have the stalking horse bidder and we have the Ad Hoc Group, we have the noteholder trustee, there's some Monitor costs, they are small in comparison. It's also expensive, as a result of the fact that many of the secured creditors, the stalking horse bidder, the note trustee have foreign based operations and so in many cases, there are Canadian and US counsel involved and some of these agreements are governed by US law.

It's also complicated by the -- the complexity of this asset and the sales process and the fighting that's gone on. That being said there is no value in this estate for unsecured creditors and there's no value for the secured noteholders as a group and so while these costs are significant they are, in effect, being borne by the first lien lenders and the purchaser and they're both supporting this transaction. But again, getting back to urgency, we do need to stop the *CCAA* costs as soon as we can, we need to get back into an operating state, we need to close this transaction.

There are conditions to closing, My Lady, I'm not going to take you to them in the APA, but as I mentioned earlier wo do have these Sureties Support Confirmations so that is a significant step forward. One of the conditions to closing is obviously Court approval and then there's the regulatory approvals, obtaining the consents that might be necessary down the road to assign key contracts, but obviously a significant step forward.

I do want to, I think, take you to the independent Director's affidavit and that is Mr. Bell and I will direct you to there, I hope and let's see if this works a bit better, My Lady.

THE COURT: I am there actually, I got it.

MR. RUBIN: Very good. So I am just going to scan through Mr. Bell's affidavit, just starting in the first, at the introduction, but I am just going to just give you a sense of what Mr. Bell has done in his affidavit. You can see on page 3 of his affidavit that he outlines Dominion sales efforts and the process. You've heard a lot about this, you approved the sale process, but Mr. Bell does go through that process and the work that was undertaken. On page 4, he talks about the Washington stalking horse bid and the SISP and he goes through what -- what occurred with respect to that bid and the sales process.

On page 5 of the affidavit between paragraphs 17 and 18, he talks about the unavailability, that's the heading of the Washington stalking horse bid and how the company then pursued alternate restructuring options. You've already heard about this; you've heard about the impasse that was reached with the sureties at that time. We now don't have the issue, but he does talk about new efforts that were made to pursue those alternative transactions.

THE COURT: Right.

MR. RUBIN: And then he goes onto talk about the Ad Hoc Group transaction in paragraph 7. Now, I won't go through this because I've actually taken you to -- I've taken you to the APA and many of the key provisions in that APA, but Mr. Bell does set out some of the key terms there in a chart format to help the reader.

And then scrolling down past the chart, I'm into about paragraph 31 now and at paragraph 31, Mr. Bell talks about how saving Dominion's business is in the best interest of its stakeholders. At paragraph 32, My Lady, he talks about this is a unique asset, he talks about how it's a material taxpayer, that is Dominion, how it's the second largest non-governmental employer, with 40 percent of its employees being Northern residents. He talks about a continuation of the mine in paragraph 32, as a going concern is critical to the Northwest Territories, Northern based employees, its contractors, communities generally and he says that importance cannot be overstated.

He has said in paragraph 33, that given its strategic importance once of his primary considerations has been trying to find a restructuring path that provides the best opportunity to restart and we have done that now and this is before you today. He talks about in paragraph 34, how the purchase agreement contemplates the purchaser will assume a number of going forward obligations and I've already taken you through to that -- to those portions in the APA.

At paragraph 37, he talks about the market exposure, he talks about how he's been in prior review processes and he references his prior affidavits. And he says at paragraph 38, that with the stalking horse bid no longer being available, based on his knowledge and his experience in the diamond mining industry including participating in three prior strategic processes, in his view the transaction contemplated is the best executable alternative for this time and in the circumstances and is in the best interests of Dominion and its stakeholders.

That is the evidence from Mr. Bell along with the various other affidavits that you have seen.

THE COURT: Okay. Thank you Mr. Rubin.

MR. RUBIN: I would like to turn to, I think the order, My Lady, and just take you through that I will again try to direct you to the order.

THE COURT: Okay.

MR. RUBIN: And see if this works.

THE COURT: Approval and vesting orders number 6, 17.24, it is listed there, so it’s an easy one to find, its listed there so …

MR. RUBIN: Excellent. And so we served this form of order on -- a form of order on Sunday, we then have made three changes to this form of order that is the one that you're on right now, we sent this out earlier this morning. So there are three changes and they are generally -- we had some discussions with one of the royalty holders and we worked through an agreement with them and you'll see that paragraph. We've included the override provision that deals with DDMI that I referenced earlier, I drafted that provision and it was sent to Mr. Collins I think around 7:00 -- 7:00 my time, might have been 8:00 his time last night. He's not in favour, does not agree with our language, but we believe that our language does the trick and that no more is needed and I'll take you to that.

And then what we've also done is moved some of the lien settlements we've had onto the permitted encumbrance list. So attached to the approval and vesting order is a list of things that are vested off and we've come to settlements with a number of these critical vendors and we've moved them to the permitted encumbrances, so that their charges will remain on title because we have settlements with them.

And so if I could take you through this form of approval and vesting order and you know,

much of it is, sort of, model form language and I will start with paragraph 3, which is the approval of the transaction, do you have that My Lady?

THE COURT: Yes I do, let's see paragraph 3, page 17.3-432?

MR. RUBIN: Yes.

THE COURT: Okay.

MR. RUBIN: And so this fairly standard language which approves the transaction in its entirely and in the middle of the paragraph, I talks about how the sellers, which is our clients, are authorized to complete the transaction. It authorizes us to take such additional steps as may be necessary to complete the transaction. So that's fairly standard.

The vesting paragraph, from paragraph 4, is again uses the standard language which is, you know, the use of a Monitor's certificate and once you have that the assets are purchased free and clear from any other encumbrances and as you scroll down to the next page on page 4, the encumbrances which are being vested off are set out in (a), (b) and (c), in a general way, but then what it does after paragraphs (a), (b), (c) and (d), is that it allows certain permitted encumbrances. So this paragraph vests of personal property, security interests, land title interests, any other charges, any other liens, but it permits the permitted encumbrances in Schedule E.

Paragraph 5, is a new paragraph and a different paragraph, not in the model order and what it does is it references Schedule E, which is that list of permitted encumbrances and it says: (as read)

> If Schedule E to this order designates any permitted encumbrances and if prior to closing those are determined to relate to agreements that are not assigned contracts or the company is not taking a contract, then such permitted encumbrances shall become encumbrances and the seller shall give prompt notice thereof to the beneficiaries and they have to be given at least ten days prior written notice.

So what this does is, is that if there's a change then ten days notice has to be given and has to be given to those parties in writing and those parties can then, if they've got an issue, can raise it. But the idea here is that they're given written notice, ten days prior to closing to the extent that they are going to know longer be assigned contracts.

THE COURT: Okay. So when is the closing again, if you could

remind me?

MR. RUBIN: January 29th, I believe, is the anticipated closing date, it might be the 28th but probably the 29th.

THE COURT: Okay.

MR. RUBIN: Paragraphs 6 and 7, again are model order type language, so is paragraph 8 and so is 9 and 10, so these are the usual paragraphs that assist us in closing our transaction providing direction to applicable registrars et cetera to assist in closing. Paragraph 11, if you want to stop there -- so paragraph 11 talks about how upon completion of the transaction, anyone who has claims of any kind whatsoever with respect to the acquired assets, save and except permitted encumbrances, of course, shall stand absolutely and forever barred. So this is just the language that makes sure that once those assets are transferred, if they're transferred free and clear, people are barred from coming after the purchaser.

And then I do want us to go to paragraph 15. So this is the new paragraph, you can see it should be in blue.

THE COURT: Okay.

MR. RUBIN: So this is the paragraph that we have added to provide that comfort, additional comfort to DDMI and so I just want to read this paragraph and I'll stop as I go through it: (as read)

> So notwithstanding anything in this order [so this is the overriding paragraph] notwithstanding any other provision in this order, any encumbrances [so these are DDMI encumbrances] which DDMI may hold pursuant to the joint venture agreement against Dominion or the application's share of the Diavik Diamond Mine production or proceeds therefrom pursuant to your order. [So again, this is any encumbrance with DDMI holds] pursuant to the agreement against our share of diamonds or pursuant to the order your previously granted or which have never been or which have never been required to be released or delivered to Dominion or any replacement assignee, [those are the undelivered diamonds] shall subject to DDMI's compliance to all orders of this Court be unaffected.

And so what this does, is it says if DDMI is not required to deliver diamonds or proceeds of diamonds, if they're not required to deliver them to Dominion, 'cause you've already

made orders on this and if they're not required to deliver them then they're unaffected. Nothing in here will take away DDMI's rights, 'cause those are unaffected by this order, this is the middle of the paragraph "and shall continue to attach to the undelivered diamonds".

So this protects it, this makes again abundantly clear that their security remains as against the undelivered diamonds and then it says, "until such time as" and that's in the middle of the paragraph and so "until such time as the undelivered diamonds are or required to be released and delivered to the applicants". So what that means is, pursuant to your prior orders, June 19th, I think -- again we're going back to June 19th as challenged on October 30th and dismissed, but once those diamonds are required or proceeds are required to be delivered to Dominion, then DDMI's security does not attach to those.

And that was the very argument that we had on June 19th and that we had on October 30th. And so what this order does is it protects DDMI and makes it clear that they don't have to deliver diamonds pursuant to the orders that you've made, no issues, we're not trying to vest off those interests.

And I want to make a couple of comments, 'cause Your Ladyship asked about this earlier, DDMI is now suggesting that they retain their security interest in diamonds even after they're delivered to Dominion pursuant to your orders. I want to repeat that. They're now suggesting that they retain a security interest in the diamonds even after they're required to send them, if they're required, cause they haven't sent any yet, pursuant to your orders on June 19th and November 4th.

THE COURT: Right, I understand what they're saying, even the ones that are delivered they want to continue their security interest over it because they say possession doesn't change their security interest. Because the bottom line was that they say that they have, under the agreement, they have security over all the diamonds, all 40 percent, not just the ones that cover the cover payments et cetera, right?

MR. RUBIN: And of course -- yes of course, and their position is simply in our submission, just not supportable and is very surprising. This issue, in our submission, this issue has been heard and decided. This was the very issue; this is why we had the dispute on June 19th and this is why they tried to set aside your order again on October 30th. In our submission, this is them taking a third kick at the can and it's a further attempt to have you change your prior court orders.

As I said, they first tried this on the 19th, they tried it on October 30th, when they asked to vary your order, 'cause they made an argument that they weren't -- they didn't feel that they were secured, there was evidence on the DICAN valuation about how they were over

secured. And in our submission, this is really actually the only issue before the Court and I think one that you have to decide and that is, whether DDMI continues to hold their security interest even after diamonds are delivered pursuant to your prior orders and we say, that issue has already been decided by you.

There's nothing to decide, it's already been decided and, in fact, the reason that they were fighting so hard on June 19th and then again on October 30th, was because they did not want to have to deliver diamonds. You will recall that, My Lady, because they argued they would be exposed. The evidence before you was they wouldn't be, you heard all of the arguments, you balanced all of the interests, you balanced the interests of not just DDMI and Dominion, but all of the stakeholders, that's in your November 4th endorsement.

THE COURT: M-hm --

MR. RUBIN: You considered the evidence that was before you and you made your order and in our submission, they don't get to come back now on this application and argue it again. This issue has already been decided and I want to say this. If DDMI's position is correct, that is that they -- they still hold security even though diamonds are delivered to Dominion in accordance with your prior orders, what was the purpose of our previous fights? Why were we even arguing on June 19th and October 30th? Because if their position is right, what it means is, that the only issue was, who is holding diamonds for DDMI? That wasn't what was argued.

And if what they're saying is right, there would've been no point to your prior orders, it would've been a complete waste of time, it was waste of all of the stakeholders' time to fight this, it was a waste of the Court's time and there's point to the order.

THE COURT: No I do not -- I think -- when I went back and just quickly, 'cause I have not had a lot of time to review any of this, but their position earlier and I will put this to Mr. Collins and he can discuss it, was that they were going to be seriously prejudiced if they delivered the diamonds to you. But now they are saying they would not be prejudiced at all 'cause they continue to have security. So anyways it was a bit of an interesting -- but I mean you have got to give credit to Mr. Collins, who you know, keeps coming up with another -- another way of looking at things. But also to be fair, you indicated at that time that you would not sell the diamonds, that they would -- you would remain and remember that you consented to that at the time, right so …

MR. RUBIN: Yes, My Lady, very good point and thank you for raising that, because that is a provision that was in the November 4th order, that the diamonds when they were delivered they would be held by Dominion.

THE COURT: Right.

MR. RUBIN: And you recall, My Lady, and you may hear from Mr. Wasserman on this, the reason for that provision was not to give DDMI another kick at the can, a third kick at the can, it was because there were other creditors like lien claimants, pensions, Government of the Northwest Territories and reclamation obligations; people were saying, hey, wait a minute, should the first lien lenders actually get those diamonds once they're delivered to Dominion? Maybe the others should have an ability to argue that they might have priority over the first lien lenders and so --

THE COURT: This was because of the waterfall issue to summarize?

MR. RUBIN: Yes, exactly.

THE COURT: Right?

MR. RUBIN: That's exactly right.

THE COURT: Okay.

MR. RUBIN: And so Mr. Wasserman actually -- and to give him credit for this, of course, you know, said well let's just hold the diamonds and if those other parties are challenging our priority position they can raise it at the time. It was not to give --

THE COURT: Okay. I understand. So but the bottom line is, is that they never delivered these diamonds based on --

MR. RUBIN: We don't have any diamonds not yet; they haven't delivered any diamonds and they may never deliver diamonds. I certainly hope that they do because it will -- but at this point there are no diamonds. But in the future, if diamonds are delivered, again we -- those diamonds are being purchased and that that's receivable that we're talking about.

And we say that this paragraph here, paragraph 15, completely protects DDMI and but of course our paragraph does contemplate what we say were your prior orders and that is, once those diamonds are delivered DDMI does lose their security and they are then purchased assets free and clear of any encumbrances.

Just quickly then, My Lady, going to paragraph 16 of the order, I won't take you to this,

but this is a paragraph that we've agreed on with royalty holder, Sandstorm Gold Inc., it should be Ltd., we'll correct that, to permit them to raise any issues they may have with respect to the royalty and whether it should stay on title.

THE COURT: Thank you.

MR. RUBIN: And then finally, My Lady, if I could turn just over the page to the break-up, well paragraph 19, there's a paragraph in 19 to deal with the Sureties Support Confirmations, I've referenced before, it's a short paragraph, I'm not going to go through it. But it is really the break-up being charged I want to talk about. So this is the break-up fee and the charge that we referenced earlier.

THE COURT: Right.

MR. RUBIN: Again, I don't believe that this paragraph prejudices Mr. Collins, at all, and I want to take you to paragraph 22 and if you have paragraph 22 of the order, you can see that the break-up fee charged shall rank in priority subsequent to the security securing both the charges any indebtedness under the pre-filing credit agreement. So what this means, is this new charge ranks after the existing charges.

THE COURT: So after DDMI's security?

MR. RUBIN: Yes, because of the way the term "charges" is defined.

THE COURT: Okay. All right.

MR. RUBIN: Charges is defined -- the reference is paragraph 56(a) of the SARIO and so many of the existing charges do not rank ahead of DDMI under paragraph 56(a) of the SARIO. So this is again, another non-issue, in our submission.

My Lady, I -- the last thing I wanted to do is, I wanted to reference the memorandum of argument. I think what I'm going to do though is, I'm not going to take you to it, I would just maybe leave a note with you that there really are two issues. The first is, should the transaction be approved under section 36 of the *CCAA*? In our submission, all of those factors are met and that's referenced at paragraphs 50 to 88, 5-0 to 88 of our argument. All of the law is there, all of the factors support this. The alternative is liquidation, people are much worse off, thorough process, supported by the Monitor, in our submission, there is just simply, there's no -- there's no basis upon which this transaction should not be approved.

As I mentioned at the outset, this is the very purpose of the *CCAA* to find these kind of solutions and we found one that it is the best transaction that we have. We've consulted with stakeholders the Monitor has approved, as I mentioned before, and the *Soundair* and section 36 factors and (INDISCERNIBLE).

And then my last point on the argument was, we do need an extension of the stay, we're seeking an extension until the beginning of March, which is set out in the draft order and that is March 1st and that is, of course, to allow the transaction to close and if any extensions are needed, whether its regulatory reasons or not, we want to make sure we have a stay in place to March 1st.

And so the test is also set out at paragraph 90 of our order and the circumstances exist to make the order -- in our submission and of course, in our submission we're acting in good faith and with due diligence.

And My Lady, the last point I want to make in closing is just I want to reiterate two things. One, this is a good news story, this is a great news story and in our submission and I appreciate that Mr. Collins' client, you know, may be a competitor to DDMI, I appreciate they're in close proximity to us, but I think the issues that they're raising, whether you call them throwing wrenches into our restructuring, or not, his client is just protected. His client is in the position that they were in, as the result of prior orders. There's nothing in here that negatively impacts them and we really do need this transaction going forward and there is absolute urgency. I want to repeat on the urgency point because the cash -- under the cash shows a company is down to $4 million in cash at the end of January. And we have to close the -- we have to get out of the *CCAA*, we need to move forward.

I know there was a lot there --

THE COURT: Okay. No that is fine. I have got it.

MR. RUBIN: Okay.

THE COURT: If you would not mind, could we take like a 10 minute break right now and then I will come back to the next parties that need to speak.

MR. RUBIN: I think that counsel for the purchasers and maybe the first lien lenders and other will want to speak, but thank you, My Lady.

THE COURT: Okay, give me 10 here, we will come back at 3:17. All right. Thank you.

(ADJOURNMENT)

THE COURT: Thank you, Mr. Clerk.

Submissions by Mr. Wasserman

MR. WASSERMAN: Good afternoon, My Lady, it's Mark Wasserman on behalf of the first lien lenders, I will be agent for the first lien lenders. I'm happy to -- I'll be very quick, I'm happy to go next if that suits you?

THE COURT: Okay. Sure.

MR. WASSERMAN: Okay. So we're obviously in support of this, you'll see there's a support agreement that's attached as a schedule to the APA that we've signed with the purchasers and WAMCO, the third party that Mr. Rubin indicated.

You know, this is the culmination of a lot of work under, you know, trying circumstances and that's because, you know, we came into this transaction or into this case, you know, there was the Washington deal, there was $100 million plus in diamond inventory, you know, the pandemic closed the diamond markets. The Washington Group, you know, tried to close the transaction and there were, you know, reasons why that transaction couldn't close. The Diamonds markets opened, a significant portion of the diamonds were sold to reply that DIP facility, the $60 million DIP facility and now more diamonds are being utilized to (a) restart the mine early and (b) continue to fund this case and (c) you know, close the transaction.

All that, frankly I mean there's lots of stakeholders, there potentially were going to be priority fights, I'm not here to argue whether, you know, one stakeholder has priority over another stakeholder, but all of that value, right is gone and it doesn’t come back. And so, surprisingly there are people that, you know, are opposed to certain provisions of this transaction, in particular, obviously the largest one is DDMI. And when you level set and you think about what's happened in this case, where we are, how much time and effort has been spend, who DDMI is, the relationship that Dominion has had with DDMI, it continues to be surprising to me that we spend so much time dealing with that issue. So much time, every hearing.

And where we are today, I mean you made a comment to Mr. Rubin, you said, you know this is DDMI coming up with different arguments, you know, with respect, I'm not sure that's what it is. It's DDMI continuing to do the same thing, continuing to make the same point. So whose compromised in this case? The lienholders, they've done a deal, their taking risks associated with the transaction. The sureties are taking some risks associated

with the transaction. The bondholders are certainly taking risks associated with the transaction, the second liens. My clients are taking risk, we're not getting our cash, we're rolling our debt. Whose taking no risk? Who hasn't contributed to one commercial outcome? An $80 billion joint venture partner that the company has had issues with for the past 20 years and you know what? Maybe we all see why now.

The order -- this transaction is irrelevant to them. The only issue is the one that Mr. Rubin identified, which is the security interest, which would be an absolute absurdity if the nature and the way Mr. Collins' client interprets your order was correct, in my view, because we spent hours upon hours arguing about the delivery of the diamonds. We told you when we argued that that the joint venture agreement says when the diamonds are delivered the security interest no longer attaches, you'd be reading into a provision of the joint venture agreement which doesn't exist, but we've had that discussion already in front of you, so I don't think we should do it again.

And the reason why Mr. Rubin says they may never deliver diamonds is because the other interpretation issue is that they're saying there's a timing difference between when you calculate the amount of the cover payments that are owed and DICAN valuation you use. And that goes to Mrs. Paplawski's submissions, if you recall, on the feedback loop, which we anticipated was going to happen and it has and we're back where we were before.

So it's 5:20 on a Friday evening in Toronto, which is where I am, I know it's only 3:20 there --

THE COURT: Still early here.

MR. WASSERMAN: -- it's the second night of Hanukkah and I'd love to be able to light to candles with my family and I implore you not to give this any time today because it's just -- we have settled, we have resolved the issue and the ambiguity in the contract in a way that makes sense. I think you'll hear from the Monitor that the Monitor supports that and we ought to let this company and all the stakeholders around the table here move on. And we can come back and address, you know, you may call it creative arguments, I call it the same argument over and over again, Mr. Collins' argument around the timing of the DICAN valuation versus the cover payments, which there's letters that have been submitted by Mr. Collins and Mr. Rubin on that issue that are on CaseLines, I'm not sure if you've had an opportunity to read those or not, but that's not an issue for today.

So this is a good day and we should try to resolve this quickly so that the company can move on, they can make a good announcement that they have a transaction, the employees are going to be employed, they've recalled employees already. The mine is going to get restarted, right? Hopefully my client will recover the money that's agreed to rollover into

this transaction -- we're still going to have to deal with all those LLC exposures on the Diavik mine which I assume, you know, if history repeats itself there's going to be a number of different hearings and arguments on that going forward for a period of time. But we really shouldn't allow this situation to continue in this court anymore.

And those are my submissions, I don't know if you have any questions.

THE COURT: No, Happy Hanukkah Mr. Wasserman.

MR. WASSERMAN: Thank you very much. You know, I'll bring you into the kitchen when we light the candles if we're still online.

THE COURT: Okay. All right. Who would like to be next?

Submissions by Mr. Kashuba

MR. KASHUBA: I can, My Lady, it's Kashuba, initial K.

THE COURT: Hello, Mr. Kashuba, you are tired of me probably today.

MR. KASHUBA: Nothing near the case, My Lady.

THE COURT: After all day yesterday. All right. Anyways …

MR. KASHUBA: My Lady, as you're aware we're counsel for the Ad Hoc Group of Bondholders. They are in the second position behind the first lien and a major creditor in these proceedings. You've heard much from me on behalf of my clients over the last nine months.

Well, today I'm pleased to announce that we have another designation and that's as purchaser under this asset purchase agreement that's before the Court for its consideration today. Let's begin and be clear, My Lady, if it wasn't previously, my clients are here to support the deal in its proposed form.

I echo Mr. Rubin's comments on this particular point and the proposed form of order that has been put forward and the proposed form of APA. In particular, with respect to section 3.1(b) and 3.2(a) and the proposed working in the APA surrounding the Diavik Joint Venture Agreement, Mr. Rubin's done a commendable job in taking, My Lady, through the APA's key and heavily negotiated terms. Those are the terms of the APA that should exist and that should be approved by the Court.

Now, with respect to our position on the approval of the asset purchase agreement, I know that there's a lot of counsel still on the call, there's a number of issues to be dealt with, so I'll be clear and quick. As we look back, My Lady, it's been nearly nine months in these proceedings and there's been a lot of twists and turns, it's been a lengthy road, but there's good news for my client. This is their deal, it's a long time coming. It's not just the only deal, it's a good deal, excellent deal, it's a critical deal, enormously beneficial to a large number of the company's stakeholders whom you'll hear from today and we need this approval and we need it today.

Now why is this a deal that needs to be done? Mr. Rubin spoke at length on this so I won't repeat all the points. But this deal provides for the continuation of the Ekati Mine operation and its related business as a going concern. People keep jobs. Pensions get assumed. The Government of Northwest Territories and the Aboriginal Community deals get honoured. The Sureties are supportive. A considerable consideration goes to the 1-L's and it's a good story all around.

Now, to use the metaphor that my friend Mr. Rubin made earlier, the ice cube has been melting, but we're due today and there's still a deal to be had but only if it happens today.

Now, for a frame of reference on our proposed deal, this Court is obviously familiar with the Washington bid that was before the Court and was to be before the Court for approval back in October. Now, I can tell you, My Lady, that the deal that is being proposed by my clients is simply just much better than the Washington bid. It puts more value in the first liens hands, they're getting $70 million, yes, they get that plus $15 million in cash and $18 million in additional consideration from the purchaser. My clients, on top of this, are leaving $1.25 million in further funds to pursue wind-up matters, including a $10.5 million to be paid on closing. Now, these amounts go to ensure proper capitalization of the purchaser, in turn this assists stakeholders such as Dominion suppliers.

Now, My Lady, we've stepped up like we said we would and we're here to close. And on top of this, we have a bunch of employee (INDISCERNIBLE) deal today, the Sureties and the Government of Northwest Territories are onside. We're posting security for reclamation obligations. This is obviously a major requirement and its to the benefit of the estate and to the proceedings. The company has done an outstanding job of bringing together, to the table, a superior deal.

Now, along the way, my clients have spent huge amounts of internal resources, now these are limited resources, but we have sophisticated financial minds that have been of mass assistance that have been dedicated wholeheartedly in getting to today's deal. My clients have assumed a number of expenditures, they're personally invested and they're stepping

forward and in a nutshell, My Lady, this is abundantly evident that there's a huge benefit here under today's terms of the deal.

Now why else must this deal be done today, it cannot wait, it's for real and I cannot be more adamant on this point; the only way that any of this works is that if the company has enough money to get a closing, it can start the Ekati Mine and we get there by January 29th. This has to stay on track or its Armageddon. The deadlines that we're talking about are very real. Mrs. Buttery will be speaking to a couple of points on this matter in the Government of Northwest Territories submissions.

If we don't have an order granted today, we don't have enough time to get governmental approvals. The company is in liquidation. There's a 45 day notice period that needs to start to get to that January 29th date and even with this, it's somewhat touch and go, but we're here to work and this includes with respect to the First Nations organizations and the consultation process (INDISCERNIBLE), it's a tremendous amount of work, but we're here and we're ready to go.

Those are my submissions, My Lady, it is the second day of Hanukkah, Christmas is around the corner, this deal is a gift to everyone but it's one we've worked very hard for. Subject to any questions arising, My Lady, those are my submissions.

THE COURT: Thank you Mr. Kashuba. Okay, Ms. Buttery, your name came up, I am going to turn to you on behalf of the Northwest Territories.

Submissions by Ms. Buttery

MS. BUTTERY: Good afternoon, My Lady.

THE COURT: Good afternoon.

MS. BUTTERY: So my submissions are quite brief and I just wanted to make two points and the first is one that's already been referenced by Mr. Wasserman and Mr. Kashuba. But the timing is frankly one of the most acute matters for the Government, because when we heard that there was a transaction that was proposed and the first question from my clients, was what is the timing? Because as you can imagine, there's several levels of approval that have to proceed before the mine can start operating.

My client's very supportive of the sale, very excited about the prospect of the mine restarting, but of course, it can't be fettered in its discretion to have these approval process proceed in the normal course. And my client has advised me that the minimum amount of time that they need to do that is 45 days. So we were very happy to see the motion being

set down today because that will get us just narrowly into the end of January and that's not even 100 percent, I mean there's certain -- for example, the Water Board, we can't fetter the discretion of it, it's quasi-judicial, but that is generally a guideline for how long it takes for the various approvals that have to happen.

And so it's crucial if this mine is to restart and if this transaction is to proceed, it's crucial that this matter be approved today in order for the government to take steps for its approval.

And on that note, the only other comment I have is -- and I do have the agreement of the purchaser on this, but nothing in the order as I understand it, is anticipated to fetter the discretion of the Government or its authority to make independent assessment of the approvals that have to be made for the purposes of this transaction.

THE COURT: No, I think it is conditional on those approvals not fettering --

MS. BUTTERY: Correct.

THE COURT: -- the Northwest Territory Government discretion.

MS. BUTTERY: Yes. Thank you My Lady.

THE COURT: Thank you Ms. Buttery.

Submissions by Mr. Regush

MR. REGUSH: My Lady, if I may, it's John Regush, Dentons Canada LLP. I'll be very brief. We're counsel for Hay River Heavy Truck Sales Limited and Dene Aurora Mining Limited. My clients are counterparties to contract that will be assigned to the purchaser and I'm supportive in accordance with the application this afternoon.

I've simply been asked to put a brief point on the record. I understand that my clients and the company have already arrived at the commercial terms to permit the assignment, that is the schedule of assigned contracts could not be included in the application materials, my clients just asked me to clarify that they support the application based on the representations that the company has made that the contracts to which they and the company are party, will be in the basket of the assigned contracts when the schedules are finalized. I understand this is consistent with the company's intention, it's reflected in the fact that my client's DPR registrations and certainly the miner's lien registrations are in the

permitted encumbrances list in the order sought.

So I'd simply ask that if for some reason the assignments were not to proceed, my clients would have the ability to appear before Your Ladyship to speak to whatever relief might be appropriate in that circumstances and in such an application, there wouldn't be any prejudice based on their support today. But my clients are supportive of the application and just asked me to put that point on the record.

THE COURT: Okay. Tremendous. Thank you Mr. Regush.

MR. REGUSH: Thank you, My Lady.

THE COURT: Anybody else on this side?

MR. WARNER: My Lady, Terry Warner on behalf --

THE COURT: Mr. Warner.

Submissions by Mr. Warner

MR. WARNER: Good afternoon, you've heard from me before on this matter.

THE COURT: Yes.

MR. WARNER: But we're on for Dene Dyno Nobel and Dyno Nobel Canada Inc. We have entered into an agreement with the purchaser -- I guess ultimately with the purchaser that permits our client to settle the existing obligations and to continue to supply the mine as it starts up -- restarts its operations in the future. We believe that this arrangement is for the best of all parties and are strongly in support of this agreement.

THE COURT: Good. Well, I am glad to hear that. There was a lot of millions of dollars, is what I recall.

MR. WARNER: It is, we're the largest lienholder.

THE COURT: Right.

MR. WARNER: And obviously a critical supplier, but we think that this is the best for all parties.

THE COURT: Great. Thank you Mr. Warner.

MR. WARNER: Thank you.

Submissions by Mr. Astritis

MR. ASTRITIS: My Lady, it's Andrew Astritis on behalf of the Public Service Alliance of Canada and the Union of Northern Workers.

I just wanted to briefly state on record that the Union is supportive of this agreement. It carries the mine forward on a going concern basis, which is critical, it protects the workers' pensions, their collective agreements and we would urge this Court to approve this order as soon as -- to approve this order today so that we can move forward and that this going concern not be jeopardized.

Thank you.

THE COURT: Thank you Mr. Astritis. All right. Anyone else in support before I turn to Mr. Collins and then I will go to the Monitor last. Mr. Collins, you are probably feeling like a minority there or you are the minority in this situation.

MR. COLLINS: Nothing has changed, good afternoon, My Lady, Collins.

THE COURT: Nothing's changed, no. That's right.

Submissions by Mr. Collins

MR. COLLINS: Collins, initial S., for the record appearing today on behalf of DDMI. Yes, you're correct, My Lady, nothing has changed and a common theme from DDMI in this case has been ardent support of a sale for Ekati. DDMI did not oppose the stalking horse transaction, it pointed out what it perceived as problems with the executability of the stalking horse transaction by the Washington Corp. Group, that difficulty ultimately came to pass.

But today, as well, My Lady, and it's clear in the bench brief that we filed, DDMI does not oppose the sale of Ekati, My Lady.

THE COURT: All right. I saw that, so thank you very much. I understand that you are not opposed to it.

MR. COLLINS: Yes, the sole interest is to ensure that its rights are not trampled upon by the proposed transaction structure and My Lady, the form of the proposed transaction structure would do exactly that. It extinguishes rights of DDMI, far from the assurances that counsel to Dominion and counsel to the first lien lenders, without getting into the particular specifics have given you, My Lady.

The fact of the matter is, is that there are issues with this transaction and rather than engaging with DDMI in respect of its concerns and trying to find a way to address those concerns, My Lady, what we get is broad brushed, visceral almost (INDISCERNIBLE) attacks on DDMI that are clearly, My Lady, without merit, which will be borne out by these submissions.

My Lady, the protestations over DDMI making submissions to protect its interest in a situation where it is an involuntary creditor that is now owed $148 million post-filing, My Lady, making it the singular most significant stakeholder in our submission given that which is at stake, $148 millions that has been spent on Dominion's behalf to assure the continued operation of the Diavik Mine. To do the very things at Diavik that are being put to the Court today as being beneficial in the Ekati transaction, employing over a thousand people during a global pandemic, My Lady, continuing compliance with health and complying with safety and notably producing collateral of diamonds for the benefit of Dominion.

So, My Lady, I'm confident that the Court will not allow Credit Suisse to dictate the processes of Your Ladyship's Court and the procedures to be followed in Your Ladyship's Court. That is something that is solely in the domain of Your Ladyship and we would appreciate and do appreciate the opportunity to bring forward legitimate concerns of DDMI today, My Lady, and we'll do so.

THE COURT: All right. Well, you have my ear. I have read your brief and reviewed your position though, just so you know, so that is one bonus of this CaseLines system, I do not have to wait for it to be sent to me in the morning.

MR. COLLINS: Thank you.

THE COURT: I was not reading to midnight last night although you would not be the first this week that has filed material after 10 PM. Anyways it has been one of those weeks as often is the case I am sure for all of you heading into Christmas and Hanukkah for Mr. Wasserman's sake and his compatriots. So okay go ahead then and get to your basic issues here so that we can deal with them.

MR. COLLINS: All right. The structure of the transaction, My Lady, put simply, obliterates the pre-filing and long held contractual rights that DDMI holds. DDMI has made proposals to facilitate the objective of those that are in favour of this transaction, in terms of obtaining Court approval today, My Lady.

I will say this, there's a certain sense of false urgency being urged upon this Court and there always in, in connection with sale approval applications, My Lady, and it's for this reason; there is a signed asset purchase agreement, there is a deal, My Lady, it is conditional, My Lady, there are 15 conditions precedent in favour of the purchasers. One of those, My Lady, is that Court approval be provided today and hopefully we get there, My Lady, but DDMI joins issue and disputes the urgency. It's not a linear process, My Lady, where they get Court approval and then they have to move ahead, My Lady, to deal with the other 15 things.

And I want to mention just some of the conditionality in this deal, only to assist, as well, with the stay extension application, I don't want to take too much time on it, but there is an important point to be made and that is, people will take a different view of the fact -- the issues that are engaged by a debtor in a process not paying post-filing obligations, whether that represents a debtor proceeding with good faith and in due diligence, My Lady. People will take issues with the fact that there is no intention to continue to pay cover payments, there is no intention to pay the $35 million closure security that's due on January 15th, but we have to be practical, DDMI agrees with that and the stay needs to be extended.

The issue, My Lady, really comes down one of, for how long and the conditionality that attends in this transaction. Because this transaction in many ways is no different in its current formulation than the much ballyhooed transaction with Washington Corp. that was before this Court for approval that was approved and didn't -- didn't -- didn't close.

So what I've done, My Lady, is I've asked you to follow along the affidavit of Fredrick Vescio on October 7th, 2020. Mr. Vescio is the Ad Hoc's financial advisor with the Houlihan Lokey firm. This affidavit --

THE COURT: Okay.

MR. COLLINS: -- was filed by the Ad Hoc Group in opposition to the approval of the Washington Court bid. At paragraph 6, in connection with that deal, what Mr. Vescio said was that he reviewed the asset purchase agreement, and leaving aside the issue of purchase price, he noted the following - there was no deposit or other discipline that the proposed purchasers would want in the transaction. That's the same case here. The company hasn't disclosed any information about the credit worthiness at solvency or the structure of the proposed entity, unknown what the leverage of the capital structure would

be. That's the case here. There's repeated desirability of restarting operations at ACADI (phonetic), that's common cause, My Lady, and not disputed.

In (d), the testimony at the time proffered by the Ad Hoc Committee in opposition to the transaction was the EPA contains numerous substantive closing conditions. These include important conditions regarding the need to entering into undefined agreements acceptable to the proposed purchaser with both governmental authorities and Surety companies like critical reclamation liabilities, the need to obtain regulatory approvals for anti-trust, competition law and other matters, details of which have not been provided, and to receive governmental approvals for the transfer of all leases, permits, licences, and other operating authorizations.

So we have precisely the same thing before you today, My Lady, with respect to the conditionality of this transaction. And let's be clear, DDMI is hopeful that these conditions will be waived but it is by no means certain. Appreciate everybody's optimism wanting to drive ahead to close this transaction, but these are serious and weighty conditions. This transaction contains a COVID closure condition, My Lady, as well. So if the mine is closed due to a COVID shutdown, then the purchaser has the ability to not close -- to close the transaction.

So quickly on the stay extension, My Lady, March 1st, in the circumstances, in a situation where there is a possibility that this transaction will not close and there's a lot of work to do, seems to be a long period of time, and what DDMI would propose in terms of the stay extension, My Lady, is as follows - is that the stay should expire on the earlier of the date that is two weeks following the termination of the asset purchase agreement or March 1st, 2020. That way, My Lady, if we find ourselves in the same situation as we did with the very similar deal that didn't close in the summer, then we give Dominion two weeks to be able to figure out what it's going to do. But they come back to court with the onus to demonstrate in the face of yet another failed transaction, My Lady, why the stay should be extended and they would show the burden there.

So I wanted to highlight the conditionality of this agreement both in terms of the stay extension application and --

THE COURT: So you are arguing for over two weeks, Mr. Collins, basically. Or if it falls through before, then two weeks after that; right?

MR. COLLINS: That's right. That's right. But the point of the conditionality, My Lady, is there is a lot of work to do here today and Court approval today is not a precondition for that work to be done. The work presumably has been underway and will continue to be done. Let's see if we can get the Court approval today, My Lady.

THE COURT: So one of the things we did the last time to satisfy some concerns about timing of the stay was to have the Monitor provide reports, which he did do, so that people were more advised as to what was going on. So that might be one way to deal with that again. I am just throwing that out there.

MR. COLLINS: It may be. The point is, is if we find ourselves -- this is a company that, on its own, cashflows is going to be perilously close to being out of money and if we get to a place in say -- for example, January 15th, where the sellers walk because, you know, I've heard there's a Surety support agreement, My Lady, what I haven't heard is whether that Surety condition has been satisfied and I doubt that it has. And by being in hopes brings eternal that it will be.

THE COURT: Well they sound like they are further along than they were last time --

MR. COLLINS: Sure.

THE COURT: -- which is the part that brought that to a halt last time. Mr. Rubin indicated that that hurdle has been overcome. So that is what I will, you know, I take for the record.

MR. COLLINS: Right. Right. And again --

THE COURT: I understand there are many conditions that still need to be dealt with, one of which is the Northwest Territories that we just heard from for instance.

MR. COLLINS: Absolutely. So the point quite simply is if -- is if the purchasers, you know, determine that conditions won't be satisfied or waived and the agreement is terminated, My Lady, say that were to occur on February 1st, just accelerate the time for a determination as to whether the stay should be extended to February 15th in my example as opposed to March 1st, you know, giving the company again the burden to do so.

THE COURT: Okay.

MR. COLLINS: So those are all the submissions I wish to make on that front, My Lady.

Let's talk a bit about DDMI's position with respect to the current structure of the deal. And

let's just start with some first principles, I'll go over them very quickly because they're common cause and I don't think they're controversial save and except one.

Again, we've said the cover payments at last evidence were 120 million, they're now 148 million. That cover payment security, My Lady, represents the first charge over the diamonds and that's pursuant to the provisions of the joint venture agreement article 9.4(c). Also, My Lady, notably both Credit Suisse and the indenture trustee for the second lien lenders have entered into subordination agreements with DDMI that subordinates their interest in --

THE COURT: Right. Right.

MR. COLLINS: -- in and to DDMI's security under the joint venture agreements.

THE COURT: I understand that, Mr. Collins.

MR. COLLINS: All right. And those -- if those subordination agreements are in the supplemental affidavit of Mr. Croese that was filed on April 20th, My Lady.

THE COURT: Right.

MR. COLLINS: When we talk about the structure of this transaction, it is one thing for the parties, my friends on behalf of Dominion and the first lien lenders, to say that there is an intention -- there isn't an intention to convey anything other than DDMI's right to receive production -- or Dominion's right to receive production. It's quite another thing when we look at those provisions to see if they withstand the scrutiny of that bald submission, My Lady, and they don't. And that is why DDMI has made what it views to be minimally intrusive suggested amendments that if the Court were to direct they be made, you know, we could all go home early this Friday afternoon.

The structure of the joint venture arrangement, My Lady, is one that allocates the production, the receivables, in return for payment of all obligations under the joint venture agreement. It's axiomatic, it goes without saying, that to be a participant under the joint venture agreement one has to accept its share of the obligations that attend with the mining operation.

The -- it -- the definition of participating interest under the joint venture agreement, My Lady, is highly relevant to this analysis and so I'm going to take you to the confidential exhibit, My Lady, that has the provision in particular.

THE COURT: Okay. I wonder if I have to open that other file because it is not in the main file; right?

MR. COLLINS: Correct. Yes, My Lady, you'd have to open the confidential matter.

THE COURT: Confidential. Okay. Hold on. Okay. I am there so you can send me to what you are looking at. Definition of participating --

MR. COLLINS: Interest? Yes. Have you been directed there?

THE COURT: No, unfortunately, because I just opened it, sorry, so probably when you sent it to -- there we go.

MR. COLLINS: I'm scrolling down to 1.23.

THE COURT: Okay.

MR. COLLINS: The participating interest, My Lady, means an undivided beneficial interest in the assets, assets includes diamonds, and all rights and obligations arising under the agreement. So the rights under the agreement, My Lady, include -- include the right to receive diamond production and receivables. And the importance of that, My Lady, is that it dovetails with two provisions in article 15 and those we've reproduced in our brief so I'll take -- I'll take everyone to those provisions. I've gone to -- I've gone to DDMI's brief of December 10th and it addresses at paragraph 17; do you see that, My Lady?

THE COURT: Paragraph 17, yes, I am there. Yes.

MR. COLLINS: All right. This is -- this is reproduced directly from sections 15 of the joint venture agreement and it deals with dispositions of interests. What it provides, My Lady, is that each participant shall have the right to transfer to any third party any or all of its participating interests solely as provided in this article. And 15.2(a), My Lady, relates that there cannot be a transfer of a participating interest or -- and we'll leave the other language aside. There cannot be a transfer of the participating interest unless the pre-emptive rights are engaged in the following section and also, My Lady, that the transferee as of the effective date of the transfer must commit in writing to be bound by the provisions of the joint venture agreement to the same extent as the transferor.

Now, DDMI recognizes that the stated intention of the parties is not to engage a transfer of

the participating interest but when we get to the provisions of the asset purchase agreement and the vesting order, My Lady, it is anything but clear as to whether or not the -- a transfer of the participating interest is engaged.

The other significant provision in section 15.2, My Lady, is (e). What this deals with, My Lady, is if there is the disposition of products, an assignment of the receivable as my friends say from the sale of products, upon distribution to a participant in accordance with article 11 which is the provision that allows a party to take in kind, a security interest in those products or proceed, i.e. in this case the security interest that arises in favour of the first lien lenders, shall be subject to the terms and conditions of this agreement. And I'm not sure I can say it any better than it's written in paragraph 18, My Lady. The import of that section is that with the assignment of the Diavik realization assets, which is the defined term for part of that which is being purchased by the purchasers, must comply with 9.4 of the JVA which provides that the DDMI security and respective cover payments shall rank prior to the first lien lenders and the second lien lenders.

So, those are the overriding principles. I think we can move quickly then to the six changes to the asset purchase agreement that DDMI is recommending, My Lady.

THE COURT: All right.

MR. COLLINS: I'm going to direct you in the first instance to the asset purchase agreement and the definition without our change because I think it's important to see it this way before you see the proposed change. So are you at the top of page 22 of the asset purchase agreement?

THE COURT: Let's see. Where is the asset purchase agreement? Oh, here it is. Yes, okay. So you want to go to page 22?

MR. COLLINS: Yeah. I thought I directed to 17.2-46, shall I try that again?

THE COURT: Yes, I did not pop up. I do not know why, that is weird. I have got two files open here because ...

MR. COLLINS: Yeah. This is no longer in the confidential file.

THE COURT: Right. No, I understand that. I have got the other one open. But, anyway, which page is it that we are going to?

MR. COLLINS: We're going to page 17.2-46.

THE COURT: Right. I am there. Okay.

MR. COLLINS: So this is in a list of the acquired assets. So acquired assets is in defined terms and acquired assets is what vests into the purchaser free and clear of all encumbrances including the DDMI encumbrances, My Lady, in the current formulation. If you look at that provision, it's: (as read)

> An assignment of all the sellers' rights and interests in relation to the receipt of realizations and recoveries from or in respect of the Diavik joint venture interest including, without limitation, all receivables, diamond production entitlements, claims, sales proceeds, cash and other collateral given for the benefit of the first lien lenders or other persons and other assets which are realizable by or on behalf of the sellers.

That's the defined term Diavik realization assets. And it says that they'll be: (as read)

> Assigned to the purchaser subject only to the continuing liens and charges with the first lien lenders pursuant to the pre-filing credit agreement until such time as all letters of credit issued by the first lien lenders in respect of the Diavik diamond mine shall have been cash collateralized or cancelled and all related fees shall have been paid.

Again, the game here for Credit Suisse, because they're undercollateralized, My Lady, and don't have security to recover the 105 million other than the 20 million in cash collateral that they hold with respect to issued LCs is any dollar that they can extract from DDMI in this process will serve to reduce their exposure under their LCs, My Lady.

Now there's two problems with this provision and let me just note as an overview contacts were made, My Lady, by counsel to Dominion that they're assigning in respect of the Diavik realizations are receivables to the extent there are receivables.

THE COURT: Right.

MR. COLLINS: Under the (INDISCERNIBLE). It's nothing more than that. And it's telling that counsel didn't take you to this provision because it does so much more than just merely conveying an interest in receivables.

The phrase "recoveries from or in respect of the Diavik joint venture interest" --

THE COURT: Okay, you have lost me where you are.

MR. COLLINS: I'm sorry, I'm back in the definition, so (b). So let's just parse this --

THE COURT: What page? What page are you at?

MR. COLLINS: It's 17.2-46.

THE COURT: Dash 2, I was at point 5.

MR. COLLINS: It's back to the definition of Diavik realization assets, My Lady.

THE COURT: Okay. I am not on the -- like, you are looking at the APA, mine is -- maybe I have the wrong. I have appendix A, DDMI's proposed revision to the APA.

MR. COLLINS: We can go there.

THE COURT: You are in a different document altogether. You are in the original one.

MR. COLLINS: You know what, let's go --

THE COURT: That is why we are having trouble here.

MR. COLLINS: Let's -- let's go -- let's go to our proposal. I just -- as I'd indicated, I thought it was more clear without the blacklining but we can -- we can go to ours.

THE COURT: I do not know why this is not coming up. It pops up in the one file but does not pop up in the other one. Weird.

Okay. So in 17.5, what page is it?

MR. COLLINS: 17.5-61.

THE COURT: Sixty-one. It is not popping up. Maybe what I will do is close this -- I do not need to look at this joint venture agreement right now, do I? Okay. So if you can try again to popping to the right document then maybe it will pop up

on this one.

MR. COLLINS: That work?

THE COURT: There. That worked. Okay. So what was your point?

MR. COLLINS: So assignment (INDISCERNIBLE) Dominion's interests in relation to receipts of realizations and recoveries from or in respect of --

THE COURT: M-hm.

MR. COLLINS: -- My Lady, that's more than conveying receivables. Because -- because when you're conveying interest in respect of the Diavik JV interest that includes, for example, the ability to take assets in kind and, again, there's no corresponding liability, My Lady, to pay the obligations with respect to this acquisition. So that's -- the proposed amendment of DDMI, My Lady, makes it very clear that which is being assigned is -- are proceeds from products.

THE COURT: Well what is the difference between receipt of realizations recoveries from proceeds from products? Frankly --

MR. COLLINS: Proceeds from products if my language, My Lady.

THE COURT: I know.

MR. COLLINS: So --

THE COURT: So why does it need to be changed? You have not convinced me why it needs to be changed.

MR. COLLINS: Okay.

THE COURT: And, in any event, this is an APA the people have agreed to; right? So --

MR. COLLINS: I understand, but --

THE COURT: Like I cannot change the APA, I can change the order --

MR. COLLINS: (INDISCERNIBLE).

THE COURT: -- or I can not approve the APA; right?

MR. COLLINS: That's correct.

THE COURT: So, you know, really this exercise is a bit -- this is what you would like to see here but there are a lot of parties to this agreement.

MR. COLLINS: Well there are two parties. There's a vendor and a purchaser to the agreement, My Lady.

THE COURT: Right.

MR. COLLINS: You've named what the Court can do.

THE COURT: Right.

MR. COLLINS: Like I say, I'm not approving the APA, I wouldn't be inclined to approve an APA with this provision.

THE COURT: But you said to me that you agree with this process and you want some changes. So let's focus perhaps on the order, the things I actually have control over, as opposed to changing the terms of an APA. I cannot do that. It is interest for you to put this forward for your friends but they have said that they will not do it. So I understand what you are doing or trying to do.

MR. COLLINS: The APA is inextricably linked to the vesting order because if the vesting order is approved and it vests the assets in the name of the purchaser free and clear, what DDMI says is that it's in contravention of its rights under the joint venture agreement. So one of the tests under section 36, My Lady, which wasn't highlighted in the submissions made by counsel to Dominion, is the Court has to have regard to the impact of the proposed transaction and vesting on other creditors. This provision, if approved and manifested in the vesting order, is prejudicial and it's overly broad, My Lady. Realizations --

THE COURT: Prejudicial, just so we are clear here, you are saying it is prejudicial because the whole of all the diamonds cannot be held as security because under the orders you have to send anything beyond the cover payments; right?

MR. COLLINS: No, I'm sorry --

THE COURT: Is that not the bottom line?

MR. COLLINS: That's coming but that's not -- that's not the difficulty with this provision.

THE COURT: Okay. So I do not quite understand what the difficulty is. I understand that other argument very, very well but --

MR. COLLINS: The --

THE COURT: -- what is the other problem then?

MR. COLLINS: The definition of Diavik realization assets, My Lady, fits into participating interest. There can't be a conveyance of the participating interest unless the assignee agrees to assume the obligations. That's obviously not going to happen here, My Lady. This amendment would make it clear that, firstly, there's not going to be noncompliance with the terms of the joint venture agreement; but, secondly and importantly, My Lady, the -- the transfer needs to be done of the Diavik realization assets. It needs to be subject to not just the first lien lenders' liens, My Lady, but the terms and conditions of the Diavik joint venture agreement. And that's what's been difficult with the provision.

Let's move, My Lady, to the definition of inventory because it's even more stark that what is -- that this does not align -- this transaction does not align with what has been represented by the Court. So if you go down to page 22, there's another component of the acquired assets all capital 'I' inventory. Let's have a look at the definition of "inventory".

THE COURT: Okay. I have my page 22, "All inventory"; right?

MR. COLLINS: So now I'm taking you to the definition of "inventory", you've been directed there at page 17.2-36.

THE COURT: Oh, here we are. Okay.

MR. COLLINS: All right. The sellers are purchasing all inventory, the vesting order approves the APA and vests all inventory into the sellers free and clear of DDMI's encumbrances. Here's the definition of "inventory": (as read)

> All diamonds and other inventory of any kind or nature.

So it's all diamonds, any other inventory including: (as read)

> ... stockpiles and goods maintained, held, or stored by for any seller whether or not prepaid and wherever located or held including any goods in transit.

My Lady. So if you stop there, if you approve this transaction, DDMI will be required to deliver up not just assets, diamonds that are subject to cover payment security, but all of the diamonds. This is all of the diamonds.

THE COURT: Well, no, Mr. Collins, that is not what Mr. Rubin was saying. He is saying, look, this covers all of Dominion Diamonds' diamonds.

MR. COLLINS: That's correct.

THE COURT: Right? And Dominion Diamonds' diamonds are, you know, the diamonds that they have the rights to and there are certain diamonds they do not have the right to and certain of those are the ones that are secured for these cover payments; right? And he is saying, look, to the extension that you have dispute over what those diamonds are, and apparently you still do, so fair enough, the amount of that can be determined at another day.

MR. COLLINS: My Lady --

THE COURT: But it should not stop this transaction from going through.

MR. COLLINS: This is important. My Lady, the definition of "inventory" includes diamonds over which there's no dispute that DDMI is entitled to hold. It's --

THE COURT: Well it does not say that.

MR. COLLINS: It says, "Inventory means all diamonds," My Lady. And the diamonds we hold are diamonds --

THE COURT: Well they can only sell diamonds that they have ownership in. They cannot sell diamonds that they do not own.

MR. COLLINS: Sure, for some --

THE COURT: If you are trying to say "inventory" means all diamonds, what, all diamonds of the world? It makes no sense.

MR. COLLINS: No, the issue here is they're selling diamonds that Dominion owns that are subject to the cover payment security and asking the Court to vest out the security; right? This is a sale of diamonds owned by Dominion --

THE COURT: Just excuse me for one second. Okay. So what were you saying? Like, I do not get your argument, Mr. Collins, I am having trouble with this.

MR. COLLINS: All right. They're selling --

THE COURT: Obviously the only diamonds that they can sell are diamonds that they have legal title to; okay? So suggesting all of a sudden that these diamonds include all diamonds over the Diavik mine, even the ones that are there security for your cover payments, makes no sense to me.

MR. COLLINS: Well, no, because the diamonds that is security for our cover payment, My Lady --

THE COURT: Yes?

MR. COLLINS: -- they have legal title to those diamonds.

THE COURT: Yes. But they are also covered by an order, like, that deals with those diamonds and you have security in those diamonds.

MR. COLLINS: We do today.

THE COURT: We have spent a lot of time arguing over your security rights in those diamonds already.

MR. COLLINS: If you signed the order today, My Lady, then it eliminates our security is the point.

THE COURT: Okay. Well, let me hear from, I want to just interrupt your argument if you do not mind so we can get to the bottom of that, can I hear from Mr. Rubin on this point? I will come back to you, Mr. Collins.

Mr. Rubin?

MR. RUBIN: Thank you, My Lady.

THE COURT: What is your position on this?

MR. RUBIN: I agree with --

THE COURT: He is saying that he is going to lose all the security over the diamonds.

MR. RUBIN: No, he's not.

THE COURT: The way this is drafted.

MR. RUBIN: No, he's not. And, in fact, I took you to paragraph 15 of the order which you do, as you mentioned, have control over.

THE COURT: Right.

MR. RUBIN: The new paragraph 15 that I took you to specifically says that the security which they hold over the diamonds, pursuant to your prior orders, they maintain that security and it's unaffected by this order. And so they maintain their security. We can't sell what we don't have the right to sell, we can't sell what we don't have. They will hold the diamonds, they will hold them pursuant to your prior orders, and this order, including the new paragraph 15, protects them. I don't know what else to say, My Lady.

THE COURT: That is what I understood so let me just go back to Mr. Collins.

Okay. Mr. Collins, so what is wrong with paragraph 15?

MR. COLLINS: All right. Let's --

THE COURT: You will recall we went through that earlier.

MR. COLLINS: Sure. Okay.

THE COURT: And I think it was in effort to reply to your concerns; right? I understand that this is a big transaction in terms of your client and they

want to make sure that the security, you know, there has been changes to the JVA, I understand that by my former orders and, you know, the days that we have spent arguing about this, I have not been arguing, that you have been arguing and I have had to make certain decisions on these things. But, anyways, I want to make sure that your client continues to have security. I thought paragraph 15 did that. What is wrong with that paragraph 15 of the order?

MR. COLLINS: Well, there's a few things that are wrong with paragraph 15, My Lady.

THE COURT: Okay.

MR. COLLINS: And that is, again, there are provisions in this catchall that, again, don't address the issues with the drafting; right? It's unclear and it doesn't do much more than that. Let's look, for example, to start, My Lady, with the provision that makes the purported non-interference of rights conditional. It starts in the middle. It says --

THE COURT: Okay. So we go to the proposed draft order?

MR. COLLINS: Yeah. Go to paragraph 15, we'll jump ahead.

THE COURT: Approval and vesting order. Okay. Just hold on. I think this is it. Yes. Okay. So paragraph 15. Okay. I am there. Thank you. Okay. So what is your problem with this proposed, I mean, I know that you have made an effort to, you know, make an order that would comply with your concerns but here is another effort here.

MR. COLLINS: So -- so this isn't in CaseLines I don't believe so I'm just looking at the PDF, paragraph 15. So if you go right after "Undelivered DDM diamonds" --

THE COURT: It is in CaseLines.

MR. COLLINS: Okay.

THE COURT: Page 17.42437, just so you know.

MR. COLLINS: I think we're looking at the same thing. If you go to the --

THE COURT: Okay.

MR. COLLINS: -- middle, "Undelivered DDM diamonds," so --

THE COURT: Okay.

MR. COLLINS: -- if we can just focus on the phrase, "Subject always to DDMI's compliance," --

THE COURT: Yes. Yes. M-hm.

MR. COLLINS: So DDMI's security is stated to be conditional upon its compliance with orders of this Court. Let me be crystal clear. DDMI is in compliance with orders of the *CCAA* Court and that matter will come to pass. But the conditionality, My Lady, is overly broad and has the potential to, again, extinguish the protection. Again, DDMI's compliance with all orders of this Court, is it the *CCAA* Court, My Lady, or is it all orders of the Court of Queen's Bench of Alberta? If DDMI, My Lady, is in default of an order that requires it to submit a brief by a certain date doesn't lose its protection. In this case, My Lady, if there were a foot foul, My Lady, if DDMI, again, didn't comply with a scheduling direction, DDMI didn't comply with --

THE COURT: Okay. Mr. Collins, so what would you prefer for it to say? Orders by me? I think I have made every order --

MR. COLLINS: (INDISCERNIBLE).

THE COURT: -- in this application, quite frankly.

MR. COLLINS: Okay. All right.

THE COURT: So, is that what you want?

MR. COLLINS: I think that provision doesn't work as well because what -- really, to get to it they're saying if you don't hand over diamonds and you were supposed to hand over diamonds then you've lost the protection of the -- of your encumbrance. That preordains I suppose a sanction for noncompliance with an order. And, again, we say we're not in noncompliance with an order, My Lady, but that's $148 million penalty today. So that's -- that's the difficulty with that provision.

THE COURT: I think that you are slaying at ghosts here, Mr. Collins.

MR. COLLINS: All right.

THE COURT: So what would you suggest here to make it more clear in this paragraph?

MR. COLLINS: Well, we've made suggestions as to a catchall provision in the order and I can either take you to that, My Lady, but -- or we can continue with these submissions. These provisions, My Lady, are overly broad, I know there is a desire to get to the transaction, to get to the end of the day, I'm having difficulty I can sense with the Court in trying to demonstrate what the fundamental problems are here.

THE COURT: Right, you are.

MR. COLLINS: There are -- there are provisions here, My Lady, that have either intended or unintended consequences that down the road which will have the result of extinguishing DDMI's rights. And the other difficulty with this proposal, My Lady, relates to a situation that says you've got the protection with respect to diamonds that have never been required to be delivered or which have never been required to be delivered. And we know, My Lady, in early days of this case the position has been that DDMI has been required to deliver Dominion's share of production to it.

I think -- I think where we should go, My Lady, then is to the main issue that, My Lady, which is DDMI has valid and perfected security in the entirety of the production to secure the obligations owing to it. And we reject the suggestion, My Lady, that this matter was determined by Your Ladyship by any orders made in these proceedings that the parties have joined in issue on the point and that the effect of the order requiring delivery of excess collateral leads to the conclusion that excess collateral comes free and clear of DDMI's security interest.

You've read the provisions of our brief, My Lady.

THE COURT: Well then why did you argue so much in that last hearing that you were so prejudiced? I went back to your briefs and, you know, my decision. If it did not make any difference because you felt that you had security over those diamonds anyways, why did, as others have pointed out, waste everybody's time over that?

MR. COLLINS: You got close to it, My Lady, is because diamonds are high value collateral that are very mobile goods, My Lady; right? It's not a situation that when we deliver these diamonds to Dominion certainly wasn't contemplated back in October until the order was made that those diamonds would remain in the Northwest Territories. So unlike, for example, aircraft objects, My Lady, that have an

international security regime, when these diamonds leave the Northwest Territories --

THE COURT: M-hm.

MR. COLLINS: -- our security doesn't follow them to India, for example, and that's where Dominion transports its diamonds. That is why we argued so strenuously to be able to maintain possession of the diamonds. Remember, the formulation of the excess collateral wasn't suggested by DDMI. DDMI has always asked you, My Lady, to allow it to withhold all of production because that assures its security.

THE COURT: Right. I understand that.

MR. COLLINS: Delivery of the diamonds to Dominion in the Northwest Territories does not extinguish the security. At the moment those diamonds leave the Northwest Territories, My Lady, then we get into issues as to whether or not when those diamonds are sold in India, transferred intercompany among the Dominion groups of company or an (INDISCERNIBLE) to whether or not Dominion -- DDMI is protected. That is the reason, My Lady.

THE COURT: Okay. Well your friends seem to have a different view of it. Your friends appear to think that once the delivery happens then they take control of the diamonds. That is sort of the way that it works. So can we push this on to another time, Mr. Collins, and make this order not subject to this debate?

MR. COLLINS: Well, if Your Ladyship takes our suggestions in the approval and vesting order I think we can, My Lady, have this debate. Just on this issue, My Lady, is, again, because it was determined by Your Ladyship that diamonds had to be passed -- excess collateral has to be passed over to Dominion. The order that was issued you'll recall that the first lien lenders had sought in that order the ability to sell those diamonds. The order that you issued said two things - one was that the diamonds can't be sold, and also that they have to remain in the Northwest Territories.

THE COURT: Right. And, as they said, there was issues at the hearing, there was issues about that monetization order that we spent some time on but we could not finish it. That was a solution there in terms of the waterfall because there was other people that did not want the money going back to Dominion directly; right? So --

MR. COLLINS: I think that's --

THE COURT: But I sorted that problem out so that the diamonds would be held and then there could be a debate at a later date if necessary about

what happened to the collateralization of those diamonds.

MR. COLLINS: That's a convenient revision of that which was submitted by Credit Suisse on October 30th. And I directed you, My Lady, to the transcript as to what was asked for in the first instance.

THE COURT: No, I do not think there is any dispute that at first there was quite a waterfall suggestion; right? There was quite a --

MR. COLLINS: It wasn't quite --

THE COURT: And during the hearing they both consented to the diamonds being held; right?

MR. COLLINS: The issue was, My Lady, the submission was that the diamonds in the first instance should be sold following delivery free of DDMI's security and the Court rejected that. There's been no determination, My Lady, with respect to how delivery of diamonds subject to a valid and perfected security interest in respect of an obligation that's in default, how that mere act extinguishes the security. And you've read that in our brief but I would commend you, My Lady, again, to go back and read the submissions on that point.

THE COURT: All right. Listen, we did not discuss that particular issue that I recall or it was not determined, I would agree with you, Mr. Collins, because it was not raised by you or claimed by you at that time.

MR. COLLINS: But why would it be raised, My Lady? I was -- DDMI's position was that it should retain the collateral.

THE COURT: Correct. I know. But you did not make that as an alternate argument.

MR. COLLINS: (INDISCERNIBLE) because it's the law. It's just by operation of law our security -- our security continues, My Lady.

THE COURT: All right. Fair enough. Mr. Wasserman just wanted to cut in for a minute, I will just allow him to say what he wanted to say.

MR. WASSERMAN: Thank you, My Lady. Just given that Mr. Collins is referencing submissions that I made, at no time, at no time, did I ever think that Mr. Collins would raise an argument that his security interests in the diamonds would continue

if possession was delivered to DDMI. The monetization issue is a fight among creditors of Dominion with (INDISCERNIBLE). If you recall --

THE COURT: I understand that.

MR. WASSERMAN: -- the monetization program that we agreed to with the diamonds that Mr. Collins' clients hold that he gets to go and monetize. His client gets to go and monetize.

THE COURT: Right.

MR. WASSERMAN: There's a distinction. There is a big distinction here. Anyways, I just wanted to make that point clear. I do encourage you if you think it's necessary to go back and read the record, but as far as I'm concerned, this decision included that. It was an adjunct in the decision, it was not raised, it's res judicata. It's rewriting the terms to the joint venture agreement and unfortunately, you know, if this was all about -- if Mr. Collins' submissions were all about that and one clause in an order requiring him to be in compliance with your orders, I don't know how we've spent an hour on this.

MR. COLLINS: Wait a second, My Lady. This is not reordering or rewording the joint venture agreement and I'll invite counsel for the first lien lenders if Your Ladyship wants to hear from them to direct Your Ladyship to the provision of the joint venture agreement that says when diamonds that are subject to our security are provided to Dominion that that security interest is extinguished. You'll be looking a long time for that provision because it's not in there.

THE COURT: Okay. You both have different views of how this joint venture agreement works, you know, that is loud and clear. I do not know that needs to be decided today. I think that the important thing is, Mr. Collins, is that your client is protected in this order. It looks to me like this section 15 does the trick, you know, you have a different way of putting it. It is hard to put one against the other because it is, you know ...

MR. COLLINS: Well, My Lady, it's hard to put one together against the other for a few reasons. You know, one is we were not consulted as were the other parties in respect of this transaction. We had no idea that this transaction was going to occur, My Lady. Candidly, I've never been involved in a *CCAA* proceeding where there has been so little consultation with a major stakeholder with respect to matters that materially impact it. Dominion's and the first lien's position vis-à-vis DDMI on this file has been to adopt a litigation posture, they are entitled to do that, but we can't then, My Lady, as well hamstring DDMI from its ability to make detailed arguments around why this

structure prejudices it at 4:30 PM on a Friday during the holiday season. That's the point there.

THE COURT: Okay. So, well, I thought that they did have discussions with you and that is in part why they put that paragraph in, to try to rely some of your concerns that they did not agree with but they were trying to allay your concerns. So I do not know that they would say you were not consulted. Are you saying that you were not, that you did not have a discussion? Like, I am starting to wonder what is going on here.

MR. COLLINS: What I'm saying, My Lady, is we weren't consulted in advance. We got this on Sunday night at 9 PM and we had discussions yesterday and I got their wording at 8 PM yesterday. And really just the process point is this, I mean, Mr. Rubin speaks of the 7-day service requirement, that's Vancouver practice, that's not Calgary practice. These materials, to be in compliance with the Calgary commercial list, should've been served last Monday and maybe we had more time. But we are where we are, My Lady, and I think what we can do is have a look at our proposed catchall provision which is at paragraph 24 of our proposed markup. I've tried to direct the Court there.

THE COURT: Yes. Yes. Thank you.

MR. COLLINS: All right. So this is what we've put forward, My Lady, and in answer to your question what can we do? Well, we can -- we can accept this wording. So, again, it reserves nothing in the purchase agreement and the answering document or this order shall transfer, convey, or assign the seller's interest in the Diavik mine, the Diavik joint venture, the Diavik joint venture interest and the Diavik leases to any person. That cannot be offensive to the parties we're joined in issue with there because it's true.

In terms of prejudice, nothing prejudice, extinguish or otherwise affects the rights and remedies of DDMI under the joint venture agreement; all right? If that's what they're saying the impact of this is, then let's see it. We can't relieve the sellers of any of their indebtedness or liability under the Diavik joint venture agreement and that's clear in the joint venture agreement. We have to be in a situation where we're still able to enforce the inevitable ongoing and continued defaults of the sellers. Nothing should affect the rights, remedies or priorities to the Diavik realization assets as established by the subordination agreement, the acknowledgment of lien dated November 1st, 2017 --

THE COURT: Okay. Just hold on if you would not mind. Can we just put these up side by side so we can take a look at the difference? It is hard, you

know, partly because I do not have this paper, which is fine, we can put them up side by side. So instead of you just reading what -- now I have lost it. Sorry, so your paragraph 24 and their paragraph what again?

MR. COLLINS: Fifteen. Sixteen -- no 15, My Lady. Fifteen.

THE COURT: Okay. So they put it earlier on in the order. So I have got the two. All right. Okay. So theirs is more directly, nothing in this order may hold pursuant to the Diavik joint venture agreement against the applicant's share of the Diavik diamond mine production as ordered on November 4th. Then they have some extra things saying that you have not released or delivered these diamonds to the applicants which is true I understand; right? They have not been released or delivered yet; right?

MR. COLLINS: That's not what their provision says, My Lady. Yes, it's correct, but that's not what the provision's designed to do.

THE COURT: By this Court on November 4th. Okay. Which have never been released or delivered. Okay. Shall, subject always with DDMI's compliance with all orders of the Court, you do not like that but I do not why you are complaining about having to comply with an order. If there is any issue, if you suggest that it is because they are late in filing a document, I am sure that you can come to court and get that dealt with, Mr. Collins. But, anyway, it is be unaffected by this order, shall continue to attach the undelivered DDMI diamonds. Okay.

All right. And you say --

MR. COLLINS: I say our (b) accomplishes that far more elegantly and in accordance with the terms of the joint venture agreement.

THE COURT: Okay. Whatever they may be, because you guys are arguing about what those are, but we can put that to another day.

MR. COLLINS: Precisely. Precisely. The resistance to relatively simple propositions, My Lady, is, to me, telling.

THE COURT: Do not ask me. Do not ask me about that. But perhaps, Mr. Collins, if you do not mind again, if I can interrupt you and then go to the Monitor and see what they have to say. Mr. Simard I know is online and ...

MR. SIMARD: Just unmuting, My Lady.

THE COURT: Yes.

MR. SIMARD: You can hear me now?

THE COURT: Yes, I can.

Submissions by Mr. Simard

MR. SIMARD: Okay. Great. I won't repeat anything we said in the Monitor's report about the support for the transaction. You've seen why we've said it, it's really the only option here and the best option but I'm not hearing any parties objecting to the approval of the transaction. So I'll go right to the DDMI issues and give you the Monitor's view.

THE COURT: That is sort of why I am interrupting at this point.

MR. SIMARD: Sure.

THE COURT: Sorry to put you on the spot, Mr. Simard.

MR. SIMARD: No. Okay. I'll cut to the chase. As Mr. Collins said, he and I and our clients had a call at 9 AM on Tuesday morning. He raised the issues that they've now put before the Court. We went back to him the next day after talking to the company, the Ad Hoc Group and the first lien lenders with the email confirmation that he's put in his affidavit, and then -- and then there were further communications throughout the week to try to address these concerns.

So I'll deal with two points. First, is the suggested amendments to the APA and the interpretation issues on the APA and then I'll deal with the competing proposed revisions to the vesting order.

On the APA, what Mr. Collins essentially is arguing and advanced this week is a position that there are certain provisions in the APA that could be interpreted in a way that would prejudice DDMI and he took you through that interpretation.

THE COURT: Right.

MR. SIMARD: But I think it's fair to say that those provisions can also be interpreted in a way that do not prejudice DDMI at all and so the discussions and the process we went through this week resulted in the confirmation of the company and the first lien lenders and the Ad Hoc Group that, yes, they interpreted the provisions in

a way that would not prejudice Mr. Collins' client. You've heard that on the record today from Dominion and I would submit that admission on the record gives DDMI protection. We commonly deal with issues like that in an efficient and practical manner in these type of proceedings where there's possible interpretations. Parties will put their view on the record. I would suggest that it will be virtually impossible for Dominion or the purchaser to come back later and try to take a contrary position to what they've told you today. So we don't think there needs to be an amendment to the APA on that basis and we do believe that the interpretation of the company and the first lien lenders and the Ad Hoc Group have confirmed does not prejudice DDMI.

And as you've stated, there's plenty of jurisprudence warning Courts of the danger of descending into a negotiated agreement like this and trying to tweak some provisions. There could be unforeseen consequences. And as we've heard from Dominion and the Ad Hoc Group today, they wouldn't agree to the provisions suggested by my friend, Mr. Collins. So we don't think there needs to be an amendment to the APA.

Turning to the vesting order, we do -- we've looking at the competing proposed revisions, the Monitor believes that paragraph 15 in the company's proposed form of order does provide sufficient clarity and protection for DDMI. Mr. Rubin walked you through that provision. It draws a clear line between two things: (1) diamonds or proceeds of diamonds that DDMI is not obligated to deliver under your existing orders; and then on the other side of the line the diamonds and the proceeds that it is obligated to deliver. So we think why -- the reasons why that form of order is preferable, it refers back to your November 4th order which, as we've heard today, was heavily argued and was decided, that is, that is the governing order that specifically deals with monetization of diamonds and proceeds and has a specific waterfall.

I'll just -- no one's brought it up today so I think it's useful to look at the waterfall. The waterfall is in CaseLines. I'll try to direct you there. It is page 3-263. Okay. I'll try and direct you there. Did that work? I can't hear you, My Lady, I don't know if you're muted or if I have an audio problem here.

THE COURT: Yes, it does. No, it is me. I was muted. Yes, it worked. It just seems to have a little bit of lag. I think my computer is tired out, it has been a hard week.

MR. SIMARD: So if you look at clause 8, this is clause 8 to the monetization procedure attached in the schedule to your order.

THE COURT: Right.

MR. SIMARD: And what it says, obviously DDMI can take the diamonds, they can sell Dominion's share of the diamonds alongside their own and then this -- this is the waterfall, if they turn those diamonds into cash proceeds, first, you know, taxes, royalties have to be paid in (a); second, fees, costs and expenses including their 1 percent fee in (b); third, the two charges from your amended and restated initial order that rank ahead of DDMI's security interest were the admin charge in DNO. So then that's next in the waterfall. And then, fourth, the DDMI and satisfaction of outstanding cover payments and interest thereon, et cetera. So that's the payment of their -- their security, their cover payment security. And then you go to (e), and (e) is fifth to Dominion and as we've heard a lot of discussion about today to be held in a segregated trust account.

So I look at that order, I wasn't at that application, but I look at that order and it's clear that for proceeds, you only get to (e), you only get to handing diamond proceeds over to Dominion after the existing cover payment security has been paid out. So that's why we say that's been dealt - that process - and so the paragraph 15 that Mr. Rubin has suggested in his draft order we think is preferable because it dovetails with that existing process which has already been considered and dealt with by the Court. And I think that's what Mr. Rubin was getting at - the receivable that Dominion has sold or will sell to the purchaser if this agreement is approved and the closing occurs is the receivable basically in paragraph 8 (e).

The DDMI form of order, I guess some of the reasons why the Monitor does not prefer it, it doesn't refer to your November 4th order. It, instead, refers to the joint venture agreements and other agreements so it sets up I guess a set of rules that potentially could conflict with your November 4th order and there could be potential confusion going forward. So, for those reasons, the Monitor believes that the company's form of order is the preferable form and does fully protect DDMI.

THE COURT: Ironically wider, this is what Mr. Collins is complaining about in the other one. But, anyways, all right. Well thank you for that interruption there, Mr. Simard.

Okay. Back to you, Mr. Collins, then. Is there anything you wanted to add, or?

Submissions by Mr. Collins

MR. COLLINS: My Lady, we'll let the record stand with respect to DDMI's view on the issues.

THE COURT: Okay.

MR. COLLINS: But we do want to discuss the break fee because

the submissions of counsel to Dominion are incorrect. If you go, and I'll direct you to our proposed change to the order, My Lady --

THE COURT: I thought the main thing was is that your DDMI security is ahead of the break fee, that is the key; right?

MR. COLLINS: It's not.

THE COURT: Oh, okay.

MR. COLLINS: Because the break fee ranks in priority subsequent to securing both the charges. And under -- under -- first off, the break fee is secured against the property, My Lady, which is a different definition. It includes all of Dominion's assets. Secondly, My Lady, DDMI is subordinate to the admin charge, the DNO charge, it's also subordinate to the financial advisor's charge. So if the intention here is for DDMI's cover payment security to rank in priority to the break fee charge, which it should, My Lady, if the purchasers here were purchasing the Diavik interest and agreeing to assume the obligations under the agreement then there might be a different bases for arguing that DDMI's collateral should stand as security for the break fee charge but there's no bases to encumber the DDMI collateral. If you look at our change, My Lady, it simply just makes it very clear that the break fee is subordinate to the indebtedness under the Diavik joint venture agreement.

MR. WASSERMAN: My Lady, it's Mark Wasserman again, I apologize for interrupting. But, you know, on this particular issue, I mean, we don't have a problem with Mr. Collins' submissions. You know, the break fee is only payable in the circumstances where we're paid in full so I don't know whether my friends have the same circumstances but in an effort to try to finalize this hearing today, we're okay with Mr. Collins' submissions on this point.

THE COURT: Okay. Mr. Rubin, do you have any problem with changing it so it is clear where the Diavik joint venture indebtedness ranks? I do not think there has been any debate about that, quite frankly.

MR. RUBIN: There isn't because (INDISCERNIBLE) charges (INDISCERNIBLE) break fee charge ranks after all of the charges. By definition in the SARIO, the charges rank after Mr. Collins' clients.

THE COURT: Well they are ahead, right, they are ahead of his --

MR. RUBIN: No --

THE COURT: Sorry, no, they are behind his. Sorry. Behind. And so --

MR. RUBIN: Yeah.

THE COURT: -- if the break fee is subsequent to them then it necessarily means they are behind Diavik.

MR. RUBIN: Exactly. And so if Mr. Wasserman's fine with this, it already protects him because of the definition of the charges, happy to include that. But it's not needed, but if it makes it easier (INDISCERNIBLE).

THE COURT: Okay. All right. Thank you.

Okay. Back to you, Mr. Collins. All right. So there is no problem with making that change although I did not think there was an issue. But if you want to be clear, let's put it in there, you know, they do not have a problem with that so all right.

MR. COLLINS: We'll move on, My Lady.

My Lady, the other changes in the vesting order relate to the provision that's vesting the purchased assets free and clear of the DDMI security. But, you know, in fairness, My Lady, that change and I've directed you to it where we say DDMI security be added to Schedule E. Like, in fairness, there's a lot that comes with that, My Lady. I just think for the purpose of the record, you know, to the extent that we have to look at this again, it's very important that DDMI not be taken to be relenting on that which should be included in the approval and vesting order.

THE COURT: Okay.

MR. COLLINS: And the reason for that inclusion, again, is the effect of the order will be to vest the acquired assets free and clear of the DDMI security which DDMI says, when you consider the transaction as a whole, is extremely prejudicial to it.

THE COURT: Okay.

MR. COLLINS: And paragraph 14, My Lady, of our suggested changes, it would presuppose -- the issue is that the current draft of paragraph 14, if you

don't put DDMI in there and it says they have no claim against the sellers, My Lady, then you're -- the effect of that is to say not just claims up to today but following the closing of the transaction we have no claim against the sellers. Sellers are Dominion. They're going to continue in existence, they're going to continue to default in their obligations under the joint venture agreement and that is the rationale for the request for including DDMI in parties that continue to have claims against the sellers.

THE COURT: Okay. All right.

MR. COLLINS: There's a provision in paragraph 6 of the vesting order, My Lady.

THE COURT: Okay. So going backwards, okay.

MR. COLLINS: Yeah. It ties into the asset purchase agreement. The definition of "Business" relates to all of Dominion's assets. And, again, without a fix there and the fix was in the asset purchase agreement, the effect of this provision is that any assets used in connection with the Business or that would otherwise (INDISCERNIBLE) the acquired assets vest in the name of the purchaser. So, again, we get into the fact that there's a definition of "business" in the APA that's overly broad and when you -- if you were to approve that provision and paragraph 6 of the vesting order, again, it's prejudicial to and completely opposite to the rights and entitlements of DDMI under the joint venture agreement.

THE COURT: The business again, like we discussed earlier with the earliest comment, is Dominion's business; right?

MR. COLLINS: My Lady, it's a defined term and there's a lot that's wrapped up into that provision and anything used or useful in connection with Dominion's business. Again, we have assets that are used or useful in connection with Dominion's business in our possession, My Lady, that are subject to the cover payment security.

THE COURT: Okay. I take your point. Thank you. Anything else?

MR. COLLINS: No, My Lady, those are all my submissions.

THE COURT: Thank you, Mr. Collins.

Okay. So I will go back to you, Mr. Simard, because you sort of were dealing with that.

We were dealing with that one section. Is there anything else that you wanted to add?

Submissions by Mr. Simard

MR. SIMARD: There are a few things, My Lady, thank you. With respect to the submissions Mr. Collins made about the other provisions of the order in his -- in his form of markup, with respect, we don't think those are necessary. If you look at paragraph 15 in Mr. Rubin's form of order, there's a very robust notwithstanding clause at the start of that provision. So the other -- the issues Mr. Collins raises with the other provisions of the order, we think those all fall away because of the protection they're given in paragraph 14 overrides all those other -- those other concerns he's identified in other paragraphs.

I just want to speak very briefly to the stay extension because he raised a couple of points in his submissions.

THE COURT: Right.

MR. SIMARD: As you've seen, we're fully supportive of the March 1st extension. In the event that this transaction doesn't close, of course Dominion can come back to court, we can issue a report. I don't know that we need a specific provision in the order like we had earlier this fall. The Monitor is obligated to report back to the Court and the stakeholders if there's a material adverse development and, of course, we'll be plugged into the process and we will -- we will do so.

THE COURT: Okay.

MR. SIMARD: So we think the stay extension is sufficient as is and don't think it would be wise to grant a stay extension of an unknown length as suggested by Mr. Collins.

And then the only other -- those were all my submissions. Mr. McConvey, who was the individual bondholder appears to have dropped off. Mr. Salmas, who is on for --

MS. WANNIAPPA: Hi.

MR. SIMARD: Hi.

MS. WANNIAPPA: Sorry, it's Angela Wanniappa, the CFO of -- I'm talking on behalf of Mr. Daniel McConvey.

MR. SIMARD: Hi, Angela.

MS. WANNIAPPA: Should I go ahead?

MR. SIMARD: Sure, so I -- just let me finish speaking to the Judge for a moment, Angela.

MS. WANNIAPPA: Sure.

MR. SIMARD: So what I was going to say, My Lady, is Mr. Salmas who's on the for the Indenture Trustee for the second lien bonds, he had asked that he -- he has very short submissions but he asked that any submissions of his follow those from the bondholder. So if it's appropriate, we could hear from Ms. Wanniappa at this point on behalf of the bondholder.

THE COURT: Instead of Mr. Salmas? Okay. All right.

Okay. All right. Ms. Wanniappa?

Submissions by Ms. Wanniappa

MS. WANNIAPPA: My name is Angela Wanniappa, the CFO for Rossport Metals and Mining Fund. Daniel McConvey had to leave to attend his son's birthday party. On behalf of Rossport Metals and Mining Fund, a minority bondholder, I would like to say that we do not want to hold this process up as clearly a lot of work has been done on it and many months have passed. However, we, and I'm sure other bondholders, (INDISCERNIBLE) Ad Hoc Group (INDISCERNIBLE) the offer was not constructed in a way that we and other minority bondholders can also participate. For the record, we would be interested in participating in this deal on a pro rata basis. Thank you very much.

THE COURT: All right. That is noted for the record. Thank you, Ms. Wanniappa. You never know, this thing seems to have a life of its own forever so you have been heard.

Okay. So, Mr. Salmas?

Submissions by Mr. Salmas

MR. SALMAS: Good evening, My Lady. John Salmas, Dentons Canada, on for Wilmington Trusts National Association, the indebted Trustee under the

second lien notes. Also in attendance with me at this hearing is my colleague, Sam Roberts.

My Lady, while the Trustee has not filed any materials in connection with today's application, we wish to advise the Court that after receiving the application record late on Sunday, December the 6th, the Trustee drafted and submitted a notice to depository trust company known as DTC which is a service that is customarily utilized by entities such as the Indenture Trustees to provide notices to the holders of securities such as the second lien notes. The Trustee had previously provided a notice by the DTC service earlier in the case notifying all holders about the Dominion Diamond *CCAA* proceedings. We understand that the most recent notice was published by DTC early on Tuesday, December the 8th, and such notice has been available to be viewed by all second lien noteholders since Tuesday morning.

In that notice, the Trustee noted, and I quote from the notice: (as read)

> The transaction does not provide recovery to the noteholders under the Indenture and the liens provided under the Indenture will be discharged as against the acquired assets in the contracting purchasers. The Trustee does not intend to file an objection or other responses to the application.

The notice also provided that the holders were notified: (as read)

> That the Trustee will take no further action under the Indenture save in its sole and absolute discretion without any direction indemnity (INDISCERNIBLE) the Trustee from the holders of the notes.

At the time of this court appearance, My Lady, the Trustee has not received any sort of Indenture informing direction or indemnity.

So, likely as a result of that recent DTC notice and perhaps in light of the uploading of the application materials to the Monitor's Dominion Diamond's case website, approximately three parties, one of which is the Rossport Metals and Mining Fund that you just heard from, had reached out to the Trustee asserting (INDISCERNIBLE) and have spoken either to the Trustee or its counsel via email. While such holders have taken the opportunity to voice their disappointment, the proposed transaction does not provide recovery to second lien notes. A disappointment that the Trustee shares. Most of the holders' primary reasons for contacting the Trustee appear to be to express an interest in participating in some fashion in connection with the purchase transaction as just heard from Ms. Wanniappa.

We have advised the proposed purchase counsel of such second lien noteholders'

communications and in the cases which we were asked to do so we have put the holders in touch with the proposed purchasers counsel. We understand that the purchasers and their counsel are amenable to receive such requests and the Trustee is supportive if such discussions occur.

We also note that prior to the service of the sale approval application, we in fact one or more non-purchaser noteholders had made similar inquiries of the proposed purchasers, i.e. in respect of the opportunity for all noteholders to participate in respect of the transaction. We understand the proposed purchasers are considering the noteholder (INDISCERNIBLE) requests and we understand that neither the transaction itself for which Your Ladyship's approval is being sought today with the form of sale approval order forecloses the opportunity for such a noteholder and purchaser discussions to occur.

We believe that one of the reasons we received the types of communications from those noteholders was due to the nomenclature utilized in the court materials in respect of the sale approval application. That was a point that we wanted to clarify today, My Lady, in terms of the -- our understanding of the sale transaction. It is the Trustee's understanding that in respect of the proposed transaction, the purchasers are not acting in the capacities as noteholders under the second lien note indenture and they are not, as mentioned previously, credit bidding any of their notes which is a structure that might have once been contemplated. Under the current structure, they are acting in capacities not as noteholders but solely as purchasers. And toward that end, the purchasers are assuming certain obligations and putting up their own money in connection with capitalizing the proposed purchasing entity in order to buy the acquired assets.

As such, the Trustee is of the view that it was inaccurate to identify the purchasers as "the Ad Hoc Group" and the transaction to be characterized as the "Ad Hoc Group transaction". It appears from our communications with the noteholders, the use of such nomenclature has caused a bit of confusion over the last few days and we just wanted to make sure today that we got heard from the parties the Trustee's understanding of the nature of the transaction and the identity and capacity of the bidder/contracting parties and proposed purchaser was accurate. And in hearing submissions from counsel today, it does appear the parties have clarified the Trustee's understanding of the transaction and the capacity of the purchaser entity to be correct.

So, subject to any questions My Lady might have for me, those are my submissions.

THE COURT: Okay. Thank you very much.

Submissions by Mr. Kashuba

MR. KASHUBA: My Lady, Kashuba, initial K. with Torys.

THE COURT: M-hm.

MR. KASHUBA: I have four matters I need to speak to. One relates to the Rossport submissions and the submissions just made by Mr. Salmas.

THE COURT: Okay.

MR. KASHUBA: So, for the record, and I thought it was clear but let it be clear now, unlike when my clients were proposing a deal previously as a credit bid, the present deal on the table in no way relates to our clients' standing as second lien noteholders. While it's true that my clients are second lien noteholders and they've lost a significant amount of funds somewhere in the area of $240 million US, the fact is that us being second lien noteholders is completely irrelevant to the sale application. This is all about putting new money on the table, this is new money for my clients and it's real consideration. Has nothing to do with their second lien noteholders.

THE COURT: Okay. Thank you, Mr. Kashuba.

MR. KASHUBA: Thank you. And I will speak to just three matters raised by Mr. Collins while I have the floor. Mr. Collins raised the Washington deal and Mr. Vescio's affidavit.

THE COURT: M-hm.

MR. KASHUBA: Unlike Washington, our deal does not have an extremely relevant Surety condition. Unlike the Washington deal, we have also fully baked deals with virtually all the critical suppliers. And, unlike what Mr. Collins suggested, my clients have made real commitments regarding the capitalization of the purchasers. The purchaser will have $70 million of funding from our clients, they are well capitalized and that is very different than the Washington transaction.

THE COURT: All right.

MR. KASHUBA: With respect to the DDMI and markups to the APA, they go well beyond unnecessary, they're entirely unacceptable to the purchasers. They rewrite the deal. DDMI shouldn't be allowed to insinuate themselves into the APA, they're only issue is maintenance of whatever security they currently have on non-delivered Diavik inventory. They get that in the AVO that was presented to the Court, paragraph 15 speaks directly to it.

And, lastly, My Lady, the purchaser has listened to the submissions on paragraph 24 that Mr. Collins has proposed. We will not proceed with paragraph 24 that's being put forward to the Court. It's simply wrong. For example, paragraph 24(a) is --

THE COURT: Is this to do with the break fee? You are saying paragraph 24 instead of 15.

MR. KASHUBA: Fifteen instead of 24.

THE COURT: Right.

MR. KASHUBA: Yes.

THE COURT: I understand your position.

MR. KASHUBA: So I can answer My Lady's question on paragraph -- with respect to the break fee. We're in agreement with what my friends have agreed to and what Mr. Collins has proposed. That paragraph --

THE COURT: That is paragraph 20 I think. Right.

MR. KASHUBA: I believe so, yes, My Lady.

THE COURT: Right. But 24 you object to. I understand that. Okay. So you support what others have objected to in terms of --

MR. KASHUBA: Yes, My Lady. And just by way of quick example, paragraph 24(a) is too broad. It says there's no transfer of anything related to the Diavik joint venture interest, that definition includes production, i.e. the diamonds from Diavik. We are in fact buying that. So if the order must be satisfactory to the purchasers and we will not proceed on the basis of paragraph 24 as it's been suggested.

To be clear, on the other very short points with respect to the changes to the AVO, there's no way to include any DDMI encumbrance in Schedule E, that's the permitted encumbrances as referenced in paragraph 4, we object to that.

With respect to the definition of capital 'B' business in paragraph 6, we suggest that Mr. Collins is incorrect here. We buy all business assets of Dominion whether directly related to the Ekati mine or not. Any change to that definition is also unacceptable to the purchasers.

My Lady, those are my further submissions on response to those points raised by my friends.

THE COURT: Okay. Thank you.

Anybody else? Mr. Collins, did you have anything else to add? Or Mr. Rubin?

MR. RUBIN: No, My Lady, it's Peter Rubin for the company. The only thing I might add was I was going to give you an update on liens. During the last couple of hours we have resolved two more liens which is fantastic and so we will be moving, if the order's granted, two entities to Schedule E which are permitted encumbrances. And those are SMS Equipment and a numbered company 507170. Don't know that it matters but we would -- we just wanted to put that on the record that we have reached settlements of those two additional critical vendor lien claimants which is fantastic news.

THE COURT: Okay. Great.

MR. COLLINS: My Lady, I don't have anything further. Thank you very much.

THE COURT: Thank you, Mr. Collins.

Decision

THE COURT: All right. Okay. So with respect to these two applications in front of me, with respect to the first one, the approval of the sale that is on the table - the purchase agreement - I will approve the sale of the purchase agreement. In my view, the granting of this purchase agreement in the order, and I will come to a couple of details in the order, is in the best interests of all of Dominion's stakeholders. Generally, and including but not limited to the interests of the Northern communities, the Northern Indigenous groups, the employees, the contractors, the Northern base employees and contractors in particular, the environment, the creditors, and all parties involved in this very complicated *CCAA* that has gone through lots of ups and downs over the last few months.

Further, in terms of the order, it appears to me that the most important thing to me is that the mine will continue as a going concern. The Ekati mine is supposed to open hopefully no later than January 29, 2021.

There are some losers in all of this and that, unfortunately, is the way it goes in these kinds

of operations. But, overall, this is a very good result and I commend all parties for the amazing efforts that have been put into making this work. It looked very grim there sort of mid to late October and I was very happy to see that you were able to pull things together.

Now, with respect to Mr. Collins' client DDMI, Mr. Collins, you are doing an admirable job to put forward your client's concerns and, unfortunately, I reject most of the changes that you have suggested and will go ahead with the change that was suggested in paragraph 15 compared to paragraph 24 that you suggested, Mr. Collins. I agree that the suggestion that you have made is too wide at various points and paragraph 15 flows through better with the other decisions that have been made by this Court and balancing acts that have had to be decided to try to make this situation as fair as possible to all.

Now, there may be ongoing disputes which would not surprise me with respect to the diamonds, costing of the diamonds, delivery of the diamonds, sale of the diamonds, et cetera, and with paragraph 15, DDMI is protected, in my view. So, but you can come back and continue to seek further decisions if necessary on those important details.

The only change that I would allow is the amendment that Mr. Collins has suggested in paragraph 20 of his proposed amended sale agreement order, that is the one dealing with a break fee.

The other changes, I just do not agree are appropriate in this situation and may derail the sale. So, it does not go to the root of the protection but I think certainly I can understand why Mr. Collins was seeking as much detail in his client's favour as possible, but in the circumstances I am not prepared to make those requested changes at this time. So that deals with that particular order.

The second part is with respect to the stay extension. I will extend the *CCAA* stay protection under March 1, 2021. To that extent, I heard your concerns, Mr. Collins, and your objections, but I also feel confident in the Monitor in this situation and to the extent that if there is a breakdown of this conditional APA that the Court will be contacted and you could return to have the stay extension reviewed if necessary.

As a Court, we try to extend it longer rather than shorter so you do not have to come back to get the stay extensions done. In fact, today I think was supposed to just be a stay extension application. But because of the hard work of everybody it will also luckily a sale approval application.

Okay. I do not have a lot of long reasons, I do not plan to write any further reasons on this. I am accepting, for the most part, the propositions that were put forward by Dominion in their brief and I have tried to deal very quickly with the objections that you have made, Mr.

Collins. But I do thank you for setting them out in writing and getting them to me even though it was late in the night. I know everybody was under a lot of time pressure so I thank you for your efforts in that regard.

All right. So I guess that concludes our matters for today and hopefully for 2020.

MR. RUBIN: Yes. Thank you, My Lady. I appreciate it is late and I thank you for taking the time.

THE COURT: Not as late for others that are joining us from the east that is for sure. It is a reasonable time here.

And I want to thank the clerk for stepping in to work overtime so that we could get this matter completed today. I want to congratulate you all and good luck with getting all of these conditions sorted out. Hopefully we will be working towards discharge of the *CCAA* before you know it. Thank you very much everyone.

PROCEEDINGS CONCLUDED

Certificate of Record

I, (INDISCERNIBLE), certify that this record is the record made of the evidence held in the proceedings in the courtroom 1104, at Calgary, Alberta, on the 7 -- on the 11th day of December, 2020, that I was the official in charge of the sound-recording machine during the proceedings.

Certificate of Transcript

I, Nicole Carpendale, certify that

(a) I transcribed the record, which was recorded by a sound recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record and

(b) the Certificate of record for these proceedings was included orally on the record and is transcribed in this transcript.

TEZZ TRANSCRIPTION, Transcriber
Order Number: AL6192
Dated: December 16, 2020

TAB 2

In the Court of Appeal of Alberta

Citation: 550 Capital Corp. v. David S. Cheetham Architect Ltd., 2009 ABCA 219

Date: 20090612
Docket: 0801-0258-AC
Registry: Calgary

Between:

550 Capital Corp.

Appellant (Applicant)

- and -

David S. Cheetham Architect Ltd., Craig A. Webber Architect Ltd., Patrick Romerman Professional Engineer Ltd., RGM Drafting Ltd., Nancy Vruwink Consulting Ltd. Operating As Group 2 Architecture Engineering Interior Design, and Group2 Architecture Engineering Ltd.

Respondents (Respondents)

The Court:

The Honourable Mr. Justice Clifton O'Brien
The Honourable Madam Justice Patricia Rowbotham
The Honourable Madam Justice Colleen Kenny

Reasons for Judgment Reserved of The Honourable Madam Justice Kenny
Concurred in by The Honourable Mr. Justice O'Brien
Concurred in by The Honourable Madam Justice Rowbotham

Appeal from the Judgment and Order by
The Honourable Mr. Justice A. G. Park
Dated the 10th day of July, 2008
Order filed on the 28th day of August, 2008
(2008 ABQB 370, Docket: 0701-02069)

Reasons for Judgment Reserved
of the Honourable Madam Justice Kenny

Introduction

[1] When tenants sought consent to assign their commercial lease, the landlord, who had agreed not to unreasonably withhold its consent, instead terminated the lease pursuant to another provision. This appeal is about the proper interpretation of that lease.

Facts

[2] The appellant, 550 Capital Corp. (550), was assigned the lease as landlord. The respondents, David S. Cheetham Architect Ltd., Craig A. Webber Architect Ltd., Patrick Romerman Professional Engineer Ltd., RGM Drafting Ltd., Nancy Vruwink Consulting Ltd., a partnership operating as Group 2 Architecture Engineering Interior Design, were tenants. The chambers judge referred to them as the "Partnership". The written lease was executed by the Partnership in January 2005.

[3] In January 2006, the Partnership incorporated and formed the respondent, Group 2 Architecture Engineering Ltd. (the Corporation). By a letter dated February 16, 2006, the Corporation advised 550 of the incorporation and that the Partnership retained 100 percent ownership and no control had changed. There was no reference to the lease and 550 did not respond to this letter.

[4] The Partnership transferred all its assets to the Corporation, including the lease, and considered the Corporation to be the sole tenant. No request for the assignment of the lease was made to 550 or Strategic Equity Corp. (Strategic), who assist in management of the premises on behalf of 550, because the Partnership was of the view that there was no assignment because there was no change in control from the Partnership to the Corporation.

[5] The changes eventually came to the attention of Strategic's legal counsel who, by a letter dated January 3, 2007, advised the Partnership that it considered the lease assigned from the Partnership to the Corporation and that article 10.02 of the lease required the prior written consent of the landlord to any assignment. Because the lease had been assigned without consent, the letter stated that the tenant was in default in accordance with article 10.07, and that the landlord would be entitled to terminate the lease if the tenant did not cure such default within 15 days.

[6] Article 10.02 provided in part:

> The Tenant shall not pledge or assign this Lease or sublet or part with possession of the Premises or any part thereof, directly or indirectly, without the prior written consent of the Landlord which consent the Landlord agrees not to unreasonably withhold or delay. . . .

[7] Article 10.07 provided:

> In the event that the Tenant shall pledge or assign this Lease or sublet or part with possession of the Premises or any part thereof otherwise than in accordance with the provisions of this Lease, the Landlord may give the Tenant notice of such default hereunder where upon the Tenant shall have fifteen (15) days to cure such default failing which the Landlord shall be entitled to terminate the Lease and to re-enter the Premises.

[8] The Corporation disputed the notice on the basis there had been no assignment. Strategic maintained that the landlord was treating the lease as having been assigned, and wrote further on January 8, 2007, "The landlord is treating the Lease as having been assigned without the Landlord's consent and unless this default is cured on or before January 19, 2007, the Landlord will be entitled to exercise its remedies pursuant to the Lease, including termination."

[9] After an exchange of correspondence, on January 12, by telephone and faxed letter, the landlord's solicitor asked the partners to request the landlord's consent to the assignment. On January 17, despite maintaining their objection, the respondents, in an effort to resolve the concerns of the landlord, requested its consent to the assignment of the lease from the Partnership to the Corporation. On the following day (January 18), the landlord sent a letter serving notice that it was terminating the lease pursuant to article 10.03. It relied upon the tenant's request for consent, which it had invited the tenant to make.

[10] Article 10.03 provides in part:

> Notwithstanding section 10.02, within 30 (30) days after the receipt by the Landlord of such request for consent and all of the information which the Landlord shall have requested hereunder (and if no such information has been requested, within ten (10) days after receipt of such request for consent) the Landlord shall have the right upon written notice to the Tenant, if the request is to assign this lease or sublet the whole of the Premises, to cancel and terminate this Lease . . . on a termination date to be stipulated in the notice of termination which shall not be less than sixty (60) days or more than ninety (90) days following the giving of such notice. . . . If the Landlord shall not exercise the foregoing right of cancellation then the Landlord's consent to the Tenant's request for consent to assign or sublet shall not be unreasonably withheld . . .

[11] The respondents refused to vacate. The landlord brought an application to enforce its rights of possession under the lease. The master in chambers found that the lease articles 10.02 and 10.03 were inconsistent and struck out 10.03 as unenforceable. As the landlord had relied upon article 10.03 to gain possession, its application was consequently dismissed.

[12] 550 appealed seeking, among other things, a declaration that article 10.03 of the lease was valid and enforceable, and that the lease was validly terminated effective March 31, 2007 pursuant to that provision.

Decision of the Chambers Judge

[13] The chambers judge refused to grant the landlord's application for possession. His reasons are set out at *550 Capital Corp. v. David S. Cheetham Architect Ltd*., 2008 ABQB 370, 70 R.P.R. (4th) 22. They are briefly summarized as follows for purposes of the appeal.

[14] The chambers judge found there had been an assignment of the lease without prior consent, contrary to article 10.02 of the lease.

[15] He further found that the landlord had given the tenant until January 19, 2007 to cure its default, which he identified as the "non-consensual assignment of the lease". Therefore, the respondents had until January 19 to cure the default. However, on January 18, the landlord purported to terminate the lease pursuant to article 10.03 of the lease.

[16] He held that the landlord was restricted to what it could do during the 15 days which it had given the tenant to cure the default. The landlord had invited the respondents to seek consent for the assignment of the lease, seemingly on the implicit basis that consent would be forthcoming. In any event, the chambers judge held that it would be inequitable to allow the landlord to rely upon article 10.03 when it had not allowed the tenant the full 15 days to cure its default.

[17] Further, the chambers judge considered that the tenants were entitled to invoke the doctrine of estoppel. He found that without the invitation to request consent, the respondents would not have sought consent. By seeking consent, the landlord could terminate under 10.03. Terminating the lease would be to the respondents' detriment. In other words, the landlord had prematurely ended the tenant's ability to cure its default of having assigned the lease without the landlord's consent.

[18] The chambers judge did not construe articles 10.02 and 10.03 as being inconsistent with each other, but merely that the landlord's use of 10.03 was inconsistent with its election to proceed under 10.07 and thereby, to give the tenant 15 days in which to cure its default.

[19] In these circumstances, the chambers judge extended the tenant's time for curing its default a further period of 10 days. The corporation was given this additional time to reassign the lease to the Partnership.

[20] Further, and in the alternative, he granted the respondents relief from forfeiture, including the respondents' failure to allow the landlord to show the premises to prospective tenants. The chambers judge found that the respondents' acts or breaches were not serious.

[21] The landlord sought a reconsideration from the chambers judge, and was heard on July 10, 2008. Reconsideration was sought on the basis that there were admissions made by the respondents that seem to be contradicted in the judgment. The respondents admitted the landlord said nothing and did nothing which would lead them to believe article 10.03 of the lease would not be relied upon.

[22] The chambers judge advised that he had not overlooked the admission. He distinguished between the landlord's right to rely on 10.03 and the tenant's right to cure a default. He relied on the landlord's conduct with regard to curing the default, not the landlord's use of 10.03.

Issue

[23] Can the landlord terminate the lease under article 10.03?

Standard of Review

[24] The interpretation of provisions of a lease as a contract involving questions of law are reviewed on a standard of correctness but where it is necessary to make fact findings in order to determine the essential terms, those findings warrant deference absent palpable and overriding error: *Double N Earthmovers v. Edmonton*, 2005 ABCA 104, 363 A.R. 201 at para. 16, aff'd, 2007 SCC 3, [2007] 1 S.C.R. 116.

Analysis

[25] I conclude the appellant cannot rely on article 10.03 to terminate the lease.

A. *Principles of Contract Interpretation*

[26] As the issue in this appeal requires the proper interpretation of the lease, it is useful to review some of the relevant principles of contract interpretation. The objective of contract interpretation is to discover and give effect to the real intention of the parties. "That intention must be found, in the first instance, in the operative words of the document, read as a whole, giving meaning to every provision if that is possible.": *Western Irrigation District v. Alberta*, 2002 ABCA 200, 312 A.R. 358 at para. 21 quoting *Scurry-Rainbow Oil Ltd. v. Kasha* (1996), 184 A.R. 177 at para. 43 (C.A.).

[27] A key principle of contract interpretation requires that words are to be given their ordinary and grammatical meaning: K. Lewison, *The Interpretation of Contracts* (London: Sweet & Maxwell, 2004) at 115. As well, a court must strive to harmonize apparently conflicting terms in a contract. Whenever possible, effect is to be given to all the terms of contracts, and none are to be rejected as having no meaning: *369413 Alberta Ltd. v. Pocklington*, 2000 ABCA 307, 271 A.R. 280 at para. 19 citing *Cotter v. General Petroleums Ltd.*, [1951] S.C.R. 154 at 158 and *Scanlon v. Castlepoint Development Corp.* (1993), 11 O.R. (3d) 744 at 770, 776 (C.A.), leave to appeal refused, [1993] 2 S.C.R. x.

[28] Where there is apparent conflict or inconsistency between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at para. 9. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective: *BG Checo* at para. 9 citing *Chitty on Contracts* (26th ed., 1989) at 526; Lewison, *The Interpretation of Contracts* (1989) at 206; *Git v. Forbes* (1921), 62 S.C.R. 1 *per* Duff J. (as he then was), dissenting, at 10, rev'd, [1922] 1 A.C. 256; *Hassard v. Peace River Co-operative Seed Growers Association Ltd.*, [1954] 2 D.L.R. 50 at 54 (S.C.C.). In seeking reasonable consistency between terms, they will, if reasonably possible, be reconciled by construing one term as a qualification of the other term; frequently, the general terms of a contract will be seen to be qualified by specific terms: *BG Checo* at para. 9, citing *Forbes v. Git*, [1922] 1 A.C. 256; *Cotter v. General Petroleums Ltd.*. But if "an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails.": *Alberta Power Ltd. v. McIntyre Porcupine Mines Ltd.* (1975), 58 D.L.R. (3d) 303; [1975] 5 W.W.R. 632 (Alta.S.C.A.D.), quoting *Forbes v. Git* at 259 (A.C.).

B. *Application of the Principles to the Lease*

[29] Reading the words of the lease, article 10.02 provided that the respondent tenants could not assign the lease without prior written consent of the landlord and further, the landlord's consent would not unreasonably be withheld. The agreement goes into detail regarding the right to assign, and the landlord's consent. Article 10.02 lists eight additional provisions refining the rights and obligations of the parties in this regard. These include that any change of control of the tenant is considered an assignment of the lease, consent to assign may be subject to payment of rent to the landlord, consent may be withheld if the proposed use violates any restriction or use covenant granted by the landlord, any proposed assignee must execute an agreement with the landlord to perform the tenant obligations in the lease, no advertising for assignment, consent by the landlord is not consent to other assignments, for any request for consent the landlord must be provided with information about the proposed assignee and the tenant cannot sublet to existing tenants.

[30] Article 10.04 provides some circumstances where the parties have agreed that the landlord will be acting reasonably if it withholds consent including where the landlord has covenants, restrictions or commitments to other tenants or parties and where the assignee does not have a successful business history or lacks a good credit rating. In such cases, article 10.04 provides that the tenant agrees not to bring any action in connection with the landlord's refusal to consent.

[31] Articles 10.05 and 10.06 makes further provisions if the landlord consents to an assignment.

[32] In contrast, article 10.03 states that notwithstanding section 10.02, if the tenant requests to assign the lease, the landlord has the right to cancel and terminate the lease. The effect of article

10.03 is to fetter and jeopardize, and effectively take away the tenant's rights agreed to under article 10.02.

[33] Inconsistent terms were described in *Neelon v. Toronto (City)* (1896), 25 S.C.R. 579 at 598 *per* Sedgewick J. as two stipulations that must be mutually exclusive of each other; they cannot stand together. "Being repugnant or irreconcilable, the one to the other, one or other or both must give way."

[34] Article 10.03 is inconsistent with article 10.02. The two articles cannot stand together. The landlord's right to terminate under 10.03 eliminates its obligation not to unreasonably withhold or delay its consent to an assignment by a tenant under 10.02.

[35] The landlord submits that the articles are not inconsistent. They give the landlord options when a tenant asks for consent to assign the lease: the landlord can consent, not consent, or terminate the lease.

[36] But from a tenant's point of view, there are no options. The tenant can seek consent to assign a lease and, on the basis of article 10.02, expect that the consent will not be unreasonably withheld or on the basis of article 10.03, expect that consent can be unreasonably withheld and the lease may be terminated. The provisions cannot be read harmoniously.

[37] It surely is not consistent with the landlord's obligation and the tenant's right under 10.02 either to negate or jeopardize such obligation or right anytime a tenant requests consent. In other words, a tenant should not be required to jeopardize its tenancy in the course of requesting the landlord to do something which it has promised, namely, not to unreasonably withhold its consent to an assignment.

[38] I appreciate that 10.03 opens with the words "Notwithstanding section 10.02". However, rather than creating a separate option to terminate on the part of the landlord, I see that provision as impinging on, or colliding with, the rights conferred in the prior provision. It is inconsistent with the covenant in 10.02 not to unreasonably withhold consent to an assignment that in order to exercise it, a tenant must jeopardize its whole entitlement.

C. *Tenant's Right to Assign a Lease*

[39] At common law, a tenant was free to dispose of its interest in a lease: E. K. Williams, *Williams and Rhodes Canadian Law of Landlord and Tenant*, 6th ed. looseleaf (Toronto: Carswell, 1983) at para. 15:3. But now, the almost universal practice is to include one or more clauses providing the tenant not assign or sublet without consent of the landlord: Law Reform Commission of British Columbia, *Report on the Commercial Tenancy Act* (Vancouver: Law Reform Commission, 1989) at 33. In British Columbia, the practice has been codified into the *Land Transfer Form Act*, R.S.B.C. 1996, c. 252, under schedule 4 as a covenant which may be included in a lease.

[40] Historically, implied in the provision requiring the landlord's consent was the proviso that such consent was not to be unreasonably withheld. *Halsbury's Laws of England*, for example, 27 Hals. (4th) 287-88 at para. 368 stated:

> 368. Unreasonable withholding of consent. Notwithstanding any express provision to the contrary, a covenant, condition or agreement against assigning, underletting, charging or parting with the possession of the demised premises, or any part of them, without licence or consent, is deemed to be subject to a proviso to the effect that such licence or consent is not to be unreasonably withheld. The proviso is not construed as implying a covenant on the part of the landlord not to refuse his consent arbitrarily or unreasonably, but if in fact it is so refused, the tenant is at liberty to assign without the landlord's consent and may obtain a declaration by the court of his right to do so. Although the tenant's right to assign or sublet is included as a term in a lease, it constitutes a separate positive covenant.

[41] The provision that a landlord will not unreasonably withhold consent is not implied in modern leases: *Southgate Shopping Centre Ltd. v. Alberta (Liquor Control Board)*, [1997] A.J. No. 1230 (Q.B.), aff'd, 2000 ABCA 45, [2000] A.J. No. 119. In some jurisdictions, not Alberta, the covenant not to unreasonably withhold consent is implied by statute: Yukon, *Landlord and Tenant Act*, R.S.Y. 2002, c. 131, s. 11; Saskatchewan, *Landlord and Tenant Act*, R.S.S. 1978, c. L-6, s. 13; Manitoba, *Landlord and Tenant Act*, C.C.S.M., c. L70, s. 22; Ontario, *Commercial Tenancies Act*, R.S.O. 1990, c. L7, s. 23; New Brunswick, *Landlord and Tenant Act*, R.S.N.B. 1978, c. L-1, s. 11; Prince Edward Island, *Landlord and Tenant Act*, R.S.P.E.I. 1988, c. L-4, s. 12; and Northwest Territories and Nunavut, *Commercial Tenancies Act*, R.S.N.W.T. 1988, c. C-10, s. 11.

[42] When the provision that consent will not be unreasonably withheld is negotiated and included as a term in a lease, it is nevertheless a separate, positive covenant. As explained in *Cudmore v. Petro Canada Inc.*, [1986] 4 W.W.R. 38 (B.C.S.C.), such a covenant is a separate contract, potentially giving rise to damages if the contract is repudiated and citing in support, Laskin, J. (as he then was) in *Highway Properties Limited v. Kelly, Douglas and Company Limited*, [1971] S.C.R. 562, who stated some general considerations respecting the interpretation of leases at 576:

> It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land.

[43] The British Columbia Court of Appeal agreed with the proposition from *Cudmore* that a lease is not simply a conveyance but also a contract, and specifically that an agreement not to

unreasonably withhold consent constitutes a positive covenant on the part of the landlord: *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.* (1989), 37 B.C.L.R. (2d) 306, 59 D.L.R. (4th) 1 at 30.

[44] Whether a right to terminate a lease by the landlord, upon receiving a request from its tenant to consent to an assignment, is consistent with its covenant not to unreasonably withhold its consent depends, of course, upon the wording of the lease. One such type of provision is described in *Tenant's Rights and Remedies in a Commercial Lease*, Harvey M. Haber, ed. (Aurora: Canada Law Book, 1998) at 47:

> In some of the more modern leases, landlords have been granting to themselves certain additional remedies in the case of an assignment and sublet. Typically, these additional remedies are called "shotgun termination clauses" and operate like this:
>
> (a) if a tenant wishes to assign or sublet, it must first provide notice to the landlord of such intent; then
>
> (b) the landlord, in a certain period of time, has to elect whether or not to terminate the lease instead of providing its consent for the assignment or sublet; and
>
> (c) if the landlord does in fact decide to terminate the lease, the tenant then has the right to either withdraw its request for consent or to accept the termination of the lease instead of the assignment or sublet.

[45] So-called shotgun termination clauses were included in the leases considered in *Zurich Canadian Holdings Ltd. v. Questar Exploration Inc.* 1998 ABQB 489, 222 A.R. 292, 62 Alta. L.R. (3d) 197, aff'd 1999 ABCA 75, 232 A.R. 160 and in *Orbus Parma Inc. v. Kung Man Lee Properties Inc.*, 2008 ABQB 754.

[46] In *Zurich*, the lease provided:

> If the Tenant intends to effect a Transfer, the Tenant shall give prior notice to the Landlord of such intent specifying the identity of the Transferee, the type of Transfer contemplated, the portion of the Premises affected thereby, and the financial and other terms of the Transfer, and shall provide such financial, business or other information relating to the proposed Transferee and its principals as the Landlord or any Mortgagee requires, together with copies of any documents which record the particulars of the proposed transfer. The Landlord shall, within 30 days after having received such notice and all requested information, notify the Tenant either that:

> (a) it consent or does not consent to the Transfer in accordance with the provisions and qualifications of this Article VIII; or
>
> (b) it elects to cancel this Lease as to the whole or part, as the case may be, of the Premises affected by the proposed Transfer , in preference to giving such consent.
>
> If the Landlord elects to terminate the Lease it shall stipulate in its notice the termination date of this Lease, which date shall be not less than 30 days nor more than 90 days following the giving of such notice of termination. If the Landlord elects to terminate this Lease, the Tenant shall notify the Landlord within 10 days thereafter of the Tenant's intention either to refrain from such transfer or to accept termination of this Lease of the portion thereof in respect of which the Landlord has exercised its rights. If the Tenant fails to deliver such notice within such 10 days or notifies the Landlord that it accepts the Landlord's termination, this Lease will as to the whole or affected part of the Premises, as the case may be, be terminated on the date of termination stipulated by the Landlord in its notice of termination. If the Tenant notifies the Landlord within 10 days that it intends to refrain from such transfer, then the Landlord's election to terminate this Lease shall become void.

[47] Similarly, in *Orbus*, the lease provided:

> In the event that the Tenant desires to assign, sublet or part with possession of all or any part of the Leased Premises or to transfer this Leases (sic) in any other manner, in whole or in part or any estate or interest thereunder, then and so often as such event shall occur the Tenant shall give prior written notice to the Landlord of such desire, specifying therein the proposed assignee, transferee or sublet tenant and the Landlord shall, within thirty (30) days thereafter, notify the Tenant in writing either, that: (i) it consents or (ii) does not consent as aforesaid to the assignment, subletting or parting with or sharing possession as the case may be, or (iii) it elects to cancel this Lease in preference to the giving of such consent. In the event the Landlord elects to cancel this Lease as aforesaid, the Tenant shall notify the Landlord in writing within fifteen (15) days thereafter of the Tenant's intention either to refrain from such assigning, subletting or parting with or sharing possession or to accept the cancellation of this Lease. Should the Tenant fail to deliver such notice within such period of fifteen (15) days, this Lease will thereby be terminated upon the expiration of the said fifteen (15) day period. If the Landlord shall not exercise its option to cancel this lease, then 17.01 and 17.05 continue to apply.

[48] These leases contain provisions effectively enabling the tenant to withdraw its request for consent to an assignment, thereby allowing the tenant to continue its tenancy. In such case, the mere

request for consent does not jeopardize the continuing tenancy of the tenant. No similar provision exists in the lease in this case.

[49] In looking at the whole of the contract in this case, the intent cannot have been to give the tenant an unenforceable right. The tenant's right to seek the landlord's consent to assign and have such consent not unreasonably withheld was accorded in article 10.02 and elaborated upon in article 10.04, with further provisions upon such assignment set out in articles 10.05 and 10.06. Yet, article 10.03 appears to make that right effectively unexerciseable as it permits the landlord to terminate without ever considering granting or withholding consent. Permitting the landlord to terminate as set out in article 10.03, without consideration to the reasonableness of the action, is also contrary to the intent of articles 10.02 and 10.04, which aim to define the circumstances for denying consent and eliminate arbitrary conduct.

[50] As well, the consequences of article 10.03 cannot have been the intent of the contract. Serious repercussions can result to the tenant who, upon making a request for consent to assign, faces the possibility of termination of its lease with no ability to withdraw the request and put itself back into its original position. The consequences are particularly highlighted in this case, where there was no change from the landlord's point of view and no change in the tenant's business; the tenant only sought to assign the lease to the new corporate identity. The partners continued to remain bound to the landlord for the fulfilment of all of the terms, covenants, conditions, and agreements contained in the lease (article 10.06).

[51] In considering the equities between the parties, finding article 10.03 unenforceable puts the landlord in no worse a position. Either the lease is assigned, or the original tenants continue with the lease; in either case, the landlord maintains the lease on the same conditions as before. The tenants, however, are put at considerable risk if article 10.03 is enforceable. At any time they seek to assign the lease, they risk having the lease terminated without any consent being given or denied. Such a result is inconsistent with the commercial purposes of the lease.

[52] In this case, article 10.03 is unenforceable. As the Alberta Supreme Court Appellate Division held in *Alberta Power Ltd. v. McIntyre Porcupine Mines Ltd.* at 637 (W.W.R.), quoting from *Forbes v. Git* at 259 (A.C.), "If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails." This was also the result in *Zurich* where this Court also found that a landlord could not rely on terms of a head lease inconsistent with the prevailing specific terms of a sublease.

[53] Therefore, article 10.02 prevails, and the landlord cannot unreasonably withhold consent to the tenant's request to assign. As the landlord simply invoked article 10.03 and did not rely upon the tenant's alleged default in assigning the lease without its prior consent as the basis for termination, this issue has not been canvassed by the court.

[54] As previously related, the chambers judge extended the tenant the opportunity to cure its default, and this Court was advised that the corporation has reassigned the lease to the partners. The landlord raised the issue whether this reassignment is sufficient to cure the default, in any event.

[55] In these circumstances, if the parties are unable to resolve their differences having regard to this judgment, then it is open for them to commence new proceedings; i.e., the landlord may apply for possession on the basis that an assignment has been made without consent; the tenant is entitled to take the position that the consent has been unreasonably withheld.

[56] In view of my interpretation of the lease, it is not necessary to deal with other issues raised by the parties in their oral submissions. As the tenant failed on the evidence to show a promise by the landlord to give its consent, promissary estoppel is not applicable. I need not, in these circumstances, rule on whether other equitable relief was available in the circumstances.

Conclusion

[57] In result, the appeal is dismissed.

Appeal heard on February 11, 2009

Reasons filed at Calgary, Alberta
this 12th day of June, 2009

Kenny J.

I concur: O'Brien J.A.

I concur: Rowbotham J.A.

Appearances:

S. S. Smyth
for the Appellant

J. A. Glass
for the Respondent

TAB 3

Court of Queen's Bench of Alberta

Citation: Accel Canada Holdings Limited (Re), 2020 ABQB 182

Date: 20200311
Docket: 1901 16581
Registry: Calgary

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

In the Matter of Accel Canada Holdings Limited and Accel Energy Canada Limited

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Reasons for Judgment
of the
Honourable Madam Justice K.M. Horner

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[1] On March 6, 2020 I delivered an Oral Decision in these Applications and noted that written Reasons would follow. These are those Reasons.

[2] In these proceedings the Applicants, Accel Canada Holdings Limited and Accel Energy Canada Limited (collectively Accel and separately Holdings and Energy) applied on November 22, 2019 to this court for an Order in proceedings they had commenced under Part III of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] to continue under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*] which was granted. On November 27, 2019 that Order was amended and restated with the Stay granted therein extended to January 31, 2020 and then on January 21, 2020, further extended to March 13, 2020.

[3] There are currently before this court Applications of four different stakeholders in these Arrangement proceedings, informally referred to as the Gross Overriding Royalty Applications. They involve applications for determination and if appropriate Declarations with respect to the following issues:

1. Whether the Gross Overriding Royalties ("GOR") held by ARC Resources Ltd ("ARC") and B.E.S.T. Active 365 Fund LP, B.E.S.T. Total Return Fund Inc. and Tier One Capital Limited Partnership (collectively "BEST"):

a) Are interests in land or contractual security for payment;
b) Can be vested off title pursuant to a Sale Approval/Vesting Order;
c) Can be redeemed for a specific sum; and
d) Have priority over other security interests held by other stakeholders.

Background

[4] Pursuant to an Asset Purchase and Sale Agreement dated May 10, 2018 (the "APA") ARC as vendor sold certain assets (the "Redwater Assets") to Holdings as purchaser. The purchase price ("PP") in the APA was $154M. Holdings did not pay the whole of the PP but rather Holdings granted to ARC a GOR under a Gross Overriding Royalty Agreement ("ARC GOR"), with royalty payments by Holdings to ARC triggered by certain events to occur in the future, namely payment by Holdings to ARC of the remaining PP of $40M (the "DPP") on or before January 1, 2020 or July 1, 2020.

[5] Holdings financed that portion of the PP that ARC did receive on closing with monies borrowed from Third Eye Capital Corporation ("TEC"). The loan by TEC was secured by way of a first ranking security interest in all of Holdings' property, including those assets purchased from ARC and in particular the assets underlying the ARC GOR.

[6] TEC (which includes itself and as agent for others) is the largest secured lender of Holdings and is currently owed over $300M. TEC has made significant loans to Accel beginning in June 2017. The loans were predominantly used by Holdings to pursue acquisitions including the Redwater Assets under the APA. In return, Holdings granted to TEC a variety of security agreements including credit agreements and fixed and floating charge debentures over all present and after acquired property, security interests in all of its present and after acquired personal property and fixed charges over certain lands, leases and/or agreements.

[7] TEC made numerous registrations of its security beginning in 2017, as will be discussed further in the consideration of the priorities issues. As at September, 2019 it also held first ranking security on Energy, which security is itself the subject of a further validity court challenge, but which may have $12.5M outstanding to TEC.

[8] The APA contains a clause whereby ARC acknowledged the first ranking security of TEC in the underlying ARC GOR assets. All three parties, namely Holdings, TEC and ARC also entered into an Acknowledgement Agreement ("Acknowledgement") that was supposed to record this understanding, but the effect of which is itself a component of this dispute.

[9] On August 29, 2018 and October 12, 2018, BEST entered into Royalty Purchase Agreements ("RPA") and GOR Agreements with Energy and Holdings respectively. These are referred to as GOR#1 and GOR#2 (collectively the "BEST GORs"). The purchase price for GOR#1 was $3M and for GOR#2 was $5M. Both sets of agreements were structured in an identical manner. Should either Energy or Holdings repurchase the Royalty by a set date for a stated amount, November 1, 2018 and $3.5M for GOR#1 or December 1, 2018 and $6M for GOR#2, the GOR would terminate. The stated amounts were not paid by either Holdings or Energy on the set dates contracted for.

[10] If the stated amount was not paid by the respective Accel entity by the set date, then the BEST GORs were payable by the respective Accel entity until an Aggregate Proceeds Amount ("Payout") had been paid pursuant to the royalty payments due under the GOR Agreements. In

the case of GOR#1, the Payout was the greater of $4M or an amount equal to $3M and interest at a rate of 59.4% per annum calculated and compounded monthly. In the case of GOR#2, the Payout was the greater of $6M or an amount equal to $5M and interest at a rate of 59.4% per annum calculated and compounded monthly. The term of each BEST GOR continues until the date that BEST has received sufficient royalty payments to reach Payout.

[11] The Monitor applied for and was granted an Order Approving Sale and Investment Solicitation Process ("SISP") over all or nearly all of the Assets of Accel on December 13, 2019. Phase one of the SISP has ended. The Monitor and Accel have therefore requested that this court accelerate its determination of the issues in these Applications in order to assist it and the potential purchasers and/or investors with certainty surrounding the nature of the assets offered for sale and this court's jurisdiction to vest off interests.

[12] I will address each issue in turn and will deal with additional facts as they are relevant to the discussion and determination.

1. Interest in land or contract for payment

[13] The current leading decision in this area in Canada remains the Supreme Court decision in ***Bank of Montreal v Dynex Petroleum Ltd***., 2002 SCC 7. That decision has more recently been the subject of application in similar circumstances to these by the Court of Appeal in Ontario in ***Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc***, 2018 ONCA 253 [***Dianor 2018***]. The ***Dianor 2018*** decision was itself the subject of discussion and application by this court in ***Manitok Energy Inc (Re)***, 2018 ABQB 488.

[14] These cases make it clear and the parties agree the test for determining whether a royalty is an interest in land is whether:

1. the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
2. the interest, out of which the royalty is carved, is itself an interest in land.

[15] These facts do not engage part 2 of the test. All parties are agreed that Accel's interests underlying the royalties in issue are themselves interests in land.

[16] Part 1 of the test, however, requires that the court determine the parties' intention in making the contracts that are outlined above. Our court of Appeal in ***Bank of Montreal v Dynex Petroleum Ltd***, 1999 ABCA 363 at para 73, aff'd 2002 SCC 7, quoted with approval in ***Dianor 2018*** at para 63, set out the approach of a court in determining the parties' intention in these circumstances which is to "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words."

[17] When interpreting an agreement, a court must read the contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": ***Creston Moly Corp v Sattva Capital Corp***, 2014 SCC 53 at para 47. Nonetheless, while surrounding circumstances are important considerations, they must not overwhelm the words of the contract or effectively create a new agreement contrary to the wording of the agreement itself: ***Sattva*** at para 57.

[18] It is important to consider the surrounding circumstances, also referred to as the "factual matrix", of an agreement because "words alone do not have an immutable or absolute meaning": Sattva at para 47. Therefore, courts must consider the surrounding circumstances regardless of whether or not a contract is ambiguous; failing to consider the surrounding circumstances when interpreting a contract is a reversible error: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at paras 57, 58, leave to appeal to SCC refused 37712 (5 April 2018).

[19] The parole evidence rule, which prevents the admission of outside evidence that alters the words of a contract, does not apply when considering the surrounding circumstances as to the intent of parties to an agreement. The primary concern of the parole evidence rule is to ensure certainty and finality in contractual arrangements by precluding evidence beyond the contract itself; however, because evidence of surrounding circumstances must necessarily be within the knowledge of both parties at or before the time of agreement, those concerns of improperly varying or contradicting the agreement do not apply: ***Sattva*** at para 59.

[20] The evidence that can be relied upon to determine the "surrounding circumstances" varies from case to case: ***Sattva*** at para 58. Evidence of surrounding circumstances should only consist of objective evidence about the background facts at the time of the contract execution. The evidence must have been, or reasonably ought to have been, within the knowledge of both parties at the time of or prior to the contract execution: ***Sattva*** at para 58.

[21] Determining what constitutes surrounding circumstances is a question of fact: ***IFP Technologies*** at para 83. Surrounding circumstances are relevant background facts that are likely not controversial to the parties and are capable of affecting how a reasonable person would understand the language of the document: ***Alberta Union of Provincial Employees v Alberta Health Services***, 2020 ABCA 4 at para 25 [***AUPE***]. Relevant background facts include those that speak to:

1) the genesis, aim or purpose of the contract;
2) the nature of the relationship created by the contract; and
3) the nature or custom of the market or industry in which the contract was executed: ***IFP Technologies*** at para 83.

[22] The type of evidence that can be used is broad, and can include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man": ***Sattva*** at para 58, citing Lord Hoffman in ***Investors Compensation Scheme Ltd. v. West Bromwich Building Society*** (1997), [1998] 1 W.L.R. 896 (U.K. H.L.) at 913.

[23] In a commercial contract, the Court should know the commercial purpose of the contract, which assumes knowledge of the genesis of the transaction and the background, context, and market in which the parties are operating: ***AUPE*** at para 24. Contractual interpretation is "an exercise in determining what the parties objectively intended having regard to the entire written text, relevant contextual background and commercial context": ***IFP Technologies*** at para 89.

[24] In ***IFP Technologies***, the Court considered an antecedent agreement and written evidence of negotiations proceeding the agreement: at paras 84, 85. As further discussed below, negotiations preceding a contractual agreement are often not permissible evidence of surrounding circumstances. However, where written evidence of negotiations can provide a

relatively objective indication of relevant background facts, such as the genesis and aim of the contract, it may be permissible: ***IFP Technologies*** at para 85.

[25] Overall, the evidence that can be used to show the surrounding circumstances of an agreement is largely left to the Court's discretion, considering the circumstances of the case. The key requirements are that the evidence speaks to objective intentions relating to the background of the agreement that was known to all parties at the time of agreement.

[26] Conversely, evidence that is not objective or known to the parties at the time of the agreement is not permissible evidence of surrounding circumstances. Therefore, evidence of subjective intentions is always inadmissible: ***AUPE*** at para 27; ***Sattva*** at para 58.

[27] Evidence of pre-contract negotiations, including prior drafts, is generally inadmissible as subjective evidence about what the parties intended: ***AUPE*** at para 27. However, the issue of whether all pre-contract negotiations are admissible is unclear. The Alberta Court of Appeal stated in ***AUPE*** at para 32 that ***Sattva*** should not be interpreted broadly so as to define surrounding circumstances to include all pre-contract negotiations as long as they do not include subjective intentions. The Court of Appeal determined that where evidence of pre-contract negotiations overlaps with evidence of surrounding circumstances, it may provide an objective interpretive aid where not speaking to subjective intentions and as long as it doesn't overwhelm the meaning of the written contract: ***AUPE*** at para 3; ***IFP Technologies*** at paras 85–87.

[28] Post-contract conduct is not admissible in regard to determining the intentions of the parties. The only instance where evidence of post-contract conduct is admissible is where it is permitted as an exception to the parole evidence rule because of an ambiguity in the contract. A contract is only ambiguous where the words can be reasonably interpreted to have more than one meaning: ***IFP Technologies*** at para 87; ***AUPE*** at para 44.

[29] In summary, the central feature of evidence that is not proper to consider as an aspect of the surrounding circumstances is that which only proves the subjective intentions of the parties. Clear examples of evidence based on subjective intentions include a bald statement by one party as to their interpretation of the agreement or pre-contract negotiations that speak only to the subjective intent of a party and/or overwhelm the resulting written agreement. Post-contract conduct is also inadmissible for the purpose of proving the surrounding circumstances at the time of the agreement.

[30] In the context of the present proceedings, any evidence in the affidavits that speaks to the circumstances leading to the agreements at issue is admissible. If the Court is satisfied that the information was known to both parties at the time of the agreements and is evidence of an objective intent, rather than mere statements about an individual's subjective beliefs, then that evidence can be considered. Considering the interrelated nature of some of the entities in this proceeding and the commercial reality of these types of agreements, evidence of interrelated occurrences and negotiations may be relevant as long as all the parties to the specific agreements were aware of it.

[31] This court's review of the permissible surrounding circumstances then will be directed at determining the genesis, aim and purpose of the contract, the nature of the relationship created by the contract and the custom of the market in which the contract was executed.

[32] As our Court of Appeal put it so succinctly in ***AUPE*** at para 30; "Obviously there would be no dispute if there was consensus on the intent, so the lack of consensus does not assist in interpretation."

[33] With these principles in mind, I then turn to a consideration of the wording of the ARC GOR and the BEST GORs together with the circumstances surrounding each transaction.

[34] Accel has filed an Application asking this court to find that the interests granted in each case are not interests in land but rather security for payment or performance and, as such, are contracts that do not run with the land.

[35] TEC similarly submits that the respective GORs are personal in nature and not interests in land.

[36] Each of the GOR holders, ARC and BEST, urge the court to find that the parties used clear language in the appropriate respective contracts to vest interests in land.

[37] What is really at stake now that the grantor or debtor, Holdings and Energy, have entered insolvency proceedings is priority concerns with all stakeholders taking positions most advantageous to their interests and, in particular, in sharing in any sale proceeds that may be realized by the SISP. It is from this perspective that the court reviews the evidence and arguments put forward.

ARC GOR

[38] ARC makes several arguments in favour of this court determining that its GOR is an interest in land. They are, in summary:

1. ARC was the owner of the Redwater Assets prior to the transfer to Holdings and, as owner, reserved the GOR share out of the of the Redwater Assets that were transferred, such that ARC remains both the owner of the assets subject to the ARC GOR and the payee under the ARC GOR;
2. The APA and the ARC GOR manifest by their language a clear intention of the parties that ARC be the owner of the ARC GOR at the conclusion of the transaction; and
3. The parties intended the ARC GOR to be an interest in land as evidenced by the wording of the APA and the ARC GOR.

[39] TEC and Accel submit that the ARC GOR, when read in conjunction with the APA and the Acknowledgment, clearly contemplate that the GOR is itself a security interest, albeit one that is a charge on land within the definition of same provided by the *Law of Property Act*, RSA 2000, c L-7 [*LPA*]. Section 64(1) of the *LPA* defines a charge on land as "an interest, whether arising immediately or in the future, in real property given by a corporation, that secures payment or the performance of an obligation.

[40] Although the APA and ARC GOR do not in the language of either couch the grant as a security interest, TEC and Accel submit that when the entirety of the documents and the transaction is viewed as a whole it is clear that the ARC GOR is security for the payment of the DPP. It is the mechanism used by ARC to secure its right to payment under the APA.

[41] When considering the intention of the APA and ARC GOR, I find that the agreements are capable of more than one meaning. On one hand, the ARC GOR could be interpreted as creating an interest in land, considering the potential for a royalty interest in perpetuity and plain wording of the provision stating that the ARC GOR creates an interest in land. On the other hand, the APA envisions the GOR as a mechanism of ensuring payment and could be read to establish a contractual agreement to pay secured by a royalty interest. Accordingly, I am permitted to consider some evidence of post-contract conduct in order to address that ambiguity.

[42] I will begin by considering the words of the ARC GOR and the APA, and then address the surrounding circumstances.

[43] Several components of the APA are particularly relevant to determining the intention of the parties in creating the ARC GOR. The Deferred Purchase Price Amount ("DPP") of $40M outlined in the ARC APA is to bear interest at the rate of 6% per annum calculated daily. The DPP and combined interest are the Deferred Obligations ("DO"). Pursuant to para 2.4 of the APA, the DO is due and payable by Holdings on January 2, 2020 (the "Maturity Date").

[44] As per para 2.8(c) of the APA, Holdings was also to make monthly payments of interest to ARC following closing. As per para 2.8(g) of the APA, Holdings agreed to provide a GOR to ARC which would be triggered only if the DO were not paid by January 2,2020 and would only bind the Petroleum and Natural Gas Rights as defined in the APA from and after that date.

[45] As per para 2.8(g)(i) of the APA, the DO that remain outstanding after January 2,2020 comprise the Unpaid Amount ("UP"). If the UP is paid after January 2, 2020 but before July 2, 2020 the GOR will terminate as per para 2.8(g)(iii).

[46] If the DO are not paid on January 2, 2020 and the GOR is triggered and enforceable, then six months after that date (July 2020) ARC must calculate the GOR Elimination Amount ("GEA") as per para 2.8(g)(v) and Schedule "S" of the APA and then give notice to Holdings of the GEA (para 1.1(cccc) "Payout Amount"; para 2.8(g)(v)(A) and Schedule "S").

[47] The GEA is calculated by taking the UP and deducting any payments received by ARC under the GOR as per para 2.8(g)(v)(A) and Schedule S. If Holdings pays the GEA within ten business days of receiving Notice of the GEA, the GOR terminates. If the GEA is not paid within the ten days period then the GOR is to continue in perpetuity as per para 2.8(g)(v)(B) of the APA. As per para 2.8(g)(vi) of the APA, ARC agreed to grant Holdings a Right of First Refusal in respect of a disposition by ARC of the ARC GOR.

[48] The ARC GOR was executed on the closing of the sale of the Redwater Assets under the APA dated August 15, 2018. Holdings has made no payments to ARC either of interest, the DO or the UP.

[49] The provisions that ARC submits support its position are:

1. The ARC GOR is to exist in perpetuity if Holdings does not pay the GEA within the time contracted for (yet to occur);

2. Para 2.2 of the ARC GOR Agreement uses the following language that makes it clear the parties intended the ARC GOR to be an interest in land:

> "....Shall constitute, and is to be construed as, an interest in land .....All terms, covenants, provisions and conditions of this Agreement shall run with and

> be binding upon the Royalty Lands and Title Documents, and the estates affected thereby for the duration of this Agreement.";

3. Para 2.3(c) of the GOR appoints Holdings as the agent and trustee of ARC with respect to proceeds;

4. Para 2.3(g)(i – iii) provide that ARC's prior written consent is to be obtained by Holdings prior to Holdings entering into a pooling unitization or other combination. Further para 3.1 provides that Holdings may not convert a well covered by the ARC GOR to another type of well. Para 3.4(c) requires Holdings to obtain ARC's consent to the surrender of title documents for the abandonment of a well covered by the ARC GOR;

5. Para 2.5(a) and para 4 provides ARC, upon the default of Holdings, with the right to take in kind its GOR, which ARC submits illustrates a strong badge of ownership as it means ARC may exert the right to take possession of its property;

6. Para 6.2 restricts Holdings from proceeding with certain types of transactions without ARC's consent; and

7. None of the language in the APA or the ARC GOR creates or talks of a security interest, charge or mortgage.

[50] Certain aspects of these provisions weigh toward the ARC GOR creating an interest in land, such as provisions that: refer to the creation of an interest in land; provide ARC with a right to take in kind the Petroleum Substances comprising the GOR, including upon default of payment by Accel; create the potential for an interest in perpetuity; and prevent Accel from proceeding with certain transactions that would affect the ARC GOR, such as particular assignments of interest.

[51] However, other aspects of the APA and ARC GOR point toward the ARC GOR being a security interest, including that the ARC GOR: predominantly ensures payment of the PP under the APA, plus interest; terminates upon full payment of the DO; does not exist in perpetuity unless Accel fails to meet its payment obligations, in which case only then additional funds would be paid to ARC by virtue of a continuing royalty interest; and is provided to ARC in exchange for payment of the APA's DO, and not in exchange for consideration from ARC beyond permitting Accel more time to meet its payment obligations.

[52] Accel points out that various cases in Alberta that have held that a significant feature of a security interest as opposed to an absolute transfer of an interest in land is whether the debtor or grantor retains a right of redemption: ***Alberta (Treasury Branches) v M.N.R; Toronto-Dominion Bank v MNR***, [1996] 1 SCR 963, ***Sharma v 643454 Alberta Ltd***, 2006 ABQB 119 and ***Equitable Trust Company v 604 1st Street SW Inc***, 2014 ABCA 427, rev'd on other grounds 2016 SCC 19.

[53] As Accel points out, the APA provides that the ARC GOR can be redeemed prior to January 2, 2020 as well as at any time after that to the expiration of the Notice of the GEA.

[54] Additionally, evidence of the surrounding circumstances at the time of the agreements also indicates that the ARC GOR was intended to be a security interest and not an interest in land.

[55] ARC was aware at all times that TEC was providing the financing to Holdings for the acquisition of the Redwater Assets in the APA. At the request of Holdings' counsel and 2 days prior to the closing of the scheduled APA the parties, TEC, ARC and Holdings entered into the Acknowledgment dated August 15, 2018.

[56] While it suffers from some ambiguous wording, reading the Acknowledgment in conjunction with correspondence between counsel during the drafting of and the drafts of the document themselves as well as considering the surrounding circumstances and giving the document commercial sense, it is clear that it subordinates the priority of whatever security interests ARC has that secure the payment by Holdings of the DPP and interest accruing due thereunder to the payment by Holdings to TEC of whatever security interests TEC has.

[57] It makes no commercial sense in the circumstances that were present when the APA and the TEC financing were negotiated that a lender in TEC's position would agree to subordinate its security to ARC for the DPP, as ARC would have the court read the Acknowledgement.

[58] Further, the second paragraph of the Acknowledgment, again given the circumstances surrounding the drafting and execution of it, make it clear that the subordination of ARC's security interests include the ARC GOR and that Holdings would not grant to ARC any "other" security interest as security for the DPP and accruing interest.

[59] The Acknowledgement therefore provides that the ARC GOR is subordinated to the TEC security interests. Priorities between the stakeholders to these Applications will be dealt with later in these reasons.

[60] After the APA, ARC GOR, and Acknowledgement were entered into, ARC continued to treat the ARC GOR as a security interest obtained to secure payment for the Redwater Assets under the APA.

[61] On May 6, 2019 ARC registered a security agreement and a land charge at the Personal Property Registry ("PPR") which identified ARC as the secured party, Holdings as the Debtor and the collateral as all the Debtor's right, title, estate and interest in the Petroleum Substances produced from the Royalty Lands as defined in the Royalty Agreement dated August 15, 2018 between the Debtor and the Secured Party.

[62] ARC also prepared and released public disclosure documents following the closing of the APA, in which the sale of the Redwater Assets was described as a disposition with the ARC GOR as security for the deferred portion of the PP.

[63] The evidence as a whole speaks to the objective intention of the parties that the ARC GOR provide a security interest for payment of the DO to ARC by Accel. Considering all of the evidence and submissions this Court is of the view that the ARC GOR is not an interest in land but rather is a security interest that does not run with the land.

[64] ARC applies in the alternative for this court to lift the Stay, currently set to expire March 13, 2020, and allow it to enforce the ARC GOR by invoking the take in kind provisions.

[65] TEC submits and this court agrees that the DPP, the UP and the GEA were all future debts to which Holdings was subject to on the initial filing date in October 2019 under both the *CCAA* and the *BIA*.

[66] In considering an application for the lifting of a Stay under the CCAA, the court is to consider the balance of convenience, the relative prejudice to the parties, the merits of the proposed action, the prejudice to the applicant of the continuation of the Stay and whether lifting the Stay is in the interests of justice.

[67] Beginning in at least March 2019, Accel began experiencing what would become sustained liquidity issues culminating in each entity filing a Notice of Intention to Make a Proposal under the *BIA* on October 21, 2019, resulting in a Stay of stakeholder's rights for a 10-day period, later extended.

[68] To allow ARC to proceed with its intended enforcement actions would have the effect of reversing the purpose of the Acknowledgement by allowing ARC to receive payments when Holdings' obligations to TEC are stayed.

[69] More importantly, the interests of justice are not served by allowing one of the stake holders to enforce its security interest and not the others. Lifting the stay would have the effect of draining finances from Holdings at a time when the status quo is the priority while it attempts to proceed with an orderly distribution of its assets. It would in effect prefer ARC over all the other Holdings stakeholders without equitable reason.

[70] ARC provides no evidence of prejudice other than the same prejudice that all stakeholders with security interests have and will suffer.

[71] The application to lift the Stay by ARC is accordingly denied.

[72] In the further alternative, ARC claims that para 2.3(c) of the GOR creates an express trust in its favour and asks this court to direct that Holdings or the Monitor hold the proceeds attributable to the Redwater lands that underlie its ARC GOR in trust for it.

[73] While para 2.3(c)(i) uses trust language, the ARC GOR as a whole must be reviewed to determine if the parties intended to great a true trust relationship.

[74] TEC submits that when the ARC GOR is considered on all of its terms it establishes a debtor-creditor relationship rather than a trustee-beneficiary relationship. TEC points to three indicia to support its interpretation:

1. The ARC GOR supports payments of interest to ARC;
2. The ARC GOR is silent on co-mingling of proceeds attributable to the ARC GOR with Holdings' own funds; and
3. The GOR does not restrict Holdings' use of the those proceeds between the periodic payments due to ARC.

[75] Again, in examining the true nature of the ARC GOR in light of the provisions of the APA and the surrounding circumstances present at the time of the execution of the agreements, it is clear that the ARC GOR is a security interest which secures the payment by Holdings to ARC of the DPP and does not give rise to a trustee beneficiary relationship.

[76] The application to hold the proceeds in trust is accordingly denied.

BEST GORs

[77] BEST relies predominantly on the language of the respective RPAs and BEST GORs to establish that Energy and Holdings granted to it interests in land and not security interests.

[78] As has already been reviewed in these reasons, the language used in the agreement is but one factor that the court considers in determining the intention of the parties to it.

[79] In August 2018, Accel sought short-term financing from BEST in order to bridge their capital requirements and to close a loan agreement with J.P. Morgan. Pursuant to a term sheet formalized on August 29, 2018, the parties entered into the RPA, whereby BEST agreed to purchase GOR#1 on Energy's lands for a purchase price of $3M, although Energy could repurchase GOR#1 at any time before November 1, 2018 for a purchase price of $3.5M. If GOR#1 was not repurchased by Energy before Nov 1, 2018, then GOR#1 was to remain effective until it expired. The Expiration Date is defined as the earlier of (i) the demand for payment by BEST, (ii) BEST receiving the greater of $4M OR the sum of $3M and an amount equal to interest of 59.4% per annum calculated and compounded monthly (the Aggregate Proceeds) and (iii) December 31, 2018.

[80] Payments under the RPA and GOR#1 were to commence November 1, 2018 if the repurchase option for $3.5M had not been exercised by Energy before that date.

[81] Pursuant to GOR#1, the payments to be made by Energy were to be that portion of the production equal to the Aggregate Proceeds amount and were to continue until the Aggregate Proceeds was paid. In other words, $3M plus interest at the rate of 59.4% until paid.

[82] BEST was entitled to demand payment at any time for any reason. The term of GOR#1 was until BEST received payment of the Aggregate Proceeds in full. If Energy defaulted in payment, then BEST was entitled to be reimbursed all out-of-pocket expenses incurred to enforce its rights under the RPA and GOR#1, which included professional fees of a certain stated kind.

[83] As security for the term sheet, Energy was to provide BEST with GOR#1.

[84] On October 12, 2018, BEST entered into a further RPA and GOR#2 whereby BEST purchased GOR#2 for $5M from Holdings. BEST was advised that the purpose of the advance was to complete an acquisition of strategic value. The terms of the RPA and GOR#2 are identical in all material respects to the RPA and GOR#1 entered into between the parties in August, 2018.

[85] No monies have been paid by Energy or Holdings to BEST under either transaction.

[86] As previously stated, in considering the BEST GORs, the real question is whether the transactions granted to BEST an interest in land or a contractual right to a portion of the Petroleum Substances recovered from the land by way of security for the payment to it of a stated amount.

[87] BEST submits that in addition to the clear grant of land language, a take in kind provision in each GOR signifies an interest in land. BEST also indicates other factors that support the creation of an interest in land, including that the BEST GORs provide a right to payment to BEST that is tied to production of the substances; create an interest capable of lasting for the duration of Accel's estate; and prevent Accel from an assignment without BEST's consent, for example.

[88] However, other factors indicate the intention of the parties to create a security interest. The overall aim and essence of the transaction support the creation of a security interest. In fact, BEST acknowledges the intention of the parties to create a security interest by also making the conflicting argument that the BEST GORs are registerable security interests capable of achieving priority over TECs interests.

[89] Further, the BEST GORs create limited, revisionary interests that terminate upon repayment of the Aggregate Proceeds. While Accel requires BEST's permission to assign its interests and obligations under the BEST GORs, Accel is entitled to pool or unitize the lands without express consent of BEST and is not generally limited in its decisions with respect to the substances, including its use of the substances as required for its operations. Finally, no further consideration was provided by BEST to attain an interest in the land beyond the funds provided to Accel which the BEST GORs function to provide repayment for from Accel. There is no further nexus between BEST and Accel's interest in the land.

[90] With respect to BEST's submissions, it is clear that when both sets of agreements and the surrounding circumstances of each transaction are considered, the agreements document a short-term financing agreement secured by a time-limited and extinguishable GOR. This conclusion is supported by the extremely high rate of interest, the demand nature of the repayment terms, and the repurchase amounts being the loan amounts rather than a calculation of the real value of the royalty, which would be tied to the underlying reserves of the land it is granted over.

[91] The BEST GORs are therefore determined to be security interests and not interests in land.

[92] BEST also applies to lift the Stay to allow it to take in kind sufficient Petroleum Substances under the GOR to repay the loan amounts. For similar reasons given with respect to the ARC application of the same nature, that Application fails and is dismissed.

2. Vesting Off the ARC and BEST Interests/Redemption

[93] As this court has determined that all three GORs before the court are not interests in land, but rather are security interests, there is no issue that the court can vest off the interests represented by the respective registrations. See ***Third Eye Capital Corporation v Ressources Dianor Inc/ Dianor Resources Inc***, 2019 ONCA 508.

[94] Given that each set of agreements provides for payout calculations it should be a simple matter to determine what those amounts are when these proceedings have reached a point where funds are ready for distribution among the stakeholders.

[95] The priorities of the various stake holders before this court on these applications based on those registrations will be dealt with below.

3. Priorities

[96] TEC, ARC, and BEST each registered multiple security interests related to their respective interests against Energy and Holdings, including security interests related to the TEC Financing Agreements with Accel as well as the ARC GOR and BEST GORs. The TEC Financing Agreements provided funding to ACCEL for the purchase of various petroleum and natural gas assets, including the Redwater Assets.

[97] TEC first registered security interests at the Personal Property Registry (PPR) on June 29, 2017, against Holdings in relation to the TEC Financing Agreements. TEC made other related registrations in the PPR against Holdings on October 31, 2017, June 27, 2018, August 15, 2018, and November 12, 2018. TEC registered each of those interests as both a land charge and as a security interest against all present and after acquired personal property of Holdings. TEC also registered interests in the PPR against Energy on September 20, 2019, including an interest against all present and after acquired property of ACCEL Energy and a land charge, which relates to a subsequent application in these proceedings.

[98] TEC registered security notices at Alberta Energy against Holdings on January 24, 2019, in relation to the financing of Accel's purchase of the Redwater Assets.

[99] BEST registered security interests through the PPR on October 18, 2018 as a land charge and a security interest against all of Holdings' right, title, estate and interest in the petroleum substances produced from the lands defined in the GOR#2 Agreement.

[100] BEST also registered a security notice against Holdings on November 15, 2018, at Alberta Energy with respect to multiple Crown mineral leases. BEST subsequently registered another security notice at Alberta Energy on January 9, 2019, against Energy.

[101] ARC registered a land charge and security agreement against Holdings' right, title, estate and interest in the Petroleum Substances produced from the royalty lands in the PPR on May 6, 2019. ARC also registered caveats against title to Holding's freehold oil and gas leases.

[102] In summary, TEC and BEST both hold multiple first in time registrations at Alberta Energy regarding Holdings' Crown mineral leases, while TEC has first in time registrations at the PPR against Holdings for land charges relative to both ARC and BEST.

[103] There are two key statutory regimes governing the security interests at issue in this circumstance: the *LPA* and the *Mines and Minerals Act*, RSA 2000, c M-17 [*MMA*].

[104] The *LPA* section 64(2) governs priority for registration through the PPR of charges on land and any right to payment arising in connection with an interest in land.

[105] Section 64(1)(b) of the *LPA* defines "charge on land" as "an interest, whether arising immediately or in the future, in real property given by a corporation, that secures payment or performance of an obligation". Real property is defined in section 64(1)(c) of the *LPA* to mean land, an interest in land, and a right to payment arising in connection with an interest in land but not a right to payment evidenced by a security or an instrument to which the *Personal Property Security Act*, RSA 2000, c P-7 [*PPSA*] applies. The *PPSA* does not apply to the creation of an interest in a right to payment that arises in connection with an interest in land: *PPSA* s 4(g).

[106] Under the *LPA*, priority of successive charges on land affecting the same interest are determined under section 64(2) as follows:

> **(2)** Subject to subsections (8) and (12), except in the case of fraud, priority among successive charges on land affecting the same interest shall be determined as follows:
>
> (a) priority between registered charges on land shall be determined by the order of registration without regard to the order of creation of the charges or execution of the agreements providing for the charges;

(b) a registered charge on land has priority over an unregistered charge on land;

(c) priority between unregistered charges on land shall be determined by the order of execution of the agreements providing for the charges.

[107] Registering under the *LPA* means, for the purposes of section 64, "registered by means of a financing statement in the Personal Property Registry in accordance with *the Personal Property Security Act* and the regulations made under that *Act*.": *LPA*, s 64(1)(d).

[108] Since 64(2) of the *LPA* is subject to subsections 10 and 12, it is necessary to consider those provisions as well. Subsection (12) relates to interests registered between 1990 and 1992, which is not relevant in this case.

[109] Subsection (8) states that:

> **(8)** This section is subject in all respects to the *Land Titles Act* and the *Mines and Minerals Act*, and the priority of any interest registered or filed under either Act shall be determined pursuant to that Act.

[110] Therefore, *LPA* registrations are subject to registrations undertaken pursuant to the *MMA*. The MMA permits secured parties to register a security notice in relation to security interests in a lease of Crown minerals: *MMA*, ss 2(a), 95. Section 95(4) establishes priorities under the *MMA* such that:

> **(4)** A security interest in respect of which a security notice is registered has priority
>
> (a) over any other security interest acquired before the registration of that security notice unless a security notice in respect of that other security interest is registered before the registration of the first mentioned security notice, ... and
>
> (b) (d) over any interest, right or charge acquired after the registration of that security notice.

[111] "Registered" in section 95 is defined as "registered under Division 2 of Part 6, in relation to a security notice or any other document registrable under that Division": *MMA* s 1(1)(ii). Registration under the *MMA* occurs through the registry operated by Alberta Energy.

[112] Under section 94(1) of the *MMA*, the following definitions apply to the registration of a Crown mineral lease:

> (e) "security interest" means an interest in or charge on collateral if the interest or charge secures
>
> (i) the payment of an indebtedness arising from an existing or future loan or advance, …
>
> and
>
> (a) "collateral" means
>
> (i) the interest of the lessee or of any of the lessees in an agreement, or

> (ii) an interest in an agreement derived directly or indirectly from the lessee or any of the lessees of the agreement or from a former lessee or any of the former lessees of the agreement;

[113] In summary, the *LPA* and the *MMA* govern registration of security interests in land or payment arising in land. The *LPA* provides for a registration-based priority system through the PPR, while the *MMA* provides a registration-based priority system through the Alberta Energy registry system for security interests relating to Crown mineral leases. PPR registrations in accordance with the *LPA* are subject to registrations that relate to Crown mineral leases under the *MMA*.

ARC GOR

[114] ARC argues that the ARC GOR is an interest in land, and that there is no registration system or statutory requirement for royalty holdings to register interests in land or interests against crown oil and gas leases.

[115] As previously discussed, the ARC GOR created a security interest, which is connected with the land making up the Redwater Assets. That security interest falls within the definition of "charge on land" within the meaning of the *LPA*, and also affects certain Crown mineral leases that fall within the meaning of the *MMA*. As such, it is governed by the statutory registration schemes under the *LPA* and *MMA*.

[116] TEC submits that it has first priority security interests based on registration under the *LPA* with respect to the Redwater Assets that are subject to the ARC GOR. Further, TEC submits that it also has priority over the land through its registration in accordance with the *MMA*.

[117] TEC registered security interests in Holdings present and after-acquired personal property and land charges in respect of its real property in the PPR on June 29, 2017. ARC did not register its security interest and land charge in the same property until May 6, 2019. TEC also registered security interests with Alberta Energy in accordance with the *MMA*. ARC did not register its security interest with Alberta Energy.

[118] TEC and Accel also argue that TEC's security interest ranks above the ARC GOR by virtue of the Acknowledgement. Conversely, ARC argues that that the Acknowledgement subordinates TEC's interest behind ARC's right to payment for the GOR.

[119] As previously discussed, applying the necessary principles of interpretation to the Acknowledgement indicates that the parties intended it to be interpreted as a full subordination of the ARC GOR, except for payments made in the ordinary course, which are currently stayed by the Orders in these proceedings.

[120] Therefore, priority is governed by date of registration for the security interests at issue. Accordingly, I find that TEC holds first in time registration in the Redwater Assets with respect to the ARC GOR pursuant to both the *PPSA*, in accordance with the *LPA*, and under the *MMA* with respect to the Crown mineral leases.

BEST GORs

[121] TEC and BEST are largely in agreement as to the state of registration regarding the Crown mineral leases related to the BEST GORs, but they disagree as to the effect of those registrations.

[122] BEST says that it holds first in time registrations with Alberta Energy against 88% of the Crown Mineral Leases subject to GOR#1 Agreement, and 43.6% of the Crown Mineral Leases subject to GOR#2.

[123] However, TEC submits that it has prior security interests over all of Accel's personal real property in the PPR, despite not having total first in time registrations under both the *LPA* and the *MMA* as compared to the BEST security interests. TEC therefore argues that BEST knew, or ought to have known, about TEC's security interests in the mineral leases, as registered first in time in the PPR prior to the BEST GORs, and that BEST's security interests should therefore be subordinated to TEC's security interests on the basis of that knowledge.

[124] Specifically, TEC argues that the *MMA* has a gap in its priority scheme that is not present in other property registries in Alberta. TEC says that the *MMA* is silent as to the effect of actual or constructive knowledge of a pre-existing interest on a secured party's right to rely on the priority rules set out in the *MMA* or as to the principles of the common law or equity.

[125] By way of contrast, TEC notes that the priorities in section 64(2) of the *LPA* are only effective "except in the case of fraud", and that section 64(9) further elaborates that:

> **(9)** For the purposes of subsection (2) and the *Land Titles Act*, a person does not act fraudulently merely because the person acts with knowledge of a charge on land, regardless of whether it has been registered under this section or not. [emphasis added]

[126] Similarly, the *PPSA* states that a "person does not act in bad faith merely because the person acts with knowledge of the interest of some other person": *PPSA* s 66(2). Further, the *PPSA* section 66(3) states that the "principles of common law, equity and the law merchant, except insofar as they are inconsistent with the express provisions of this Act, supplement this Act and continue to apply".

[127] TEC suggests that the Court must look to the common law to address the legislative gap, being the *MMA*'s failure to explicitly address knowledge. TEC claims that BEST was, or should have been, aware of its pre-existing security interests in the property and therefore should be subject to its interest despite the fact that TEC did not register its entire interest under the *MMA* prior to BEST. To that end, TEC relies on pre-PPSA case law to support the premise that actual knowledge of a prior unregistered interest can defeat a subsequent claim to title.

[128] BEST disagrees that there is a legislative gap. BEST submits that the *MMA* establishes a priority system based on registration, and that knowledge is not mentioned because knowledge is not relevant.

[129] As the Supreme Court of Canada stated in ***ATCO Gas & Pipelines Ltd v Alberta (Energy & Utilities Board)***, 2006 SCC 4 at para 51, a court must determine and apply the intention of the legislation "without crossing the line between judicial interpretation and legislative drafting". A court's role in filling in legislative gaps is described in Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law Inc, 2016) at 301 as follows:

> ...the courts have a jurisdiction to cure drafter's errors. However, gaps in the legislative scheme are attributed to the legislature. Gaps may be the result of a considered decision or the result of an oversight or mistake, but in either case the court normally claims that it has no jurisdiction to cure the problem. The

> technique required to remedy it, namely, reading in, is generally perceived as going beyond interpretation and impinging on the legislative role.

[130] It is for the legislature to address the statutory scheme for registration, not for this Court. The *MMA* establishes a clear priority ranking scheme in section 95(4), based on registration with Alberta Energy. If the Legislature was concerned with knowledge in creating a registration scheme under the *MMA*, it would have said so. Accordingly, I find that the *MMA* priority system is based solely upon registration as specified in section 95(4), without regard to knowledge.

[131] TEC and Accel also both argue that the principle of *nemo dat quod non habet* (*nemo dat*) should apply. *Nemo dat* is the principle that, as between legal interests in property, the first party to take a legal interest in a property takes priority: ***Innovation Credit Union v Bank of Montreal***, 2010 SCC 47 at para 51 [***Innovation***]. TEC suggests that Accel could not grant priority interests to BEST because it was prohibited from doing so under the Credit Agreement with Accel, which requires Accel to gain consent from TEC before incurring, among other things, new debts or liens against the land. TEC says that for this reason, Accel did not have the authority to grant a subsequent security interest to BEST.

[132] BEST argues that *nemo dat* doesn't apply to the *LTA* or the *MMA*.

[133] The Supreme Court's discussion of *nemo dat* in ***Innovation*** is indicative of the type of circumstances where the *nemo dat* principle may apply in relation to security interests. Those circumstances are distinguishable from the present circumstances. In Innovation, the Supreme Court of Canada applied the principle of *nemo dat* when considering two competing security interests. The competing interests were between an unperfected security interest subject to the *PPSA* and a subsequently acquired *Bank Act* security interest. *Nemo dat* was necessarily invoked in Innovation because the *Bank Act* gave priority over security interests acquired after the *Bank Act* security interest, without addressing whether or not a prior unperfected interest took priority. The Court noted that because the *Bank Act* establishes that a *Bank Act* security interest is subject to prior acquired interests, the Bank can receive no greater interest in the property than the debtor has, similar to the principle of *nemo dat*: ***Innovation*** at para 51. The Bank in ***Innovation*** asked the Court to adopt a rule that would give priority based on registration rather than relying on principles of *nemo dat*, and the Court recognized that it would be open to Parliament, rather than the Court, to do so: at paras 52, 53.

[134] The circumstances in ***Innovation*** are distinguishable from the present circumstances, where the statutory schemes of the *LPA* and *MMA* both establish priority schemes based on registration. Here, the Legislature has created priority schemes under the *MMA* and the *LPA*, and therefore the principles of *nemo dat* are not applicable as to determining priority between security interests in the same property.

[135] Registration systems provide commercial certainty. The registration schemes in the *LPA* and *MMA* establish priority for security interests based on registration. It is neither necessary nor would it provide certainty to commercial parties to create additional obligations beyond those contemplated within the statutory regimes, such as by limiting that priority system based on knowledge or preventing a party from providing funding in exchange for a security interest based on *nemo dat*.

[136] Accordingly, the statutory registration schemes, as established in the *LPA* with regard to the freehold leases and the *MMA* with regard to the Crown mineral leases, apply to determine

which interests are first in time as between TEC and the BEST GORs. Therefore, priority with respect to the BEST and TEC interests is also governed by date of registration for the security interests at issue. The Crown mineral leases have priority based on date of registration under the *MMA*, and any remaining leases have priority based on registration under the *PPR*.

[137] Should the parties wish to address costs of these applications, their respective right to do is reserved.

Heard on the 20th and 21st days of February, 2020. Oral Reasons given on the 6th day of March, 2020.
Dated at the City of Calgary, Alberta this 11th day of March, 2020.

K.M. Horner
J.C.Q.B.A.

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TAB 4

Court of Queen's Bench of Alberta

Citation: Bellatrix Exploration Ltd (Re), 2020 ABQB 332

Date: 20200521
Docket: 1901 13767
Registry: Calgary

In the Matter of the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36, as amended

And In the Matter of the Plan of Compromise or Arrangement of Bellatrix Exploration Ltd.

Reasons for Judgment of the Honourable Madam Justice M.H. Hollins

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[1] Bellatrix Exploration Ltd. is an oil and gas company involved in proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c.C-36 (*CCAA*). It has been soliciting offers to purchase its assets or shares over approximately the last six months. On Thursday, May 7, 2020, I heard Bellatrix' application for an Order approving the Asset Purchase Agreement it signed with Winslow Resources Inc. on April 22, 2020. Winslow's offer was backed by its parent company, Return Energy Inc. doing business as Spartan Delta Corp. For consistency with other material filed in this Action, that purchaser is referred to herein as Spartan.

[2] The Spartan Asset Purchase Agreement, if approved, would produce sufficient funds to pay the *CCAA* priority charges and a substantial portion of the first lienholder notes, as well as providing for the assumption of other contractual and statutory obligations. It would not be sufficient to pay the entire first lienholder debt and would leave nothing for the second or third lien note holders.

[3] The application to approve was opposed by a group of creditors holding the majority of the second lien notes of Bellatrix, namely FS/EIG Advisor LLC and FS/KKR Advisor LC (EIG/KKR), as well as the remaining minority of second lien noteholders, separately represented.

[4] EIG/KKR cross-applied for an adjournment of Bellatrix' application for a period of just less than 3 weeks in order to put an alternative, and in their opinion, better offer before the Court. The adjournment application was opposed by all the parties supporting the Spartan bid, namely Bellatrix, the Monitor PricewaterhouseCoopers Inc. (PWC), the first lien noteholders and their lenders, the prospective purchaser and by numerous other parties with which Bellatrix does business.

[5] I dismissed EIG/KKR's application for the adjournment and approved the Spartan Asset Purchase Agreement. I provided brief oral reasons on May 8, 2020 with these written reasons to follow.

Background

[6] Bellatrix Exploration Ltd. is a Calgary-based oil and gas company with assets in Saskatchewan, Alberta and British Columbia. Its President/Chief Executive Officer deposed to a number of market conditions which have depressed commodity prices and created uncertainty in the market, resulting in Bellatrix seeking *CCAA* protection. An Initial Order under the *CCAA* was granted on October 2, 2019. That was quickly followed by the Order approving the Sales and Investment Solicitation Process (SISP) on October 9, 2019.

[7] The first phase of the SISP was to solicit non-binding expressions of interest in the purchase of the assets or shares of Bellatrix. From those received, Bellatrix and the court-appointed Sale Advisor, Bank of Montreal Capital Markets (BMO), would then select parties to participate in second phase, during which those parties would complete their due diligence and formulate binding bids.

[8] Under the SISP, Phase I ran to November 13, 2019. The parties proceeding to Phase II were to submit binding bids by a date to be chosen by the Bellatrix, called the Binding Bid Deadline (ultimately February 6, 2020). The SISP required Binding Bids to be, *inter alia*, irrevocable and accompanied by an irrevocable financial commitment from any entity financing a particular bid.

[9] Bellatrix' existing creditors were also entitled to participate in the sales process. These creditor bidders were not required to participate in Phase I of the SISP and in fact were not required to submit their bid by the Binding Bid Deadline. They were entitled to be advised whether any third-party bids being considered would be sufficient to pay out the Secured Notes (defined as the first, second and third lien noteholders collectively) and to receive detailed information about any such third-party bids.

[10] Bellatrix and the Monitor were permitted, but not required, to consult with any bidders, including the potential creditor bidders, after the Binding Bid Deadline. Subject to consulting with the Monitor, Bellatrix retained discretion to reject any bid, regardless of compliance with the SISP.

[11] The second lien noteholders had negotiated some provisions into the SISP to protect their position in the bidding process. One, referred to above, was their ability to submit bids after the third-party bidding was concluded. A second advantage was their ability to include the value of their debt as part of an offer. However, any credit bid was still required to have any financing firmly in place. The language of Clause 13 of the SISP is as follows:

> For certainty, a Potential Credit Bidder shall provide written evidence of all required funding or financing to advance the cash consideration necessary to satisfy such priority payments and the New Money Notes [defined in the second note indenture] in full in cash or otherwise assume such obligations in full, and that any such credit bid shall not be conditional upon obtaining financing, acceptable to each of the Sale Advisor and the Monitor in their sole discretion.

[12] EIG/KKR had indicated as early as December of 2019 that they might participate in the bid process, depending on the extent to which the Binding Bids received addressed their financial interests.

[13] Bellatrix received no qualifying Binding Bids by February 6, 2020 but, along with BMO and the Monitor, continued to consult with interested parties, including EIG/KKR. The resulting bid from Spartan was to purchase substantially all Bellatrix' oil and gas assets for $87,357,000 (the Spartan Bid). This would pay all amounts owing under the Key Employee Retention Plan (KERP) approved in the Initial Order, all priority charges of BMO, the Monitor, the Bellatrix Directors and the Interim Financing (as described in paragraph 42 of the Initial Order) and a substantial portion of the first lien noteholders' debt, which totaled approximately $90M.

[14] On March 10, 2020, the Monitor advised EIG/KKR that the bid under consideration would not generate any payment to them as it was not likely to completely pay out the first lien noteholders. The second lien noteholders held approximately $197M in debt and the third lien noteholders approximately another $66M. Beginning April 1, 2020, counsel for EIG/KKR and for Bellatrix began to trade mark ups of the EIG/KKR proposal.

[15] On April 13, 2020, EIG/KKR submitted a draft term sheet proposing a purchase backed by financing from the First Lien Lenders (a syndicate of National Bank, Canadian Western Bank and Alberta Treasury Branches), which financing would be replaced within 12 months of closing, plus some new cash from the second lien noteholders. On April 20, 2020, a revised term sheet was provided by EIG/KKR which replaced the reference to financing from the First Lien Lenders to financing from unidentified third-party lenders with whom EIG/KKR was "in discussions". At some later point, a company name was inserted in that part of the EIG/KKR term sheet but by the time of this application, that had changed again and CIBC was the proposed financier of the EIG/KKR offer.

[16] After receipt of the third version of the non-binding bid of EIG/KKR on April 20, 2020, the Board of Directors of Bellatrix met to consider their options. They voted to approve the Spartan Bid and on April 22, 2020, signed the Asset Purchase Agreement, subject to the court approval now sought.

Adjournment

[17] The request of EIG/KKR for an adjournment was intertwined with its objection to Bellatrix' approval of the Spartan bid. The additional time requested was for the purpose of finalizing its offer so that it could be more fairly considered alongside the Spartan Bid. By the time of the court application, EIG/KKR confirmed that it was in discussions with Westbrick Energy Ltd, a local oil and gas operator owned mostly by EIG/KKR, about participating in the EIG/KKR bid. It was submitted that, even with financing, a successful purchaser would need to partner with a company with industry knowledge.

[18] Westbrick had been one of the early third-party bidders in its own right, having submitted several non-binding bids through Phases I and II but dropping out of the bidding in late February. When the Spartan Bid was received by Bellatrix on March 10, 2020, Westbrick was contacted again but did not participate further until its name came up as part of EIG/KKR's alternative non-binding bid.

[19] Westbrick's interest at this approval stage is still subject to confirmatory due diligence. In fact, one of the bases on which EIG/KKR sought the adjournment was the refusal of the Monitor to allow Westbrick into the data room in the days before the application, which EIG/KKR argued had delayed its progress. The Monitor provided no written explanation to EIG/KKR at the time but it became apparent during the course of argument that its reluctance to do so was based, at least in part, on the fact that Westbrick had participated in earlier phases of the process and so already had that information about the Bellatrix assets. The fact that it wanted to do further due diligence as part of a credit bid when it had already failed to capture the interest of Bellatrix, BMO or the Monitor earlier in the process was not compelling to the Monitor, nor to this Court.

[20] Westbrick's equivocal commitment was only part of EIG/KKR's problems, second to the lack of any firm financing commitment. As mentioned, CIBC was proposing to lend an amount sufficient to pay the priority charges plus the first lien noteholder debt, with the second lien noteholders proposing to then convert their debt to an equity position in the company. However, the borrower (presumably a partnership of EIG/KRR and Westbrick, or their respective designates) would still need to qualify to assume all the liabilities and obligations of the ongoing business of Bellatrix.

[21] More importantly, CIBC expressly was not yet committed to providing that funding. Its willingness to proceed was contingent on a number of outstanding items, including:

a. satisfactory final negotiations;

b. the absence of any material adverse change (which could include the claims already anticipated by at least two of the counterparties to Bellatrix contracts);

c. acceptable arrangements being made between CIBC and Westbrick or another operator; and

d. no adverse change in the capital markets generally.

[22] Against the backdrop of the precarious current oil and gas market, all these outstanding conditions limited EIG/KKR's ability to present this proposal as close enough to final to justify putting everything on hold for another few weeks in hopes that all the pieces would fall into place.

[23] EIG/KKR quite properly emphasized that they are significant stakeholders in the proceedings generally and the most significant stakeholders at this precise juncture, given the consequences to them if the Spartan Bid is effectively the only option left. EIG/KKR also pointed out that the company had sufficient short-term financing to continue operating during the requested adjournment, courtesy of their agreement to provide the interim financing under the Initial Order. EIG/KKR said that their willingness to provide that interim financing, without which the SISP could not have been conducted, was part of their plan to protect their position, should that become necessary.

[24] It appears that EIG/KKR thought they would have more time and more opportunity to finalize a competing proposal than what was afforded to them. They pointed out, legitimately, that the COVID pandemic has created logistical challenges and has introduced even more uncertainty into financial markets, making it more difficult to get the Westbrick bid in a final form.

[25] Bellatrix, along with all the other parties backing the Spartan Bid, argued that EIG/KKR had had more than ample time to negotiate the financing for a Binding Bid, having known from October of last year that they could end up needing to put a competing offer forward. More importantly, as of March 10, 2020, EIG/KKR knew unequivocally that the only offer in play was going to see them receive no recovery on their debt at all. From that point, if not before, it was incumbent on them to move quickly, presumably building on work done beforehand, to finalize their competing bid.

[26] They were unable to do this. I accept that the COVID pandemic, which was narrowly preceded by a severe and historic drop in the commodity prices for oil, made it very difficult to secure the missing financial and operational commitments. However, it is equally obvious that these factors may continue to affect market conditions negatively for some unknown period of time. Indeed, the uncertainty around the likely duration of these negative market forces is the reason given by the Bellatrix Board of Directors for approving the Spartan Bid. While the Spartan Bid is not ideal – certainly not for Bellatrix' creditors – it does allow the transfer of the company as a going concern to a bidder who had its financing secured and was ready to close on time, removing as much uncertainty around this transaction as possible. It is the proverbial bird in hand.

[27] This Court has discretion to allow or deny requests for adjournment of proceedings before it. However, that discretion, as all judicial discretion, must be exercised with a view to the fairness of the proceedings to all parties. The impact of denying EIG/KKR's adjournment application is devastating to them and to the investors they represent. However, putting the *CCAA* proceedings on hold for the next few weeks carries it owns costs and risks to the other participating parties.

[28] Spartan, as the successful bidder, was not shy about arguing the unfairness inherent in a process that imposed a number of conditions and deadlines on bidders, all of which it met in order to make a firm financial commitment in the midst of a difficult and uncertain market, only to be forced to unilaterally leave its offer on the table while a competing offer is further developed.

[29] Certainly, there is more than ample jurisprudence for considering the integrity of the process itself in this analysis; ***Re Grant Forest Products Inc*** 2010 ONSC 1846 at paras.28-33. In ***Royal Bank v Soundair Corp***, 1991 Carswell Ont 205 at para. 22, the Ontario Court of Appeal adopted the caution of the Nova Scotia Court of Appeal in ***Cameron v Bank of Nova Scotia***, (1981) 38 CBR (NS) 1 at p.11:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[30] The application to approve the sale in a *CCAA* proceeding is not a "rubber stamp" exercise. The Court must retain and execute its mandate to balance the interests of stakeholders affected by any offer, even one arriving late. However, an important factor in that exercise may be protecting the predictability of the process, for these participants and possibly for others in future proceedings. While buyers, including Spartan, know that their purchase is subject to court approval, any arbitrary exercise of that discretion may well discourage similar transactions necessary to promote the purposes of this legislation.

[31] While there was no imminent threat of Spartan withdrawing its offer, the Asset Purchase Agreement approved and executed by Bellatrix' Board of Directors has a June 30, 2020 closing date. No one wants to see that date jeopardized and it already appears that there are a number of pre-closing issues that will need to be addressed in short order to preserve this sale.

[32] And practically speaking, while Bellatrix does have access to interim financing, whatever additional costs and losses are incurred over the next few weeks would come directly from the residue of the purchase price going to the first lien noteholders because that financing is a priority charge. They are the ones financing the adjournment and they object to doing so.

[33] I am balancing the ongoing costs, not just in Bellatrix' operations but in the continued involvement in this litigation of these many parties, their executives, lawyers and the third-party advisors, as well as the risk, small but serious in consequence, of losing the one Binding Bid made against the chance for EIG/KKR to finalize a proposal in a matter of weeks that has not crystallized in months and still seems somewhat fluid and uncertain.

[34] As difficult as the decision is, in my view, the sales process must continue as scheduled. The adjournment request is denied.

Approval of the Asset Purchase Agreement

[35] Apart from dismissing the application by EIG/KKR for an adjournment, this Court must still review the Spartan Bid against the statutory and common law criteria for approval. EIG/KKR and the remaining second lien noteholders opposed the sale to Spartan because it provides no recovery to them or any subsequent creditors. Although some parties reserved their rights to argue about the form of Order and their inclusion or exclusion on the anticipated s.11.3 application, no other parties opposed the Spartan Bid.

[36] Although the *CCAA* itself contains no description of its objectives, a number of purposes of this legislation have been identified in case law. For our purposes, the most germane include the goal of permitting a company to stay in business and thereby avoid the social and economic costs of liquidation and the goal of giving the company the chance of finding an arrangement acceptable to its creditors or which, at least, seeks to balance the interests of the company's stakeholders.

[37] Section 36(3) of the *CCAA* sets out a non-exhaustive list of factors to consider on an application to approve a sale. The related criteria from the common law are included in this list where relevant.

A. Whether the Sales Process was Reasonable

[38] There was no real complaint at this application about the form of the SISP approved by this Court in October, 2019. As is often the case, much of the work necessary to proffer the

assets for sale had been done prior to the court order. BMO was appointed as the Sale Advisor to assist Bellatrix in soliciting and developing potential bids. The process was to be overseen by the Monitor, as appointed in the Initial Order.

[39] The first phase, as mentioned, was just over one month. The deadline for binding bids in Phase II was not included in the SISP or in the SISP Order but was to be set by Bellatrix with the Monitor's consent.

[40] The process as envisioned was reasonable. It was also designed to be efficient; ***Soundair*** at para.16. Bellatrix set the deadline for binding bids at January 13, 2020 and then extended that deadline to February 7, 2020. There was no suggestion that this information was not communicated in a proper and timely way. The period of time between October 9, 2019 and February 7, 2020 was short enough to protect the value of the company assets for sale and long enough to provide Bellatrix with a good look at the market prospects, as discussed *infra*.

[41] Not only was there no dispute about the reasonability of the SISP before me, there had been no dispute about the final form of the SISP before the issuing Justice on October 9, 2019. As is often the case, the parties had negotiated their own concessions which were represented in that Order. Indeed, even EIG/KKR made the point that they had negotiated certain concessions in the form of the SISP before it was approved by the Court.

[42] I will also address the implementation of the sales process at this juncture, although I realize that is often done separately from a review of the mechanics of the process itself. The relevant cases make it clear, and it is completely intuitive, that the process must not only be designed to be fair but must be fairly implemented.

[43] EIG/KKR complained of a number of developments they felt were unfair; that they provided the necessary interim financing in order to protect their interests and then were "cut out" of the final bidding, that the First Lien Lenders opted to finance the Spartan Bid even though EIG/KKR had approached them first) and that EIG/KKR had made it known throughout the sales process that they might wish to put in a credit bid if whatever offer(s) came out of the SISP did not provide for recovery for the second lien noteholders.

[44] While it is true that EIG/KKR did provide the interim financing without which Bellatrix would not have had the opportunity to look for a purchaser under the protection of the *CCAA*, it is equally true that EIG/KKR's *quid pro quo* for doing so are the fees and interest payments they will receive in a priority position. It should not be treated as consideration for a strategic advantage to a credit bidder, at least not beyond what was negotiated in the SISP.

[45] The First Lien Lenders chose to back the Spartan Bid, even though that offer meant that the first lien debt advanced by that syndicate would not be paid out to those noteholders in full. It did so knowing that EIG/KKR was working on an alternative that would, if successful, see a more full recovery. It is safe to infer that the certainty of the Spartan Bid outweighed the possibility of increased recovery under a much less certain scenario.

[46] The Bellatrix Affidavit filed for this application also indicated that the Monitor had been notified at some prior point in time that Spartan might received confidential information that it ought not to have had. The Monitor investigated and determined that this had not affected the process or provided any advantage to Spartan as a bidder. Given what little information I had about this information and its source, combined with the fact that it was not much pursued in

argument, I am similarly convinced that it evidences no impropriety that has affected the sales process or the result.

B. Whether the Monitor approved of the SISP

[47] The Monitor supported the Court's approval of the SISP at the October 9, 2019 application.

C. Whether the Monitor Supports the Proposed Sale

[48] The Monitor supports the proposed sale of the Bellatrix assets to Spartan for the reasons set out in its Sixth Report. Those reasons included the experience of BMO as the Sale Advisor, the interest expressed in the Bellatrix assets from industry participants, the time taken to market the assets and its own experience in overseeing sales processes similar to this one. The Monitor's opinion was that the process was fair and open. While the Monitor, among others, engaged in ongoing discussions with EIG/KKR, those discussions did not culminate in a binding bid from EIG/KKR or any credit bidder.

[49] Because the Monitor is assumed to be independent and experienced, the Court is entitled to rely on the opinion of the Monitor, albeit not blindly. As quoted in ***Soundair*** at paragraph 21:

> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role of the Receiver both in the perception of receiver and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers; ***Crown Trust Co v Rosenberg*** (1986), 60 OR (2d) 87 at p.112

[50] In my view, the Monitor has discharged its duties to this point and its recommendation that the Spartan Asset Purchase Agreement be approved is entitled to due consideration.

D. The Extent to which the Company's Creditors were Consulted

[51] The Monitor's Report and the Affidavit of Mark Caiger of BMO outline the consultations undertaken with the various groups of creditors. EIG/KKR argued that they were not properly consulted because they were not provided with a copy of the final Spartan Asset Purchase Agreement, either as proposed or as signed. They say this was in contravention of Clause 7 of the SISP, which entitled them to receive further, detailed information about a competing third-party bid "in a form satisfactory to Bellatrix and the Monitor, more detailed information in respect of any such Binding Bid, including copies of the Binding Bid and any definitive agreement(s) in connection therewith" (Clause 7, SISP).

[52] However, a careful reading of that paragraph shows that the Monitor and BMO expressly retained the ability to vet information given to any credit bidder. While no particularly satisfactory explanation was provided to me as to why that document was not provided to EIG/KKR, I cannot conclude that EIG/KKR suffered any disadvantage as a result.

[53] In ***Soundair***, the unsuccessful bidder complained it was not given needed information, specifically an offering memorandum. However, the Court found the bidder was not prejudiced by that decision of the Receiver, rather its offer was rejected because it contained a condition

unacceptable to the Receiver; ***Soundair*** at paras.50-57. Similarly, the provision of the Spartan Asset Purchase Agreement itself was not necessary for EIG/KKR to get the financing in place that it was missing.

[54] The most important thing for EIG/KKR to know as creditors and potential competing bidders was the information given to them on March 10, 2020; that the only offer left was one that would be insufficient to pay anything beyond a portion of the first lien noteholders. Their real complaint is that the SISP afforded them no set period of time in which to finalize their bid and that Bellatrix, the Monitor and BMO should have put Spartan on ice to afford EIG/KKR an adequate and mutually-communicated/accepted period of time in which to finalize their competing bid.

[55] While I understand why EIG/KKR would be unhappy about the way things unfolded, I cannot conclude that the process was unfair to them. The SISP, which they negotiated with Bellatrix and others, did not provide that cushion of time – it only said that credit bids could be submitted after third party bids. The SISP further reserved to BMO and the Monitor the "sole discretion" to decide whether the financing arrangements for any credit bid were satisfactory.

[56] When the Bellatrix Board of Directors considered the Spartan offer on April 20, 2020, it opted to lock Spartan in by signing the Asset Purchase Agreement. EIG/KKR was not in a position at that time to give the Board any other viable options, nor had that changed appreciably by the time of this application.

[57] Service of Bellatrix' application and supporting Affidavit was effected on April 27, 2020 although the date for the hearing was not set or communicated until April 30, 2020. There was almost two weeks between service of the application and the return date of the motion. EIG/KKR certainly moved quickly within that time to put together their own Affidavit and to provide written confirmation of CIBC's interest. However, it was not the timing of the motion that was problematic, it was the failure of EIG/KKR to advance a firm competing offer before that; if not after March 10, 2020 then after April 23, 2020 when they learned more specifics of the Spartan transaction from the public announcement.

E. The Effects of the Proposed Sale on Creditors and Other Stakeholders

[58] While this Court is to consider the effect of the proposed sale on all stakeholders, the primary stakeholders are obviously the company's creditors. They have financed the company to their detriment and now hold compromised security for those debts. They have only the process itself to assist them.

[59] The Spartan Bid will see the first lien noteholders paid a portion of their outstanding debt but not all. The second and third lien noteholders will receive nothing. While some of the earlier non-binding bids would have been sufficient to pay the first lien debt in full plus some of the second lien debt, making the second lien noteholders the fulcrum creditors, that shifted over time to the point where the only certain offer on the table no longer covered the first lien noteholders. As I understand the Monitor's argument, that meant that the first lien noteholders became the fulcrum creditors and thus their preferences took on more importance.

[60] Assuming that I am understanding the meaning of the term correctly, I accept the Monitor's submissions. That does not absolve the Monitor nor the Bellatrix Board from consideration of other creditors, nor was that suggested; ***Soundair*** at para.21. Rather, it was

argued that the Bellatrix Board, with assistance from BMO and the Monitor, did consider the effect on these stakeholders before accepting the Spartan Bid.

[61] The Spartan Asset Purchase Agreement obligates Spartan to assume the obligations and liabilities, except relating to excluded assets. This will include environmental liabilities, as well as employment, regulatory and contractual obligations. The parties represented at the approval hearing included various contracting parties and regulators, all of whom supported the Spartan Bid. While they cannot be assumed to be overly concerned about which of Bellatrix' creditors receive payment, it is important to remember that these other stakeholders do represent the beneficiaries of a sale of the company as a going concern. From an overarching economic view, keeping contracts intact and people employed is a significant and positive factor.

[62] It is axiomatic that considering someone's interests is not the same thing as satisfying those interests. I accept the submissions of Bellatrix, the Monitor, BMO and the other parties supporting the Spartan bid that the interests of all parties and particularly the creditors were considered. The weighing of these competing interests and the ultimate decision by the Board to accept the Spartan bid are discussed below.

F. Is the Sale Price Fair and Reasonable?

[63] For EIG/KKR, the price on the proposed sale does not seem fair or reasonable because it believes that, given more time, it could present an offer to purchase the Bellatrix assets for much more that Spartan has offered. As I said in my brief oral decision, if the Westbrick offer had included committed financing, was unconditional and irrevocable and for a much higher price, that may have changed the assessment of the Spartan bid. Where a substantially higher bid turns up at the approval stage, it may indicate that all reasonable attempts to get the best offer were not made; ***Soundair*** at para. 28 quoting from ***Re Beauty Counsellors of Canada Ltd***., (1986), 58 CBR (NS) 237 (Ont. SC).

[64] However, the Westbrick offer cannot be said to be truly comparable to the Spartan Bid because of its outstanding conditions. The Bellatrix Board of Directors, the first lien noteholders and all the independent advisors to the company recommended a lower but certain offer over a higher but uncertain offer. The Board of Directors, who have statutory and common law fiduciary obligations to act in the best interests of the company as a whole, considered their options and chose this proposal. In fact, they committed to the sale in order to make sure that the one Binding Bid they did have did not disappear before this application could be heard and decided. The exercise of their business judgment deserves a measure of deference.

[65] The directors were assisted, as was Bellatrix and as is this Court, by an independent Monitor and an independent Sale Advisor, both of whom were working to find an arrangement that would benefit the entire economic community, with focus on the creditors. Bellatrix received six conditional non-binding offers during Phase II but no binding bids, plus two additional non-binding bids after February 6, 2020. Bellatrix, BMO and the Monitor then continued to work with all these bidders and with EIG/KKR to try and convert non-binding bids into binding bids.

[66] I am satisfied that the sufficient efforts were made to find the best possible price. While it will satisfy only a small portion of the company's entire debt, it is still the only unconditional offer in play, notwithstanding the time anticipated by the SISP plus the additional time since

Phase II officially expired in February. As so succinctly put in ***Re Nortel Networks Corp***, 2009 CarswellOnt 4467 (Ont SCJ) at para.49, there is no better viable alternative.

Conclusion

[67] The fact that the only offeror willing to make an unconditional, fully financed commitment will still result in a shortfall is not evidence that the process was flawed or unfair, that stakeholders were ignored or that the price is not reasonable. Rather, the fact that a court-approved and competently-managed sales process narrowed to only one viable offer when conditions had to be removed is reflective of the challenges in our economic markets and in this industry in particular.

[68] It is understandable, even if not ideal, that the Bellatrix directors ultimately concluded that accepting the Spartan offer was in the best interests of the company and its stakeholders collectively. The fact that that decision is now supported by virtually all affected parties is also important.

[69] I am satisfied that Bellatrix has met the tests, both statutory and common law, for approving the Spartan Asset Purchase Agreement.

Sealing Orders

[70] Bellatrix applied to seal confidential portions of and supplements to the Monitors' reports. EIG/KKR applied to seal the Affidavit of Eric Long. No parties opposed any of this relief. As the Spartan Asset Purchase Agreement has yet to close and having reviewed the information sought to be sealed, I am satisfied that the tests for doing so have been satisfied; ***Sierra Club of Canada v Canada (Minister of Finance)***, 2002 SCC 41 at para.53

[71] The sealing orders requested are granted. Counsel are requested to include in the form of Order time limits for the expiration thereof.

Heard on the 7th day of May, 2020.
Dated at the City of Calgary, Alberta this 21st day of May, 2020.

M.H. Hollins
J.C.Q.B.A.

Appearances:

Robert J. Chadwick, Caroline Descours and Andrew Harmes
for Bellatrix Exploration Ltd.

Sean F. Collins
for Winslow Resources Inc.

Tom Cumming, Caireen Hanert, Warren Foley and Ram Sankaran
for Yangarra Resources Ltd

Kelly Bourassa, James Reid and Peter Bychawski
for the First Lien Lenders

Michael Hanlon, Adam Maerov and Kourtney Rylands
for U.S. Bank National Association, in its capacities as
Second Lien Notes Trustee and Third Lien Notes Trustee

Ed Halt
Conflict counsel for the First Lien Lenders

Josef G. A. Kruger and Robyn Gurofsky
for the Monitor

Maria Lavelle
for the Alberta Energy Regulator

Howard A. Gorman, Q.C. and Gunnar Benediktsson
for BP Canada Energy Group ULC

Guy Martel & Danny Vu
for EIG/KKR

Michael Shakra, Kevin J. Zych, Chris Simmard, Kristopher Hanc
for the Ad Hoc Committee of Second Lien and Third Lien Noteholders

Christa Nicholson and Andrew MacGregor
for TAQA NorthLtd

Colin Feasby
for Bank of Montreal

Jordan Milne and Lori Williams
Department of Justice Canada
for the Indian Oil and Gas Canada (IOGC)

Jeffrey Poole and Ian Carruthers
for the O'Chiese First Nation

Alexis Teasdale and Karen Dawson

for the Bull Moose Capital Ltd.

Randal Van de Mossalaer and Emily Paplawski
for Keyera Patrnership

Brad Angove
for Nelson Brothers Oilfield Services 1997 Ltd
and Gen7 Environmental Solutions Ltd.

Joseph Reynaud and Leland Corbett
for Stream Asset Financial Lumos LP,
by its General Partner Stream Asset Financial Lumos Corp

Kelsey Meyer
for SCCP Ferrier Facility LP

Louis Belzil
for Jo-Anne Reynolds

Shane King
for Bidell Gas Compression

Marian Baldwin Fuerst
for Delaware Trust Company

Mikkel Arnston
for Thomas Group Inc.

Jennie Buchanan and Frankie Deni
for Mark Stephen

TAB 5

British Columbia Hydro and Power Authority *Appellant*

v.

BG Checo International Limited *Respondent*

and between

BG Checo International Limited *Appellant*

v.

British Columbia Hydro and Power Authority *Respondent*

INDEXED AS: BG CHECO INTERNATIONAL LTD. *v.* BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

File Nos.: 21939, 21955.

1992: January 28; 1993: January 21.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Stevenson* and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Torts — Negligence — Negligent misrepresentation — Concurrent liability in tort and contract — Hydro calling for tenders to erect transmission towers and string transmission lines — Tender documents stating that right-of-way would be cleared by others — Parties incorporating tender documents into contract — Right-of-way not properly cleared — Whether plaintiff can sue in tort if duty relied on is also made a contractual duty by an express term of the contract — If so, whether terms of contract excluded Hydro's potential liability for misrepresentation.

Contracts — Breach of contract — Hydro awarding contract to erect transmission towers and string transmission lines — Contract stating that right-of-way would be cleared by others — Right-of-way not properly cleared — Hydro liable for damages for breach of contract.

*Stevenson J. took no part in the judgment.

British Columbia Hydro and Power Authority *Appelante*

c.

BG Checo International Limited *Intimée*

et entre

BG Checo International Limited *Appelante*

c.

British Columbia Hydro and Power Authority *Intimée*

RÉPERTORIÉ: BG CHECO INTERNATIONAL LTD. *c.* BRITISH COLUMBIA HYDRO AND POWER AUTHORITY

Nos du greffe: 21939, 21955.

1992: 28 janvier; 1993: 21 janvier.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Stevenson* et Iacobucci.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Responsabilité délictuelle — Négligence — Déclaration inexacte faite par négligence — Responsabilité concomitante en matières délictuelle et contractuelle — Appel d'offres lancé par Hydro pour l'érection de pylônes et la pose de lignes de transport d'électricité — Dossier d'appel d'offres précisant que l'emprise serait déboisée par d'autres — Dossier d'appel d'offres incorporé dans un contrat par les parties — Emprise mal déboisée — Le demandeur peut-il exercer un recours en responsabilité délictuelle si l'obligation sur laquelle il fonde son recours constitue également, aux termes mêmes du contrat, une obligation contractuelle? — Dans l'affirmative, les conditions du contrat excluent-elles la responsabilité potentielle d'Hydro pour toute déclaration inexacte?

Contrats — Inexécution de contrat — Contrat accordé par Hydro pour l'érection de pylônes et la pose de lignes de transport d'électricité — Contrat stipulant que l'emprise serait déboisée par d'autres — Emprise mal déboisée — Hydro responsable en dommages-intérêts pour inexécution de contrat.

*Le juge Stevenson n'a pas pris part au jugement.

Hydro called for tenders to erect transmission towers and string transmission lines. Checo had a representative inspect the area by helicopter before its tender was submitted. The representative noted that the right-of-way had been partially cleared, and also noted evidence of ongoing clearing activity. He assumed that there would be further clearing prior to the commencement of Checo's work. Hydro accepted Checo's tender and the parties entered into a written contract. The tender documents, which were subsequently incorporated in the contract, stated that clearing of the right-of-way would be done by others and formed no part of the work to be performed by Checo. They also stated that it was Checo's responsibility to inform itself of all aspects of the work and that should any errors appear in the tender documents, or should Checo note any conditions conflicting with the letter or spirit of the tender documents, it was Checo's responsibility to obtain clarification before submitting its tender. The tender documents also provided that Checo would satisfy itself of all site conditions and the correctness and sufficiency of the tender for the work and the stipulated prices. In fact, no further clearing of the right-of-way ever took place, and the improper clearing caused Checo a number of difficulties in completing its work.

Checo sued Hydro seeking damages for negligent misrepresentation, or, in the alternative, for breach of contract. The evidence at trial indicated that Hydro had contracted the clearing out to another company, and that, to Hydro's knowledge, the work was not done adequately. There was no direct discussion between the representatives of Checo and Hydro concerning this issue. During the trial Checo amended its statement of claim to include a claim in fraud. The trial judge found that Hydro had acted fraudulently in its dealings with Checo and awarded damages to Checo. Hydro appealed to the Court of Appeal, which rejected the finding of fraud, but found that there had been a negligent misrepresentation which induced Checo to enter into the contract. The Court of Appeal awarded damages for the misrepresentation, but reduced the trial judge's damage award, and referred the question of breach of contract and damages flowing therefrom back to the trial court.

The issues raised by Hydro's appeal are (1) whether a pre-contractual representation which becomes a contractual term can found liability in negligent misrepresentation; (2) if so, whether the terms of the contract operate to exclude Hydro's potential liability for any misrepre-

Hydro a lancé un appel d'offres pour l'érection de pylônes et la pose de lignes de transport d'électricité. Avant que la soumission soit présentée, un représentant de Checo a inspecté les lieux par hélicoptère. Il a observé que l'emprise avait été partiellement déboisée et que des activités de déboisement s'y poursuivaient. Il a donc présumé que l'emprise serait plus amplement déboisée avant que Checo n'entreprenne les travaux. Hydro a accepté la soumission de Checo et les parties ont conclu un contrat écrit. Le dossier d'appel d'offres, incorporé par la suite dans le contrat, prévoyait que le déboisement de l'emprise serait effectué par d'autres et ne faisait pas partie du travail que Checo devait exécuter. Il stipulait également qu'il incombait à Checo de se renseigner sur tous les aspects des travaux et que, advenant le cas où il y aurait des erreurs dans le dossier, ou si Checo remarquait des conditions qui venaient en contradiction avec la lettre ou l'esprit du dossier, elle devait obtenir les explications voulues avant de présenter sa soumission. Le dossier d'appel d'offres prévoyait également que Checo devait vérifier l'état des lieux et s'assurer que sa soumission était exacte et complète au regard des travaux et des prix indiqués. Dans les faits, l'emprise n'a jamais fait l'objet d'autres travaux de déboisement et le déboisement incomplet a occasionné à Checo de nombreuses difficultés dans l'exécution des travaux.

Checo a poursuivi Hydro en dommages-intérêts pour déclaration inexacte faite par négligence ou, subsidiairement, pour inexécution de contrat. Il est ressorti de la preuve présentée au procès qu'Hydro avait accordé un sous-contrat de déboisement à une autre compagnie, qui n'avait pas, à sa connaissance, effectué les travaux de façon satisfaisante. Il n'y a pas eu de discussions directes à ce sujet entre les représentants de Checo et d'Hydro. Au cours du procès, Checo a modifié sa déclaration pour y inclure une allégation de fraude. Le juge de première instance a conclu qu'Hydro avait agi frauduleusement dans ses rapports avec Checo et a accordé à celle-ci des dommages-intérêts. Hydro a interjeté appel auprès de la Cour d'appel, qui a rejeté la conclusion relative à la fraude mais a estimé qu'il y avait eu déclaration inexacte faite par négligence ayant amené Checo à conclure le contrat. La Cour d'appel a accordé des dommages-intérêts pour déclaration inexacte, mais a réduit la somme adjugée en première instance et a renvoyé la question de l'inexécution de contrat et des dommages en résultant au tribunal de première instance.

Le pourvoi d'Hydro soulève les questions suivantes: (1) Peut-on se fonder sur une déclaration précontractuelle qui devient une clause du contrat pour conclure à la responsabilité pour déclaration inexacte faite par négligence? (2) Dans l'affirmative, les clauses du con-

sentations; (3) if not, whether Hydro is liable for negligent misrepresentation; and (4) whether there was a breach of contract. Checo's cross-appeal is to determine (1) whether Hydro should be liable for fraudulent misrepresentation and (2) whether the Court of Appeal correctly assessed Checo's damages for negligent misrepresentation.

trat ont-elles néanmoins pour effet d'exclure la responsabilité potentielle d'Hydro pour toute déclaration inexacte? (3) Dans la négative, Hydro est-elle responsable par suite d'une déclaration inexacte faite par négligence? (4) Y a-t-il eu inexécution de contrat? Le pourvoi incident formé par Checo soulève les questions suivantes: (1) Hydro devrait-elle être tenue responsable d'avoir fait une déclaration inexacte et frauduleuse? (2) La Cour d'appel a-t-elle correctement évalué le préjudice subi par Checo par suite de la déclaration inexacte faite par négligence?

Held (Sopinka and Iacobucci JJ. dissenting in part): The appeal should be dismissed and the cross-appeal allowed in part.

Arrêt (les juges Sopinka et Iacobucci sont dissidents en partie): Le pourvoi est rejeté et le pourvoi incident est accueilli en partie.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ.: Hydro is liable to Checo for breach of contract. The contract required Hydro to clear the right-of-way as specified and that duty was not negated by the more general clauses relating to errors and misunderstandings in tendering, site conditions and contingencies. Since Hydro did not remove the logs and debris from the right-of-way, it is liable for breach of contract.

Les juges La Forest, L'Heureux-Dubé, Gonthier et McLachlin: Hydro est responsable envers Checo en raison d'une inexécution de contrat. Hydro était tenue de déboiser l'emprise comme prévu au contrat et cette obligation n'était pas écartée par les clauses plus générales relatives aux erreurs et aux méprises en ce qui concerne la soumission, l'état des lieux et les imprévus. Étant donné qu'Hydro n'a pas enlevé les billes et les débris de l'emprise, elle est responsable en raison d'une inexécution de contrat.

The contract does not preclude Checo from suing in tort. The general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse* is that where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, subject to any limit the parties themselves have placed on that right by their contract. This limitation on the general rule of concurrency arises because it is always open to parties to limit or waive the duties which the common law would impose on them for negligence. The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on how they have dealt with it. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon.

Le contrat n'empêche pas Checo d'exercer un recours en responsabilité délictuelle. La règle générale qui ressort de l'arrêt de notre Cour *Central Trust Co. c. Rafuse* est que, lorsqu'un préjudice permet à première vue d'étayer une action en responsabilité contractuelle et une action en responsabilité délictuelle, la partie peut exercer l'un ou l'autre recours ou les deux, sous réserve de toute restriction que les parties ont elle-mêmes prévue dans leur contrat. Cette restriction à la règle générale de la concomitance est possible parce que les parties peuvent toujours limiter les obligations que la common law leur impose en matière de négligence, ou renoncer à celles-ci. Le simple fait que les parties aient traité d'une question expressément dans leur contrat ne signifie pas qu'elles avaient l'intention d'exclure le droit d'intenter une action en responsabilité délictuelle. Cela dépend de la manière dont elles en ont traité. Dans la mesure où le contrat ne déroge pas à l'obligation en responsabilité délictuelle, celle-ci demeure intacte et elle ouvre droit à un recours.

This principle is illustrated by consideration of the three situations that may arise when contract and tort are applied to the same wrong. The first class of case arises where the contract stipulates a more stringent obligation than the general law of tort would impose. In that case, the parties are hardly likely to sue in tort, since they

Ce principe est illustré par l'examen des trois catégories de cas susceptibles de se présenter lorsque les responsabilités contractuelle et délictuelle sont appliquées au même préjudice. La première survient lorsque le contrat prévoit une obligation plus stricte que ne l'imposerait le droit général de la responsabilité délictuelle. Dans

could not recover in tort for the higher contractual duty. The vast majority of commercial transactions fall into this class. The right to sue in tort is not extinguished, however, and may remain important, as where suit in contract is barred by expiry of a limitation period. The second class of case arises where the contract stipulates a lower duty than that which would be presumed by the law of tort in similar circumstances. This occurs when the parties by their contract indicate their intention that the usual liability imposed by the law of tort is not to bind them. The most common means by which such an intention is indicated is the inclusion of a clause of exemption or exclusion of liability in the contract. Generally, the duty imposed by the law of tort can be nullified only by clear terms. The third class of case arises where the duty in contract and the common law duty in tort are co-extensive. In this class of case, like the others, the plaintiff may seek to sue concurrently or alternatively in tort to secure some advantage peculiar to the law of tort, such as a more generous limitation period. The case at bar falls into this third category. Hydro's common law duty not to negligently misrepresent that it would have the right-of-way cleared by others is not excluded by the contract, which confirmed Hydro's obligation to clear the right-of-way.

un tel cas, les parties sont peu susceptibles d'exercer un recours en responsabilité délictuelle puisqu'elles ne pourraient recouvrer de dommages-intérêts relativement à l'obligation contractuelle supérieure. La grande majorité des opérations commerciales s'inscrivent dans cette catégorie. Toutefois, le droit d'intenter une action en responsabilité délictuelle n'est pas éteint, et il peut encore être important, par exemple dans le cas où il est impossible de poursuivre en responsabilité contractuelle parce que la période de prescription est écoulée. La deuxième catégorie se présente lorsque le contrat prévoit une obligation moindre que celle qui découlerait du droit de la responsabilité délictuelle dans des circonstances semblables. Cela se produit lorsque les parties indiquent par leur contrat leur intention de ne pas être liées par la responsabilité qu'impose habituellement le droit de la responsabilité délictuelle. La façon la plus courante d'indiquer cette intention est l'inclusion d'une clause d'exemption ou d'exclusion de responsabilité dans le contrat. En règle générale, l'obligation qu'impose le droit de la responsabilité délictuelle ne peut être annulée que par des conditions claires. La troisième survient lorsque l'obligation contractuelle et l'obligation de common law en responsabilité délictuelle coïncident. Dans cette catégorie, comme dans les autres, le demandeur peut chercher à intenter une action de façon concomitante ou subsidiaire en responsabilité délictuelle pour obtenir un certain avantage particulier au droit de la responsabilité délictuelle, comme un délai de prescription plus généreux. L'espèce s'inscrit dans cette troisième catégorie. L'obligation de common law d'Hydro de ne pas déclarer de façon inexacte et par négligence que l'emprise serait déboisée par d'autres n'est pas écartée par le contrat, qui confirmait l'obligation d'Hydro de déboiser l'emprise.

The availability of concurrent liability in contract and tort should not be predicated on whether the contractual term is express or implied. Using the express-implied distinction as a basis for determining whether there is a right to sue in tort poses a number of problems. The law has always treated express and implied terms as being equivalent in effect, and it is difficult to distinguish between them in some cases. It is not evident that if parties to a contract choose to include an express term in the contract dealing with a particular duty relevant to the contract, they intended to oust the availability of tort remedies in respect of that duty. Finally, the test will be difficult to apply in situations where the express contractual term does not exactly overlap the tort duty. Neither principle, the authorities nor the needs of contracting parties support the conclusion that dealing with

La concomitance de la responsabilité contractuelle et délictuelle ne devrait pas être fondée sur le fait que la condition du contrat est expresse ou implicite. Un certain nombre de problèmes découlent de l'utilisation de la distinction entre conditions expresses et implicites pour déterminer s'il existe un droit d'exercer un recours en responsabilité délictuelle. Le droit a toujours considéré les conditions expresses et implicites comme ayant un effet équivalent, et il est difficile d'établir une distinction entre elles dans certains cas. Il n'est pas évident que, si les parties choisissent d'inscrire dans le contrat une condition expresse qui traite d'une obligation particulière pertinente, elles ont l'intention d'éliminer la possibilité des recours en responsabilité délictuelle relativement à cette obligation. Enfin, le critère sera difficile à appliquer dans les cas où la condition contractuelle

a matter by an express contract term will, in itself, categorically exclude the right to sue in tort.

The contract did not limit the duty of care owed by Hydro to Checo, nor did Checo waive its common law right to bring such tort actions as might be open to it. Checo is thus entitled to claim against Hydro in tort.

In situations of concurrent liability in tort and contract it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen, though particular circumstances or policy may dictate such a course.

Checo is entitled to be compensated for all reasonably foreseeable loss caused by the tort. The Court of Appeal was justified in finding that had the misrepresentation not been made, Checo would have entered into the contract, but with a higher bid. It was of the view that Checo would have increased its bid by an amount equal to the cost of the extra work made necessary by the improperly cleared work site plus profit and overhead. To compensate only for the direct costs of clearing, however, is to suggest that the only tort was the failure to clear. The real fault is that Hydro misrepresented the situation and Checo may have relied on that representation in performing its other obligations under the contract. Having to devote its resources to that extra work might have prevented Checo from meeting its original schedule, thereby resulting in Checo incurring acceleration costs in order to meet the contract completion date. Such costs would also arguably be reasonably foreseeable. The matter should be referred back to the trial court for determination of whether any such indirect losses were the foreseeable result of the misrepresentation.

The breach of contract claims should be referred to the trial court for determination. Checo is to be put in the position it would be in had the work site been cleared properly, and is therefore to be reimbursed for all expenses incurred as a result of the breach of con-

expresse ne chevauche pas exactement l'obligation en responsabilité délictuelle. Ni le principe, ni la jurisprudence ou la doctrine, ni les besoins des parties contractantes n'appuient la conclusion que le seul fait de traiter d'une question par une condition contractuelle expresse écartera de façon catégorique le droit d'exercer un recours en responsabilité délictuelle.

Le contrat ne restreignait pas l'obligation de diligence d'Hydro envers Checo, et Checo n'a pas non plus renoncé à son droit de common law d'intenter les actions en responsabilité délictuelle dont elle pouvait disposer. Checo a donc le droit d'exercer contre Hydro un recours en responsabilité délictuelle.

Dans des cas de responsabilité concomitante en matières délictuelle et contractuelle, il ne semblerait pas normal d'accorder des montants différents de dommages-intérêts pour ce qui constitue essentiellement le même préjudice sur le seul fondement de la forme d'action choisie, bien que des circonstances particulières ou des raisons de principe puissent dicter une telle façon de faire.

Checo a droit à être indemnisée de toutes les pertes raisonnablement prévisibles causées par le délit. La Cour d'appel était justifiée de dire que, si la déclaration inexacte n'avait pas été faite, Checo aurait conclu le contrat, mais à un prix plus élevé. Elle était d'avis que Checo aurait augmenté le montant de sa soumission du coût des travaux additionnels rendus nécessaires par le déboisement incomplet des lieux, plus les bénéfices et les frais généraux. Toutefois, accorder une indemnisation seulement pour les coûts directs de déboisement équivaut à dire que le délit consistait simplement à ne pas avoir déboisé. La véritable faute est qu'Hydro a fait une déclaration inexacte concernant la situation et que Checo peut s'être fiée à cette déclaration pour exécuter ses autres obligations découlant du contrat. Le fait de devoir consacrer ses ressources à ces travaux additionnels peut avoir empêché Checo de respecter son calendrier initial, entraînant ainsi des coûts d'accélération des travaux pour lui permettre de suivre les échéances. On pourrait dire que ces coûts sont raisonnablement prévisibles. La question devrait être renvoyée au tribunal de première instance pour qu'il détermine si ces pertes indirectes étaient le résultat prévisible de la déclaration inexacte.

Les demandes fondées sur l'inexécution de contrat devraient être renvoyées au tribunal de première instance. Checo doit être placée dans la situation qui aurait été la sienne si les lieux avaient été déboisés de façon adéquate, et elle doit donc recouvrer tous les frais

tract, whether expected or not, except to the extent that those expenses may have been so unexpected that they are too remote to be compensable for breach of contract. The damages in contract would thus include not only the costs flowing directly from the improperly cleared work site, but also consequent indirect costs such as acceleration costs due to delays in construction.

There was no evidence of an intention on the part of Hydro to deceive, and the Court of Appeal therefore correctly concluded that Hydro should not be liable for fraudulent misrepresentation.

Per Sopinka and Iacobucci JJ. (dissenting in part): In the circumstances of the case, Hydro may be liable in contract for the representations which Checo complains of, but it cannot be liable in tort. While as a general rule, the existence of a contract between two parties does not preclude the existence of a common law duty of care, contractual exclusion or limitation clauses can operate either to exclude or limit liability, or to limit the duty owed by one party to the other, whether in contract or in tort. In neither case will the plaintiff be permitted to use an action in tort to circumvent the limitation of liability or of duty in the contract. The contractual relationship can bring the parties into sufficient proximity to give rise to a duty of care, but no duty of care in tort can be concurrent with a duty of care created by an express term of the contract. If the duty is defined by an express term of the contract, the plaintiff will be confined to whatever remedies are available in the law of contract. A claim in tort is not foreclosed in all circumstances, however. A contextual approach should be adopted which takes into account the context in which the contract is made, and the position of the parties with respect to one another. The policy reasons in favour of the rule are strongest where the contractual context is commercial and the parties are of equal bargaining power. Here there is no question of unconscionability or inequality of bargaining power. If such issues, or others analogous to them, were to arise, however, a court should be wary not to exclude too rapidly a duty of care in tort on the basis of an express term of the contract, especially if the end result for the plaintiff would be a wrong without a remedy.

engagés par suite de l'inexécution de contrat, prévus ou non, sauf dans la mesure où ces frais étaient si imprévus qu'ils sont trop indirects pour faire l'objet d'un remboursement pour inexécution de contrat. Les dommages-intérêts en matière contractuelle comprendraient ainsi non seulement les frais découlant directement du déboisement incomplet des lieux, mais aussi les frais indirects corollaires comme les frais d'accélération des travaux entraînés par les retards dans la construction.

Il n'y avait aucun élément de preuve d'une intention de tromper de la part d'Hydro, et la Cour d'appel a donc eu raison de conclure qu'Hydro ne devrait pas être tenue responsable d'avoir fait une déclaration inexacte et frauduleuse.

Les juges Sopinka et Iacobucci (dissidents en partie): Dans les circonstances, Hydro peut encourir une responsabilité contractuelle pour les déclarations que Checo lui reproche, mais elle ne peut encourir de responsabilité délictuelle. En règle générale, le fait que deux parties soient liées par contrat n'empêche pas l'existence d'une obligation de diligence en common law; toutefois, les clauses contractuelles d'exclusion ou de limitation peuvent avoir pour effet d'exclure ou de limiter la responsabilité, ou encore de limiter les obligations qu'une des parties a envers l'autre, qu'elles soient de nature contractuelle ou délictuelle. Dans l'un ou l'autre cas, il ne sera pas permis au demandeur de se servir du recours en responsabilité délictuelle pour contourner la limitation de la responsabilité ou des obligations prévue au contrat. Il peut résulter des liens contractuels existant entre les parties des rapports suffisamment étroits pour donner naissance à une obligation de diligence, mais une obligation de diligence en matière délictuelle ne pourra coexister avec une autre créée expressément par le contrat. Si l'obligation est expressément prévue au contrat, les recours du demandeur seront limités à ceux prévus par le droit des contrats. Toutefois, un recours en responsabilité délictuelle n'est pas exclu dans tous les cas. On devrait adopter une méthode permettant de tenir compte du contexte dans lequel le contrat est intervenu, ainsi que de la position des parties l'une par rapport à l'autre. C'est dans un contexte commercial où les parties ont un pouvoir de négociation égal que la règle a le plus sa raison d'être. En l'espèce, il n'est pas question d'iniquité ni de pouvoir de négociation inégal. Si ces questions ou d'autres semblables devaient être soulevées, le tribunal devrait se garder d'exclure trop rapidement l'existence d'une obligation de diligence en matière délictuelle en invoquant une condition expresse du contrat, surtout si cela signifiait l'absence de recours pour le demandeur lésé.

An action for negligent misrepresentation will survive the making of a contract between the parties. As in other areas of negligence, the plaintiff may have the option of concurrent actions in tort and contract. Here, however, the duty imposed in tort on Hydro by the clause in the tender documents is co-extensive with the duty imposed in contract by the express clause in the contract. Consequently, subject to any overriding considerations arising from the context in which the transaction occurred, Checo is limited to whatever remedies may be available to it in contract for Hydro's breach of the contract. An assessment of the context strengthens the conclusion that Checo should be limited to any remedies that might be available to it under the contract. This transaction occurred in a commercial context. The parties are both large corporations, and there is no allegation or indication of any inequality of bargaining power or unconscionability. As well, the contract which was concluded by the parties was included as part of the tender documents. Checo knew when it was preparing its bid that if its bid were accepted, the representation as to the condition of the right-of-way would be a term of the contract. Checo knew, or ought to have known, that disputes as to the condition of the right-of-way would potentially be governed by the contract.

There is no clause in the contract or in the tender documents which serves either to limit or exclude Hydro's liability for the representation the contract contained. Hydro breached the express term of the contract that the right-of-way would be cleared and is accordingly liable for damages, which should be assessed at the new trial.

There was insufficient evidence to support a finding of deceit. The Court of Appeal properly concluded that Hydro should not be liable for fraudulent misrepresentation.

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L'action pour déclaration inexacte faite par négligence survivra à la conclusion d'un contrat entre les parties. Comme dans d'autres domaines de la négligence, il se peut que le demandeur dispose de recours concomitants en matières contractuelle et délictuelle. Toutefois, en l'espèce, l'obligation en responsabilité délictuelle imposée à Hydro par la clause du dossier d'appel d'offres coïncide avec l'obligation d'ordre contractuel imposée par la clause expresse du contrat. Par conséquent, sous réserve de toute considération prépondérante résultant du contexte dans lequel l'entente est intervenue, les recours de Checo se limitent à ceux qui découlent du droit des contrats en cas d'inexécution du contrat par Hydro. L'analyse du contexte vient renforcer la conclusion que les recours de Checo doivent être limités à ceux dont elle dispose en vertu du contrat. L'entente s'inscrivait dans un contexte commercial. Les parties sont deux grandes entreprises et il n'y a pas eu d'allégation ou d'indication d'inégalité dans la négociation ni d'iniquité. En outre, le contrat conclu par les parties faisait partie du dossier d'appel d'offres. Checo savait, au moment de préparer sa soumission que, si celle-ci était acceptée, la déclaration relative à la condition de l'emprise deviendrait une clause du contrat. Checo savait, ou aurait dû savoir, que tout litige concernant l'état de l'emprise serait assujetti au contrat.

Il n'y a pas de clause au contrat ou au dossier d'appel d'offres susceptible de limiter ou d'exclure la responsabilité d'Hydro quant à la déclaration contenue dans le contrat. Hydro a violé la condition expresse du contrat selon laquelle l'emprise serait déboisée, et elle est donc tenue responsable des dommages-intérêts, qui devraient être évalués au cours d'un nouveau procès.

Les éléments de preuve présentés ne suffisaient pas à étayer une conclusion de dol. La Cour d'appel a à bon droit conclu qu'Hydro ne devait pas être tenue responsable par suite d'une déclaration inexacte et frauduleuse.

Jurisprudence

Citée par les juges La Forest et McLachlin

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Glenn A. Urquhart, *Arthur M. Grant* and *Gordon D. Phillips*, for British Columbia Hydro and Power Authority.

Donald J. Sorochan, *Q.C.*, *Meredith A. Quartermain* and *Mari A. Worfolk*, for BG Checo International Ltd.

The judgment of La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by

LA FOREST AND MCLACHLIN JJ.—We have had the advantage of reading the reasons of our colleague Justice Iacobucci. We agree with his conclusion that Hydro is liable to Checo for breach of contract. We disagree, however, with his conclusion that the contract precludes Checo from suing in tort. In our view, our colleague's approach would have the effect of eliminating much of the rationalizing thrust behind the movement towards concurrency in tort and contract. Rather than attempting to establish new barriers to tort liability in contractual contexts, the law should move towards the elimination of unjustified differences between the remedial rules applicable to the two actions, thereby reducing the significance of the existence of the two different forms of action and

McLauchlan, D. W. «Assessment of Damages for Misrepresentations Inducing Contracts» (1987), 6 *Otago L. Rev.* 370.
McLauchlan, D. W. «Pre-Contract Negligent Misrepresentation» (1977), 4 *Otago L. Rev.* 23.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de la Colombie-Britannique (1990), 44 B.C.L.R. (2d) 145, 4 C.C.L.T. (2d) 161, 41 C.L.R. 1, [1990] 3 W.W.R. 690, qui a infirmé en partie un jugement du juge Cohen (1988), 10 A.C.W.S. (3d) 312, [1988] B.C.D. Civ. 971-01, [1988] B.C.W.L.D. 2324, qui avait accordé des dommages-intérêts pour déclaration inexacte et frauduleuse. Pourvoi rejeté et pourvoi incident accueilli en partie, les juges Sopinka et Iacobucci sont dissidents en partie.

Glenn A. Urquhart, *Arthur M. Grant* et *Gordon D. Phillips*, pour British Columbia Hydro and Power Authority.

Donald J. Sorochan, *c.r.*, *Meredith A. Quartermain* et *Mari A. Worfolk*, pour BG Checo International Ltd.

Version française du jugement des juges La Forest, L'Heureux-Dubé, Gonthier et McLachlin rendu par

LES JUGES LA FOREST ET MCLACHLIN—Nous avons eu l'avantage de prendre connaissance des motifs de notre collègue le juge Iacobucci. Nous souscrivons à sa conclusion qu'Hydro est responsable envers Checo en raison d'une inexécution de contrat. Toutefois, nous ne partageons pas sa conclusion que le contrat empêche Checo d'exercer un recours en responsabilité délictuelle. À notre avis, la façon de voir de notre collègue aurait pour effet d'annuler en bonne partie la tendance à la rationalisation qui est derrière le mouvement vers la concomitance en matières délictuelle et contractuelle. Au lieu de tenter d'établir de nouveaux obstacles à la responsabilité délictuelle dans des contextes contractuels, le droit devrait tendre à l'élimination des différences injustifiées entre les règles relatives aux redressements applicables aux deux actions, ce qui réduirait l'importance de l'existence des deux formes d'action différentes et permettrait à un per-

allowing a person who has suffered a wrong full access to all relevant legal remedies.

The facts have been fully set out by our colleague and need not be repeated. The tender documents (subsequently incorporated in the contract) stated that clearing of the right-of-way would be done by others and formed no part of the work to be performed by Checo. The tender documents and contract documents also stated that it was Checo's responsibility to inform itself of all aspects of the work and that should any errors appear in the tender documents, or should Checo note any conditions conflicting with the letter or spirit of the tender documents, it was the responsibility of Checo to obtain clarification before submitting its tender. The tender documents also provided that Checo would satisfy itself of all site conditions and the correctness and sufficiency of the tender for the work and the stipulated prices.

Checo argues that the right-of-way was not properly cleared and that the statement in the tender documents and the contract that it had been cleared constituted a breach of contract and negligent misrepresentation.

Hydro argues first that it carried out the clearing required by clause 6.01.03 of the contract, and second, that in any event it was up to Checo to satisfy itself that the site was adequately cleared before tendering. In other words, if there was ambiguity as to what was meant by "cleared" Checo had assumed the risk of clearing which might not meet its expectations.

The trial judge found Hydro liable for the tort of deceit. The Court of Appeal found that the evidence fell short of supporting that finding, there being no evidence of intention to deceive. That conclusion cannot seriously be contested and Checo's cross-appeal on the issue of fraudulent misrepresentation must accordingly be dismissed. The only issues therefore are whether claims lie in

sonne qui a subi un préjudice d'avoir accès à tous les redressements judiciaires pertinents.

Notre collègue a présenté les faits de manière détaillée et il n'est pas nécessaire de les répéter. Le dossier d'appel d'offres (incorporé par la suite dans le contrat) prévoyait que le déboisement de l'emprise serait effectué par d'autres et ne faisait pas partie du travail que Checo devait exécuter. Le dossier d'appel d'offres et le contrat stipulaient également qu'il incombait à Checo de se renseigner sur tous les aspects des travaux et que, advenant le cas où il y aurait des erreurs dans le dossier, ou si Checo remarquait des conditions qui venaient en contradiction avec la lettre ou l'esprit du dossier, elle devait obtenir les explications voulues avant de présenter sa soumission. Le dossier d'appel d'offres prévoyait également que Checo devait vérifier l'état des lieux et s'assurer que sa soumission était exacte et complète au regard des travaux et des prix indiqués.

Checo soutient que l'emprise n'a pas été correctement déboisée et que la déclaration contenue dans le dossier d'appel d'offres et dans le contrat selon laquelle elle l'avait été constitue une inexécution du contrat et une déclaration inexacte faite par négligence.

Hydro soutient, premièrement, qu'elle a effectué le déboisement exigé par la clause 6.01.03 du contrat et, deuxièmement, que de toute façon il incombait à Checo de s'assurer que les lieux avaient été correctement déboisés avant de présenter sa soumission. En d'autres termes, s'il y avait ambiguïté quant à la signification du terme «déboisé», Checo avait assumé le risque d'un déboisement qui risquait de ne pas satisfaire à ses attentes.

Le juge de première instance a conclu qu'Hydro était responsable du délit civil de dol. La Cour d'appel a conclu que cette conclusion n'est pas étayée par la preuve puisqu'il n'y avait aucun élément de preuve de l'intention de tromper. Cette conclusion ne peut être sérieusement contestée et le pourvoi incident de Checo sur la question de la déclaration inexacte et frauduleuse doit donc être rejeté. Par conséquent, les seules questions soulevées sont de savoir s'il peut y avoir des recours en

contract and tort and if so, what is the measure of damages.

The Claim in Contract

The parties chose to set out their respective rights and obligations in the contract they signed. They chose to incorporate the tender documents into the contract. Thus all rights and obligations flowing from the tender documents onward are set by the parties' own agreement.

It follows that a court, in assessing the rights and obligations of the parties, must commence with the contract. It must look to what the parties themselves had to say about those rights and obligations.

This brings us to construction of the contract. The problem is that of reconciling provisions in the contract which are said to be inconsistent. One, the provision that placed on Hydro the obligation of clearing the right-of-way, was specific. Clause 6.01.03 stated that "[c]learing of the right-of-way and foundation installation has been carried out by others and will not form part of this Contract." It went on to state a limited exception for two areas, again drafted in specific terms: "Standing trees and brush have not been removed from the right-of-way in certain valley and gully crossings." The other relevant provisions are the general provisions placing on Checo the responsibility for any misunderstandings as to the conditions of the work or errors in the tender documents (clause 2.03), and for satisfying itself before bidding as to site conditions, quantities of work, etc., and requiring it to "obtain all necessary information as to risks, contingencies, and other circumstances which may influence or affect [its] Tender" (clause 4.04).

It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the

responsabilité contractuelle et en responsabilité délictuelle et, le cas échéant, quel est le montant des dommages-intérêts.

Le recours en responsabilité contractuelle

Les parties ont choisi d'énoncer leurs droits et obligations respectifs dans le contrat qu'elles ont signé. Elles ont choisi d'incorporer le dossier d'appel d'offres dans le contrat. Ainsi, tous les droits et obligations susceptibles de découler du dossier d'appel d'offres sont établis par l'entente entre les parties.

Il en découle qu'un tribunal doit d'abord se fonder sur le contrat pour évaluer les droits et les obligations des parties. Il doit tenir compte de ce que les parties elles-mêmes ont dit à ce sujet.

Cela nous amène à l'interprétation du contrat. Le problème est de concilier des dispositions du contrat qui seraient incompatibles. L'une d'elles, la disposition qui imposait à Hydro l'obligation de déboiser l'emprise, était explicite. La clause 6.01.03 prévoyait que [TRADUCTION] «[l]e déboisement de l'emprise et l'installation des fondations ont été faits par d'autres et ne feront pas partie du présent contrat». Elle prévoyait également une exception qui visait deux domaines, encore une fois rédigée en termes explicites: [TRADUCTION] «Les arbres sur pied et les broussailles n'ont pas été enlevés de l'emprise dans certaines vallées et ravins.» Les autres dispositions pertinentes sont les dispositions générales en vertu desquelles Checo est responsable de toute méprise quant aux conditions d'exécution des travaux ou des erreurs dans le dossier d'appel d'offres (clause 2.03), et est tenue de se renseigner, avant de présenter sa soumission, sur les conditions des lieux, la quantité des travaux, etc., et d'[TRADUCTION] «obtenir tous les renseignements pertinents quant aux risques, imprévus et autres circonstances susceptibles d'avoir une incidence sur sa soumission» (clause 4.04).

Il existe une règle primordiale en interprétation des contrats selon laquelle les diverses parties du contrat doivent être interprétées dans le contexte

parties as evident from the contract as a whole: K. Lewison, *The Interpretation of Contracts* (1989), at p. 124; *Chitty on Contracts* (26th ed. 1989), vol. I, at p. 520. Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective: *Chitty on Contracts*, *supra*, at p. 526; Lewison, *supra*, at p. 206; *Git v. Forbes* (1921), 62 S.C.R. 1, *per* Duff J. (as he then was), dissenting, at p. 10, rev'd [1922] 1 A.C. 256; *Hassard v. Peace River Co-operative Seed Growers Association Ltd.*, [1954] 2 D.L.R. 50 (S.C.C.), at p. 54. In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term: *Forbes v. Git*, [1922] 1 A.C. 256; *Cotter v. General Petroleums Ltd.*, [1951] S.C.R. 154. A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms—or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term.

Approaching the matter in this way, the provisions referred to above are capable of reconciliation. The parties agreed that Hydro should bear the responsibility of clearing the right-of-way. The only exception was as to the removal of trees and debris in certain valley and gully crossings. The general obligation of Checo for misunderstandings and errors in the tender documents and for satisfying itself as to the site, the work and all contingencies must not have been intended to negate the specific obligation for clearing which the contract placed squarely on the shoulders of Hydro. The failure to discharge that responsibility was not a "misunderstanding" or "error" in the tender documents within clause 2.03. Nor was it relevant to the tenderer's inspection of the site or responsibil-

de l'intention des parties qui ressort de l'ensemble du contrat: K. Lewison, *The Interpretation of Contracts* (1989), à la p. 124; *Chitty on Contracts* (26e éd. 1989), vol. I, à la p. 520. Lorsque des incompatibilités ressortent entre différentes conditions d'un contrat, le tribunal doit tenter de trouver une interprétation qui peut raisonnablement attribuer un sens à chacune des conditions en question. Le tribunal ne conclura à l'inapplicabilité d'une clause que s'il ne peut trouver une interprétation qui en rend les conditions raisonnablement compatibles: *Chitty on Contracts*, *op. cit.*, à la p. 526; Lewison, *op. cit.*, à la p. 206; *Git c. Forbes* (1921), 62 R.C.S. 1, le juge Duff (plus tard Juge en chef), dissident, à la p. 10, inf. par [1922] 1 A.C. 256; *Hassard c. Peace River Co-operative Seed Growers Association Ltd.*, [1954] 2 D.L.R. 50 (C.S.C.), à la p. 54. Dans ce processus, les conditions seront conciliées, dans la mesure du possible, par l'interprétation de l'une comme étant une restriction de l'autre: *Forbes c. Git*, [1922] 1 A.C. 256; *Cotter c. General Petroleums Ltd.*, [1951] R.C.S. 154. Il résulte fréquemment de ce genre d'analyse que des conditions générales d'un contrat seront considérées comme restreintes par des conditions spécifiques — ou, autrement dit, lorsqu'il y a apparence de conflit entre une condition générale et une condition explicite, elles peuvent être conciliées si l'on considère que les parties ont voulu que la condition générale ne s'applique pas à l'objet de la condition spécifique.

Si l'on examine la question de cette manière, les dispositions mentionnées précédemment peuvent être conciliées. Les parties ont convenu qu'Hydro se chargerait du déboisement de l'emprise. La seule exception visait l'enlèvement d'arbres et de débris dans certaines vallées et ravins. L'obligation générale de Checo en matière de méprise et d'erreurs dans le dossier d'appel d'offres et quant aux renseignements sur les lieux, les travaux et tous les imprévus n'a pas pu être conçue pour annuler l'obligation explicite de déboisement qui, en vertu du contrat, incombait nettement à Hydro. L'omission de s'acquitter de cette obligation ne constituait pas une «méprise» ou une «erreur» dans le dossier d'appel d'offres au sens de la clause 2.03. Elle ne se rapportait pas non plus à l'examen des

ity for risks and contingencies that might affect the bid within clause 4.04. Given the specific nature of Hydro's obligation to clear the right-of-way, the site inspection and contingencies referred to can reasonably be read as relating to matters other than clearing, which was a clearly assigned obligation and thus not a contingency. The same applies to the provision for preparation of the site (clause 7.01.02). In this way, the clause placing on Hydro the obligation to clear the right-of-way can be reconciled with the clauses placing on Checo the consequences of errors and misunderstandings in the tender documents and the obligation to satisfy itself as to the site, the work and contingencies.

We thus conclude that the contract required Hydro to clear the right-of-way as specified in clause 6.01.03 of the contract and that duty was not negated by the more general clauses relating to errors and misunderstandings in tendering, site conditions and contingencies. This was the view of the trial judge and the majority in the Court of Appeal. The trial judge, based on the evidence he heard, went on to define what "clearing" meant in the contract; it meant that "the right-of-way would be free of logs and debris." The majority of the Court of Appeal accepted this conclusion. So must we. Since it is not seriously contended that Hydro cleared the right-of-way to this standard, Hydro's breach of contract is established.

The plaintiff suing for breach of contract is to be put in the position it would have been in had the contract been performed as agreed. The measure of damages is what is required to put Checo in the position it would have been in had the contract been performed as agreed. If the contract had been performed as agreed, Hydro would have removed the logs and debris from the right-of-way. Checo would not have been required to do the additional work that was necessitated by reason of the work site being improperly cleared. It might also have

lieux par le soumissionnaire ni à sa responsabilité pour ce qui est des risques et imprévus susceptibles d'avoir une incidence sur la soumission au sens de la clause 4.04. Étant donné la nature spécifique de l'obligation d'Hydro de déboiser l'emprise, l'examen des lieux et l'évaluation des imprévus mentionnés peuvent raisonnablement être interprétés comme liés à des questions autres que le déboisement, qui, de toute évidence, était une obligation attribuée et non pas un imprévu. C'est le cas également de la disposition relative à la préparation des lieux (clause 7.01.02). Ainsi, la clause qui impose à Hydro l'obligation de déboiser l'emprise peut être conciliée avec les clauses qui imposent à Checo les conséquences des erreurs et des méprises dans le dossier d'appel d'offres et l'obligation de se renseigner sur les lieux, les travaux et les imprévus.

Par conséquent, nous concluons que le contrat exigeait qu'Hydro déboise l'emprise aux termes de la clause 6.01.03 et que cette obligation n'était pas écartée par les clauses plus générales relatives aux erreurs et aux méprises en ce qui concerne la soumission, l'état des lieux et les imprévus. Le juge de première instance et la Cour d'appel, à la majorité, étaient de cet avis. Le juge de première instance, sur le fondement de la preuve qui lui a été présentée, a défini le sens du terme «déboisement» dans le contrat; il signifiait que [TRADUCTION] «l'emprise serait dégagée des billes et des débris». La Cour d'appel, à la majorité, a accepté cette conclusion, ce que nous devons faire également. Étant donné qu'Hydro ne soutient pas sérieusement qu'elle a déboisé l'emprise selon cette norme, l'inexécution du contrat par Hydro est démontrée.

La partie qui intente une poursuite fondée sur l'inexécution du contrat doit être placée dans la situation qui aurait été la sienne si le contrat avait été exécuté comme convenu. Le montant des dommages-intérêts est celui qui est nécessaire pour placer Checo dans la situation qui aurait été la sienne si le contrat avait été exécuté comme convenu. Dans un tel cas, Hydro aurait enlevé les billes et les débris de l'emprise. Checo n'aurait pas été obligée de faire le travail supplémentaire qui s'imposait parce que les lieux n'avaient pas été déboi-

avoided certain overhead. The contract stipulated 15 percent for overhead and profit on extra work. Checo may be entitled to a portion of this sum for overhead. It would not be entitled to profit on the cost of clearing the right-of-way, since that would put Checo in a better position than it would have been had Hydro performed its contract; Checo never bargained for profit on this work, which was totally outside the parties' expectations. As will be explained in greater detail later in these reasons, we share Iacobucci J.'s view that if damages are to be assessed for breach of contract regarding the improper clearing of the work site, the case should be returned to trial for that to be done.

sés correctement. Elle aurait également peut-être pu éviter certains frais généraux. Le contrat prévoyait 15 pour 100 de frais généraux et de bénéfices pour le travail supplémentaire. Elle peut avoir droit à une partie de cette somme à titre de frais généraux. Elle n'aurait pas droit à des bénéfices sur le coût du déboisement de l'emprise, parce que cela la placerait dans une meilleure situation que si Hydro avait exécuté son contrat; Checo n'a jamais négocié en vue d'obtenir un bénéfice sur ces travaux, que les parties ne pouvaient absolument pas prévoir. Comme nous l'expliquerons de manière plus détaillée plus loin, nous partageons l'opinion du juge Iacobucci que, s'il doit y avoir évaluation de dommages-intérêts pour inexécution de contrat relativement au déboisement incomplet des lieux, l'affaire doit être renvoyée en première instance à cette fin.

The Claim in Tort

The Theory of Concurrency

The first question is whether the contract precludes Checo from suing in tort.

Iacobucci J. concludes that a contract between the parties may preclude the possibility of suing in tort for a given wrong where there is an express term in the contract dealing with the matter. We would phrase the applicable principle somewhat more narrowly. As we see it, the right to sue in tort is not taken away by the contract in such a case, although the contract, by limiting the scope of the tort duty or waiving the right to sue in tort, may limit or negate tort liability.

In our view, the general rule emerging from this Court's decision in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, is that where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. This limitation on the general rule of concurrency arises because it is always open to parties to limit

Le recours en responsabilité délictuelle

La théorie de la concomitance

La première question est de savoir si le contrat empêche Checo d'exercer un recours en responsabilité délictuelle.

Le juge Iacobucci conclut qu'un contrat entre les parties peut empêcher un recours en responsabilité délictuelle relativement à un préjudice donné lorsque le contrat traite expressément de la question. Nous énoncerions le principe applicable d'une manière un peu plus restreinte. À notre avis, dans un tel cas, le contrat ne supprime pas le droit d'exercer un recours en responsabilité délictuelle, bien que, par la restriction de l'obligation en cette matière ou par la renonciation à ce droit, il puisse restreindre ou éliminer la responsabilité délictuelle.

À notre avis, la règle générale qui ressort de l'arrêt de notre Cour *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147, est que, lorsqu'un préjudice permet à première vue d'étayer une action en responsabilité contractuelle et une action en responsabilité délictuelle, la partie peut exercer l'un ou l'autre recours ou les deux, sauf lorsque le contrat indique que les parties avaient l'intention de restreindre ou d'éliminer le droit d'intenter une action

or waive the duties which the common law would impose on them for negligence. This principle is of great importance in preserving a sphere of individual liberty and commercial flexibility. Thus if a person wishes to engage in a dangerous sport, the person may stipulate in advance that he or she waives any right of action against the person who operates the sport facility: *Dyck v. Manitoba Snowmobile Association Inc.*, [1985] 1 S.C.R. 589. Similarly, if two business firms agree that a particular risk should lie on a party who would not ordinarily bear that risk at common law, they may do so. So a plaintiff may sue either in contract or in tort, subject to any limit the parties themselves have placed on that right by their contract. The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on how they have dealt with it.

Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering—the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished. The rule is not that one cannot sue concurrently in contract and tort where the contract limits or contradicts the tort duty. It is rather that the tort duty, a general duty imputed by the law in all the relevant circumstances, must yield to the parties' superior right to arrange their rights and duties in a different way. In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon. For example, where the contractual limitation on the tort duty is partial, a tort action founded on the modified duty might lie. The tort duty as modified by the contractual agreement between the parties might be raised in a case where the limitation period for an action for breach of contract has expired but the limitation period for a tort action

en responsabilité délictuelle. Cette restriction à la règle générale de la concomitance est possible parce que les parties peuvent toujours limiter les obligations que la common law leur impose en matière de négligence, ou renoncer à celles-ci. Ce principe est très important pour la préservation d'un aspect de la liberté individuelle et de la souplesse commerciale. Ainsi, la personne qui désire pratiquer un sport dangereux peut au préalable renoncer au droit de poursuivre l'exploitant de l'installation sportive: *Dyck c. Manitoba Snowmobile Association Inc.*, [1985] 1 R.C.S. 589. De même, si deux entreprises commerciales conviennent qu'une partie assumera un risque particulier qu'elle n'assumerait pas ordinairement en common law, elles peuvent le faire. Un demandeur peut donc intenter une action en responsabilité contractuelle ou délictuelle, sous réserve de toute restriction que les parties elles-mêmes ont imposée à ce droit aux termes du contrat. Le simple fait que les parties aient traité d'une question expressément dans leur contrat ne signifie pas qu'elles avaient l'intention d'exclure le droit d'intenter une action en responsabilité délictuelle. Cela dépend de la manière dont elles en ont traité.

Selon cette interprétation, la seule restriction imposée au droit de choisir un moyen d'action est le principe de la primauté du choix personnel—le droit des particuliers d'organiser leurs affaires et d'assumer les risques d'une manière différente de ce que prévoit le droit de la responsabilité délictuelle. C'est seulement dans la mesure où ce choix personnel déroge à l'obligation en responsabilité délictuelle que celle-ci est réduite. La règle n'est pas qu'on ne peut pas poursuivre à la fois en responsabilité contractuelle et en responsabilité délictuelle lorsque le contrat restreint une obligation en responsabilité délictuelle ou y déroge. C'est plutôt que cette dernière, une obligation générale qui découle de la loi dans toutes les circonstances pertinentes, doit céder devant le droit supérieur des parties d'organiser leurs droits et leurs obligations d'une manière différente. Dans la mesure où le contrat ne déroge pas à l'obligation en responsabilité délictuelle, celle-ci demeure intacte et elle ouvre droit à un recours. Par exemple, lorsque la restriction contractuelle de l'obligation en respon-

has not. If one says categorically, as we understand Iacobucci J. to say, that where the contract deals with a matter expressly, the right to sue in tort vanishes altogether, then the latter two possibilities vanish.

This is illustrated by consideration of the three situations that may arise when contract and tort are applied to the same wrong. The first class of case arises where the contract stipulates a more stringent obligation than the general law of tort would impose. In that case, the parties are hardly likely to sue in tort, since they could not recover in tort for the higher contractual duty. The vast majority of commercial transactions fall into this class. The right to sue in tort is not extinguished, however, and may remain important, as where suit in contract is barred by expiry of a limitation period.

The second class of case arises where the contract stipulates a lower duty than that which would be presumed by the law of tort in similar circumstances. This occurs when the parties by their contract indicate their intention that the usual liability imposed by the law of tort is not to bind them. The most common means by which such an intention is indicated is the inclusion of a clause of exemption or exclusion of liability in the contract. Generally, the duty imposed by the law of tort can be nullified only by clear terms. We do not rule out, however, the possibility that cases may arise in which merely inconsistent contract terms could negative or limit a duty in tort, an issue that may be left to a

sabilité délictuelle est partielle, un recours en responsabilité délictuelle fondé sur l'obligation modifiée pourrait peut-être être exercé. Il pourrait être possible de soulever l'obligation en responsabilité délictuelle modifiée par l'entente contractuelle entre les parties dans le cas où le délai de prescription relatif à une action en inexécution de contrat est expiré mais pas celui relatif à une action en responsabilité délictuelle. Si l'on dit de façon catégorique, comme le fait à notre avis le juge Iacobucci, que lorsque le contrat traite expressément d'une question, le droit d'intenter une action en responsabilité délictuelle disparaît complètement, alors ces deux dernières possibilités disparaissent.

Ce point est illustré par l'examen des trois catégories de cas susceptibles de se présenter lorsque les responsabilités contractuelle et délictuelle sont appliquées au même préjudice. La première survient lorsque le contrat prévoit une obligation plus stricte que ne l'imposerait le droit général de la responsabilité délictuelle. Dans un tel cas, les parties sont peu susceptibles d'exercer un recours en responsabilité délictuelle puisqu'elles ne pourraient recouvrer de dommages-intérêts relativement à l'obligation contractuelle supérieure. La grande majorité des opérations commerciales s'inscrivent dans cette catégorie. Toutefois, le droit d'intenter une action en responsabilité délictuelle n'est pas éteint, et il peut encore être important, par exemple dans le cas où il est impossible de poursuivre en responsabilité contractuelle parce que la période de prescription est écoulée.

La deuxième catégorie se présente lorsque le contrat prévoit une obligation moindre que celle qui découlerait du droit de la responsabilité délictuelle dans des circonstances semblables. Cela se produit lorsque les parties indiquent par leur contrat leur intention de ne pas être liées par la responsabilité qu'impose habituellement le droit de la responsabilité délictuelle. La façon la plus courante d'indiquer cette intention est l'inclusion d'une clause d'exemption ou d'exclusion de responsabilité dans le contrat. En règle générale, l'obligation qu'impose le droit de la responsabilité délictuelle ne peut être annulée que par des conditions claires. Nous n'écartons toutefois pas la pos-

case in which it arises. The issue raises difficult policy considerations, viz. an assessment of the circumstances in which contracting parties should be permitted to agree to contractual duties that would subtract from their general obligations under the law of tort. These important questions are best left to a case in which the proper factual foundation is available, so as to provide an appropriate context for the decision. In the second class of case, as in the first, there is usually little point in suing in tort since the duty in tort and consequently any tort liability is limited by the specific limitation to which the parties have agreed. An exception might arise where the contract does not entirely negate tort liability (e.g., the exemption clause applies only above a certain amount) and the plaintiff wishes to sue in tort to avail itself of a more generous limitation period or some other procedural advantage offered by tort.

The third class of case arises where the duty in contract and the common law duty in tort are coextensive. In this class of case, like the others, the plaintiff may seek to sue concurrently or alternatively in tort to secure some advantage peculiar to the law of tort, such as a more generous limitation period. The contract may expressly provide for a duty that is the same as that imposed by the common law. Or the contractual duty may be implied. The common calling cases, which have long permitted concurrent actions in contract and tort, generally fall into this class. There is a contract. But the obligation under that contract is typically defined by implied terms, i.e., by the courts. Thus there is no issue of private ordering as opposed to publicly imposed liability. Whether the action is styled in contract or tort, its source is an objective

sibilité que de simples conditions contractuelles incompatibles puissent annuler ou restreindre une obligation en responsabilité délictuelle, question qu'il vaudrait mieux trancher lorsqu'elle se présente. La question soulève de difficiles considérations de principe, c'est-à-dire une évaluation des circonstances dans lesquelles les parties contractantes devraient pouvoir consentir à des obligations contractuelles qui réduiraient leurs obligations générales aux termes du droit de la responsabilité délictuelle. Il est préférable d'aborder ces questions seulement dans une affaire où on dispose des faits pertinents, de façon à fournir un contexte approprié à la décision. Dans la deuxième catégorie, comme dans la première, il est habituellement peu indiqué d'exercer un recours en responsabilité délictuelle puisque l'obligation en matière délictuelle, et par conséquent toute responsabilité délictuelle, est limitée par la restriction précise dont les parties ont convenu. Il pourrait y avoir une exception lorsque le contrat n'élimine pas entièrement la responsabilité délictuelle (p. ex., la clause d'exemption ne s'applique qu'au-delà d'un certain montant) et lorsque le demandeur désire exercer un recours en responsabilité délictuelle pour se prévaloir d'un délai de prescription plus généreux ou de tout autre avantage procédural offert par le droit de la responsabilité délictuelle.

La troisième survient lorsque l'obligation contractuelle et l'obligation de common law en responsabilité délictuelle coïncident. Dans cette catégorie, comme dans les autres, le demandeur peut chercher à intenter une action de façon concomitante ou subsidiaire en responsabilité délictuelle pour obtenir un certain avantage particulier au droit de la responsabilité délictuelle, comme un délai de prescription plus généreux. Le contrat peut prévoir expressément une obligation identique à celle qu'impose la common law. L'obligation contractuelle peut également être implicite. Les affaires touchant les professions publiques, qui ont depuis longtemps permis la concomitance d'actions en matières contractuelle et délictuelle, s'inscrivent généralement dans cette catégorie. L'existence d'un contrat est établie. Toutefois l'obligation aux termes du contrat est en règle générale déterminée selon des conditions impli-

expectation, defined by the courts, of the appropriate obligation and the correlative right.

The case at bar, as we see it, falls into this third category of case. The contract, read as we have proposed, did not negate Hydro's common law duty not to negligently misrepresent that it would have the right-of-way cleared by others. Had Checo known the truth, it would have bid for a higher amount. That duty is not excluded by the contract, which confirmed Hydro's obligation to clear the right-of-way. Accordingly, Checo may sue in tort.

We conclude that actions in contract and tort may be concurrently pursued unless the parties by a valid contractual provision indicate that they intended otherwise. This excludes, of course, cases where the contractual limitation is invalid, as by fraud, mistake or unconscionability. Similarly, a contractual limitation may not apply where the tort is independent of the contract in the sense of falling outside the scope of the contract, as the example given in *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522 (H.L.), of the captain of a vessel falling asleep and starting a fire in relation to a claim for cargo damage.

The Express-Implied Distinction

Our colleague asserts that where the parties deal with a matter expressly in their contract, all right to sue in tort is lost. We have suggested, with great respect, that this proposition is unnecessarily draconian. The converse of this proposition is that implied terms of contracts do not oust tort liability.

cites, c.-à-d., par les tribunaux. Par conséquent, il n'est pas question de choix des parties par opposition à la responsabilité générale. Que l'action soit fondée sur la responsabilité contractuelle ou délictuelle, elle résulte de ce que l'on attend objectivement, suivant la détermination des tribunaux, de l'obligation appropriée et du droit qui en découle.

À notre avis, l'espèce s'inscrit dans la troisième catégorie. Le contrat, interprété comme nous l'avons proposé, n'a pas éliminé l'obligation de common law d'Hydro de ne pas déclarer de façon inexacte et par négligence que l'emprise serait déboisée par d'autres. Si Checo avait connu la vérité, elle aurait présenté une soumission plus élevée. Cette obligation n'a pas été écartée par le contrat, qui confirmait l'obligation d'Hydro de déboiser l'emprise. Par conséquent, Checo peut exercer un recours en responsabilité délictuelle.

Nous concluons qu'il est possible d'intenter à la fois une action en responsabilité contractuelle et une action en responsabilité délictuelle, à moins que les parties n'indiquent, dans une disposition contractuelle valide, leur intention contraire. Il va sans dire que cela exclut les cas où la restriction contractuelle n'est pas valide, que ce soit pour cause de fraude, d'erreur ou d'iniquité. De même, une restriction contractuelle peut ne pas s'appliquer lorsque le délit est indépendant du contrat, en ce sens qu'il ne relève pas du contrat, comme l'exemple, donné dans l'arrêt *Elder, Dempster & Co. c. Paterson, Zochonis & Co.*, [1924] A.C. 522 (H.L.), du capitaine de navire qui s'est endormi et a provoqué un incendie, relativement à une réclamation pour avaries au chargement.

La distinction entre condition expresse et condition implicite

Notre collègue affirme que lorsque les parties traitent expressément d'une question dans leur contrat, elles perdent tout droit d'exercer un recours en responsabilité délictuelle. Avec égards, nous trouvons cette position inutilement draconienne. L'inverse de cette proposition est que les conditions implicites des contrats n'éliminent pas la responsabilité délictuelle.

Although Iacobucci J. states at p. 68 of his reasons that he is leaving open the question of "[w]hether or not an implied term of a contract can define a duty of care in such a way that a plaintiff is confined to a remedy in contract", the distinction between implied and express terms figures in his discussion of the effect of contract terms on tort liability. For example, at p. 67 of his reasons, our colleague states:

> The compromise position adopted by Le Dain J. was that any duty arising in tort will be concurrent with duties arising under the contract, unless the duty which the plaintiff seeks to rely on in tort is also a duty defined by an express term of the contract. [The emphasis is Iacobucci J.'s.]

It would seem to follow from this statement that concurrent duties in contract and tort would lie where the contract duty is defined by an implied term of the contract, but not where the term is express. In these circumstances, it is not amiss to consider the utility of the distinction between express and implied terms of the contract as a basis for determining when a contract term may affect tort liability.

In our view, using the express-implied distinction as a basis for determining whether there is a right to sue in tort poses a number of problems. The law has always treated express and implied contract terms as being equivalent in effect. Breach of an implied term is just as serious as breach of an express term. Moreover, it is difficult to distinguish between them in some cases. Implied terms may arise from custom, for example, or from the conduct of the parties. In some cases words and conduct intermingle. Why should parties who were so certain in their obligations that they did not take the trouble to spell them out find themselves able to sue in tort, while parties who put the same matters in writing cannot?

Bien que le juge Iacobucci dise, à la p. 68 de ses motifs, qu'il laisse à une détermination future la question de savoir si «une condition implicite d'un contrat [peut] être ou non déterminative d'une obligation de diligence de sorte que le demandeur est limité à un recours contractuel», la distinction entre des conditions implicites et expresses figure dans son analyse de l'effet des conditions du contrat sur la responsabilité délictuelle. Par exemple, notre collègue dit, à la p. 67 de ses motifs:

> Suivant la position de compromis du juge Le Dain, les obligations délictuelles et contractuelles seront concomitantes sauf si l'obligation en responsabilité délictuelle qu'invoque le demandeur constitue également une obligation expressément prévue au contrat. [Souligné par le juge Iacobucci.]

Il semble découler de cet énoncé qu'il y aurait des obligations concomitantes en matières contractuelle et délictuelle lorsque l'obligation contractuelle découle d'une condition implicite du contrat, mais non s'il s'agit d'une condition expresse. Dans ces circonstances, il convient donc de tenir compte de l'utilité de la distinction entre les conditions expresses et implicites pour déterminer si une condition du contrat peut influer sur la responsabilité délictuelle.

À notre avis, un certain nombre de problèmes découlent de l'utilisation de la distinction entre conditions expresses et implicites pour déterminer s'il existe un droit d'exercer un recours en responsabilité délictuelle. Le droit a toujours considéré les conditions expresses et implicites des contrats comme ayant un effet équivalent. La violation d'une condition implicite est tout aussi grave que la violation d'une condition expresse. Qui plus est, il est difficile d'établir une distinction entre elles dans certains cas. Par exemple, les conditions implicites peuvent découler de la coutume ou de la conduite des parties. Il arrive que les termes utilisés et la conduite s'entremêlent. Pourquoi des parties qui étaient si certaines de leurs obligations qu'elles n'ont pas pris la peine de les préciser devraient-elles être en mesure d'exercer des recours en responsabilité délictuelle alors que les parties qui ont prévu les mêmes par écrit ne le peuvent pas?

Nor is it evident to us that if parties to a contract choose to include an express term in the contract dealing with a particular duty relevant to the contract, they intended to oust the availability of tort remedies in respect of that duty. In such cases, the intention may more likely be:

(a) To make it clear that the parties understand particular contractual duties to exist as between them, rather than having the more uncertain situation of not knowing whether a court will imply a particular duty under the contract; and/or

(b) To prevent litigation (for breach of contract) in the event of disputes arising—the more certain the parties' respective rights and obligations (as is usually the case when those rights and obligations are set out in express contractual terms), the more likely it will be that disputes between the parties can be settled.

While the tort duty may be limited by the contractual terms so as to be no broader than the contract duty, there is no reason to suppose that merely by stipulating a duty in the contract, the parties intended to negate all possibility of suing in tort.

Indeed, a little further on in his reasons, our colleague appears to concede that the ouster of recourse to tort law must depend on more than the fact the contract has expressly dealt with the matter. He indicates at p. 69 of his reasons that whether the parties will be held to have intended to oust tort remedies in favour of contract remedies will depend on the context, including:

(a) whether the contract is commercial or non-commercial;

(b) whether the parties were of equal bargaining power;

Selon nous, il n'est pas évident non plus que, si les parties choisissent d'inscrire dans le contrat une condition expresse qui traite d'une obligation particulière pertinente, elles ont l'intention d'éliminer la possibilité des recours en responsabilité délictuelle relativement à cette obligation. Dans de tels cas, l'intention serait plutôt:

a) de préciser que les parties comprennent les obligations contractuelles particulières qui existent entre elles, plutôt que d'être dans la situation plus incertaine de ne pas savoir si un tribunal déduira une obligation particulière du contrat;

b) d'empêcher les litiges (fondés sur l'inexécution de contrat) en cas de conflit—plus les droits et les obligations des parties sont certains (comme c'est ordinairement le cas lorsque ces droits et obligations sont énoncés dans des conditions expresses du contrat), plus il sera possible de régler les conflits entre les parties.

Bien que l'obligation en responsabilité délictuelle puisse être limitée par les conditions contractuelles de façon que sa portée ne soit pas plus grande que celle de l'obligation contractuelle, il n'y a aucune raison de présumer que, par la simple stipulation d'une obligation dans le contrat, les parties ont eu l'intention d'éliminer toute possibilité de recours en responsabilité délictuelle.

En fait, un peu plus loin dans ses motifs, notre collègue semble admettre que l'élimination du recours au droit de la responsabilité délictuelle ne doit pas reposer sur le seul fait que le contrat traite expressément de la question. Il indique, à la p. 69 de ses motifs, que, pour déterminer si les parties sont réputées avoir eu l'intention d'éliminer les recours en responsabilité délictuelle et de leur préférer les recours en responsabilité contractuelle, il faut tenir compte du contexte, notamment:

a) s'il s'agit d'un contrat de nature commerciale ou non;

b) si les parties ont un pouvoir de négociation égal;

(c) whether the court is of the view that to find such an intention will lead to an unjust result in the court action.

Thus the question of whether a concurrent action in tort lies would depend not only on whether the contract expressly deals with the matter, but also on the elastic distinctions between commercial and non-commercial contracts, the court's perception of relative bargaining power, and finally, whether the court sees the result as just or unjust. We do not agree that parties contracting in a commercial context should be presumed to be more desirous of ousting the availability of tort remedies than parties contracting in a non-commercial context. If there are particular commercial relationships in which the parties wish remedies for disputes between them to be in contract only, then they may be expected to indicate this intention by including an express clause in the contract waiving the right to sue in tort. As for equality of bargaining power and the court's view of whether the result would be just or unjust, we fear they would introduce too great a measure of uncertainty. Parties should be able to predict in advance whether their remedies are confined to contract or whether they can sue concurrently in tort and contract. Finally, it seems to us that Iacobucci J.'s test for determining when concurrent liability is precluded will be difficult to apply in situations where the express contractual term does not exactly overlap a tort duty. In the present case, the contractual term was identical to the negligent misrepresentation, but that is not often to be expected.

The Authorities

The authorities, as we read them, do not support the conclusion that the express mention of a matter in the contract, and only its express mention in the contract, ousts any possibility of suing in tort. The opposing schools of thought on the concurrent lia-

c) si le tribunal est d'avis que conclure à l'existence d'une telle intention entraînerait un résultat injuste dans l'action devant le tribunal.

Par conséquent, la question de savoir si l'on peut intenter une action concomitante en responsabilité délictuelle dépendrait non seulement du fait que le contrat traite expressément ou non de la question, mais aussi de la souplesse des distinctions entre les contrats commerciaux et non commerciaux, de la perception qu'a le tribunal du pouvoir de négociation relatif des parties et, enfin, de l'opinion du tribunal quant à savoir si le résultat est juste ou injuste. Nous ne souscrivons pas à l'opinion qu'il y a lieu de présumer que les parties qui concluent un contrat en matière commerciale préconisent davantage l'élimination des recours en responsabilité délictuelle que les parties qui concluent un contrat dans un contexte non commercial. S'il existe des rapports commerciaux particuliers et que les parties souhaitent régler leurs litiges uniquement au moyen de recours contractuels, on s'attendrait à ce qu'elles l'indiquent par une clause expresse au contrat renonçant au droit à un recours en responsabilité délictuelle. En ce qui a trait à l'égalité du pouvoir de négociation et à l'opinion du tribunal quant à savoir si le résultat serait juste ou non, nous craignons que cela n'entraîne trop d'incertitude. Les parties devraient être en mesure de prédire si leurs recours se limitent à ceux prévus par le contrat ou s'il y a concomitance des recours en responsabilité délictuelle et en responsabilité contractuelle. Enfin, il nous semble que le critère utilisé par le juge Iacobucci pour déterminer quand la responsabilité concomitante est exclue sera difficile à appliquer dans les cas où la condition contractuelle expresse ne chevauche pas exactement une obligation en responsabilité délictuelle. En l'espèce, la condition contractuelle était identique à la déclaration inexacte faite par négligence, mais cela n'est pas susceptible d'arriver souvent.

La jurisprudence

À notre avis, la conclusion que la mention expresse d'une question dans le contrat, et seulement celle-ci, écarte toute possibilité d'exercer un recours en responsabilité délictuelle n'est pas appuyée par la jurisprudence. Les écoles de pensée

bility issue have not been divided along such lines. Instead, the issue has been whether there should be concurrent liability where any term of a contract, either express or implied, deals with the same duty imposed by tort law. For example, in *Lister v. Romford Ice and Cold Storage Co.*, [1957] A.C. 555 (H.L.), Viscount Simonds noted (at p. 573):

> It is trite law that a single act of negligence may give rise to a claim either in tort or for breach of a term express or implied in a contract. [Emphasis added.]

Similarly, in *Canadian Indemnity Co. v. Andrews & George Co.*, [1953] 1 S.C.R. 19, Rand J. stated (at p. 26):

> Where a contract expressly or by implication of fact provides for a performance with care, as in the case of carriers, the general duty is clearly not displaced and the person injured or damaged in property may sue either in contract or tort. [Emphasis added.]

On the other side of the concurrent liability debate, Wilson J.A. (as she then was), arguing in favour of liability lying in contract only, stated at p. 408 in her dissenting opinion in the Ontario Court of Appeal decision of *Dominion Chain Co. v. Eastern Construction Co.* (1976), 68 D.L.R. (3d) 385, aff'd *sub nom. Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346:

> The borderline of contract and tort in my opinion exists where a contract either expressly or impliedly imposes on A a duty of care vis-à-vis B, the other party to the contract, to do the things undertaken by the contract without negligence and there is also coincidental with, but independent of, the contract a duty of care upon A in tort. . . . [W]here the person to whom the duty is owed, the scope of the duty and the standard of care have all been expressly or impliedly agreed upon by the parties, it appears to me somewhat artificial to rely upon Lord Atkin's "neighbour" test to determine whether or not the duty is owed to the particular plaintiff and as to

opposées sur la question de la responsabilité concomitante ne se sont pas divisées de cette façon. La question a plutôt été de savoir s'il doit y avoir responsabilité concomitante lorsqu'une condition du contrat, expresse ou implicite, traite de la même obligation que celle qu'impose le droit de la responsabilité délictuelle. Par exemple, dans l'arrêt *Lister c. Romford Ice and Cold Storage Co.*, [1957] A.C. 555 (H.L.), le vicomte Simonds a fait remarquer (à la p. 573):

> [TRADUCTION] Il est bien établi en droit qu'un seul acte fautif peut donner lieu soit à une action délictuelle, soit à une action pour manquement à une condition expresse ou implicite d'un contrat. [Je souligne.]

De même, dans l'arrêt *Canadian Indemnity Co. c. Andrews & George Co.*, [1953] 1 R.C.S. 19, le juge Rand a dit (à la p. 26):

> [TRADUCTION] Lorsqu'un contrat prévoit expressément ou par déduction de fait l'exécution d'un travail avec diligence, comme dans le cas des transporteurs, de toute évidence, il n'y a pas déplacement de l'obligation générale et la personne qui a subi un préjudice physique ou matériel peut intenter une action en responsabilité contractuelle ou délictuelle. [Je souligne.]

Représentant l'autre position dans le débat sur la concomitance des responsabilités, le juge Wilson (plus tard juge de notre Cour), à l'appui de la thèse selon laquelle la responsabilité découle seulement du contrat, a dit, à la p. 408 de son opinion dissidente dans l'arrêt de la Cour d'appel de l'Ontario *Dominion Chain Co. c. Eastern Construction Co.* (1976), 68 D.L.R. (3d) 385, confirmé *sub nom. Giffels Associates Ltd. c. Eastern Construction Co.*, [1978] 2 R.C.S. 1346:

> [TRADUCTION] À mon avis le cas limite de la responsabilité contractuelle et délictuelle survient lorsque le contrat impose à A de manière expresse ou implicite une obligation de diligence envers B, l'autre partie au contrat, de faire les choses prévues au contrat sans négligence, et qu'il se trouve dans le contrat simultanément, mais de façon indépendante, une obligation de diligence en matière délictuelle qui incombe à A. [. . .] [L]orsqu'il y a eu entente expresse ou implicite des parties quant à la personne envers qui l'obligation existe, à la portée de cette obligation et à la norme de diligence applicable, il m'apparaît quelque peu artificiel de recourir au critère

the requisite standard of care the defendant must attain. [Emphasis added.]

It is perhaps a source of some confusion that in the course of his judgment in *Central Trust Co. v. Rafuse*, *supra*, Le Dain J. stated (at p. 205):

Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort.

In our view, this passage should not be read as predicating the availability of concurrent liability in contract and tort on whether the contractual term is express or implied. Le Dain J. is simply stating that tort liability lies where the contractual term is implied. He does not go on to state that tort liability is always excluded by an express contractual term. This happens only when the express contractual term negates the tort duty. Thus in his summary of the applicable rules, Le Dain J. refers to exclusion clauses—express contract terms that negate general liability—as the kind of contract clause that may oust tort liability.

Our colleague relies on a second passage from *Central Trust Co. v. Rafuse*, *supra*, at p. 205, for the proposition that an express contractual term always ousts tort liability:

What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. . . . A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obliga-

du «prochain» qu'a énoncé lord Atkin pour décider si l'obligation existe envers le demandeur en cause et déterminer quelle est la norme de diligence applicable au défendeur. [Je souligne.]

Il se dégage peut-être une certaine confusion des motifs du juge Le Dain dans l'arrêt *Central Trust Co. c. Rafuse*, précité (à la p. 205):

Lorsque l'obligation de diligence en *common law* coïncide avec celle qui résulte d'une condition implicite du contrat, il est évident qu'elle ne dépend pas des conditions de ce contrat et il n'y a rien qui découle de l'intention des contractants qui devrait empêcher d'invoquer une responsabilité délictuelle concurrente ou alternative.

À notre avis, cet extrait ne devrait pas être interprété comme fondant la concomitance de la responsabilité contractuelle et délictuelle sur le fait que la condition du contrat est expresse ou implicite. Le juge Le Dain dit simplement qu'il y a recours en responsabilité délictuelle lorsque la condition contractuelle est implicite. Il n'ajoute pas que la responsabilité délictuelle est toujours exclue par une condition expresse du contrat. Ce n'est le cas que lorsque cette condition élimine l'obligation en responsabilité délictuelle. Par conséquent, dans son résumé des règles applicables, le juge Le Dain mentionne les clauses d'exclusion — les conditions expresses du contrat qui éliminent la responsabilité générale — comme le genre de clause du contrat susceptible d'écarter la responsabilité délictuelle.

Notre collègue se fonde sur un deuxième extrait de l'arrêt *Central Trust Co. c. Rafuse*, précité, à la p. 205, pour appuyer l'argument selon lequel une condition contractuelle expresse écarte toujours la responsabilité délictuelle:

Les engagements stipulés dans le contrat révèlent la nature des liens dont découle l'obligation de diligence en *common law*, mais la nature et la portée de l'obligation de diligence invoquée comme fondement de la responsabilité délictuelle ne doivent pas dépendre d'obligations ou de devoirs précis créés expressément par le contrat. C'est dans ce sens que l'obligation de diligence en *common law* doit être indépendante du contrat. [. . .] On ne saurait affirmer qu'une réclamation est en matière délictuelle si elle tient, en ce qui concerne la nature et la

tion or duty has been expressly and specifically defined by a contract.

Again, with respect, our understanding of the passage is different. In our view, Le Dain J.'s use of the words "created" and "depends" indicates the meaning of this passage is simply that for concurrent tort liability to be available there must be a duty of care in tort that would exist even in the absence of the specific contractual term which created the corresponding contractual obligation.

This interpretation of *Rafuse* accords with the view taken in other cases that concurrent liability in tort and contract is available where the contractual obligation in question arises from an express term of the contract. For example, in *Batty v. Metropolitan Property Realisations Ltd.*, [1978] Q.B. 554, the English Court of Appeal ruled that the plaintiffs were entitled to judgment against the defendant developers in either contract or tort where a house leased to the plaintiffs on a 999-year lease was gradually becoming uninhabitable due to instability of the land on which the house was built. The contractual obligation owed to the plaintiffs by the developers arose from an express warranty in the contract between the plaintiffs and the developers that the house had been built "in an efficient and workmanlike manner and of proper materials and so as to be fit for habitation . . ." (p. 563). This contractual obligation in effect corresponded with a tort duty "to examine with reasonable care the land, which in this case would include adjoining land, in order to see whether the site was one on which a house fit for habitation could safely be built" (p. 567).

Nor do we see the reference by Le Dain J. in *Rafuse* to *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399 (C.A.), and other related English case law differentiating tort and contract, as supportive of a distinction between express and implied contractual terms. The issue in those cases was one of classifying the causes of action as

portée de l'obligation de diligence alléguée, à la façon dont une obligation a été expressément et précisément définie dans un contrat.

Encore une fois, avec égards, nous interprétons différemment cet extrait. À notre avis, l'utilisation par le juge Le Dain des termes «créés» et «tient» signifie simplement que, pour qu'il y ait une responsabilité délictuelle concomitante, il doit y avoir une obligation de diligence en matière délictuelle qui existerait même en l'absence de la condition contractuelle précise qui créait l'obligation contractuelle correspondante.

Cette interprétation de l'arrêt *Rafuse* est conforme à la position adoptée dans d'autres affaires selon laquelle il y a concomitance de la responsabilité en matières contractuelle et délictuelle lorsque l'obligation contractuelle en question découle d'une condition expresse du contrat. Par exemple, dans l'arrêt *Batty c. Metropolitan Property Realisations Ltd.*, [1978] Q.B. 554, la Cour d'appel d'Angleterre a jugé que les demandeurs devaient avoir gain de cause contre les promoteurs défendeurs selon la responsabilité contractuelle ou délictuelle parce que la maison qu'ils avaient louée pour 999 ans devenait graduellement inhabitable en raison de l'instabilité du terrain sur lequel elle avait été construite. L'obligation contractuelle que les promoteurs avaient envers les demandeurs découlait d'une garantie expresse du contrat conclu entre eux selon laquelle la maison avait été construite [TRADUCTION] «de façon efficiente et professionnelle avec des matériaux convenables, de manière à ce qu'elle soit habitable . . .» (à la p. 563). Cette obligation contractuelle correspondait en fait à une obligation délictuelle [TRADUCTION] «d'examiner avec un soin raisonnable le terrain, ce qui en l'espèce comprend le terrain voisin, pour voir si on peut y construire en toute sécurité une maison habitable» (à la p. 567).

Dans l'arrêt *Rafuse*, la mention par le juge Le Dain de l'arrêt *Jarvis c. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399 (C.A.), et d'autres arrêts anglais connexes établissant une différence entre la responsabilité délictuelle et la responsabilité contractuelle, n'appuie pas, à notre avis, une distinction entre les conditions contrac-

either tort or contract for procedural purposes under the successive County Courts Acts. Indeed, they may be seen as resting on the assumption that, apart from statutory prescription, concurrent actions may lie.

Summary

We conclude that neither principle, the authorities nor the needs of contracting parties support the conclusion that dealing with a matter by an express contract term will, in itself, categorically exclude the right to sue in tort. The parties may by their contract limit the duty one owes to the other or waive the right to sue in tort. But subject to this, the right to sue concurrently in tort and contract remains.

In the case at bar, the contract did not limit the duty of care owed by Hydro to Checo. Nor did Checo waive its common law right to bring such tort actions as might be open to it. It follows that Checo was entitled to claim against Hydro in tort.

Damages in Tort and Contract in this Case

The measure of damages in contract and for the tort of negligent misrepresentation are:

Contract: the plaintiff is to be put in the position it would have been in had the contract been performed as agreed.

Tort: the plaintiff is to be put in the position it would have been in had the misrepresentation not been made.

tuelles expresses et implicites. La question soulevée dans ces arrêts portait sur la qualification des causes d'action comme étant délictuelles ou contractuelles à des fins de procédure aux termes des lois successives sur les cours de comté. En fait, ils pourraient être considérés comme reposant sur l'hypothèse qu'il peut y avoir concomitance des actions, sauf dispositions législatives expresses à cet égard.

Résumé

Nous concluons que ni le principe, ni la jurisprudence ou la doctrine, ni les besoins des parties contractantes n'appuient la conclusion que le seul fait de traiter d'une question par une condition contractuelle expresse écartera de façon catégorique le droit d'exercer un recours en responsabilité délictuelle. Les parties peuvent limiter par contrat l'obligation que l'une a envers l'autre ou renoncer au droit d'exercer un recours en responsabilité délictuelle. Toutefois, sous réserve de cette conclusion, le droit d'intenter une action concomitante en responsabilité délictuelle et en responsabilité contractuelle s'applique toujours.

En l'espèce, le contrat ne restreignait pas l'obligation de diligence d'Hydro envers Checo. Checo n'a pas non plus renoncé à son droit de common law d'intenter les actions en responsabilité délictuelle dont elle pouvait disposer. Il en découle que Checo avait le droit d'exercer contre Hydro un recours en responsabilité délictuelle.

Dommages-intérêts en responsabilité délictuelle et en responsabilité contractuelle en l'espèce

L'évaluation des dommages en responsabilité contractuelle et relativement au délit civil de déclaration inexacte faite par négligence se fait de la façon suivante:

Contrat: le demandeur doit être placé dans la situation qui aurait été la sienne si le contrat avait été exécuté comme convenu.

Délit civil: le demandeur doit être placé dans la situation qui aurait été la sienne n'eût été la déclaration inexacte.

At trial the plaintiff relied primarily on fraudulent misrepresentation, with its claim in contract being in the alternative to the claim in tort. The apparent reason for this approach was that the plaintiff had calculated its damages in tort as exceeding the damages in contract. In situations of concurrent liability in tort and contract, however, it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen, though, of course, particular circumstances or policy may dictate such a course.

The trial judge found for the plaintiff in fraudulent misrepresentation, and seems at some points in his judgment to have accepted the argument of the plaintiff that but for the misrepresentation the plaintiff would not have entered into the contract with Hydro. Accordingly, Checo's damages were calculated on the basis of what Checo lost overall on the contract. The trial judge also awarded the plaintiff a 15 percent markup for overhead and profit. With respect, while including an amount for overhead is appropriate where the damages are assessed as equalling the costs to the plaintiff of entering a contract it would not otherwise have entered, including as well something for profit is not appropriate. The trial judge's purported justification for this part of the damage award is not convincing. To fit this part of the award within a tort analysis, one would have to assume that but for the misrepresentation the plaintiff would have increased its bid by exactly the amount of the loss, plus overhead and profit (and would have been awarded the contract). This assumption contradicts the apparent assumption by the trial judge at other points of his judgment that Checo would not have

En première instance, la demanderesse s'est fondée principalement sur la déclaration inexacte et frauduleuse, sa demande fondée sur le contrat étant subsidiaire à celle fondée sur la responsabilité délictuelle. Cette position découle apparemment du fait que la demanderesse avait calculé que ses dommages-intérêts en responsabilité délictuelle étaient supérieurs à ceux fondés sur le contrat. Cependant, dans des cas de responsabilité concomitante en matières délictuelle et contractuelle, il ne semblerait pas normal d'accorder des montants différents de dommages-intérêts pour ce qui constitue essentiellement le même préjudice sur le seul fondement de la forme d'action choisie, bien que, naturellement, des circonstances particulières ou des raisons de principe puissent dicter une telle façon de faire.

Le juge de première instance a conclu que la demanderesse a fait l'objet d'une déclaration inexacte et frauduleuse et semble à certains points dans son jugement avoir accepté l'argument de la demanderesse qu'elle n'aurait pas conclu de contrat avec Hydro n'eût été la déclaration inexacte. Par conséquent, le montant des dommages-intérêts de Checo a été calculé sur le fondement de l'ensemble de ses pertes qui découlent du contrat. Le juge de première instance a également accordé à la demanderesse une majoration de 15 pour 100 au titre des frais généraux et des bénéfices. Avec égards, bien qu'il convienne d'inclure un montant pour couvrir les frais généraux lorsque l'évaluation des dommages-intérêts équivaut aux frais engagés par la demanderesse pour conclure un contrat qu'autrement elle n'aurait pas conclu, il ne convient pas d'inclure également un montant pour les bénéfices. La justification proposée par le juge de première instance relativement à cette partie des dommages-intérêts n'est pas convaincante. Pour que cette partie de la décision s'inscrive dans le cadre d'une analyse fondée sur la responsabilité délictuelle, il faudrait présumer que n'eût été la déclaration inexacte, la demanderesse aurait augmenté sa soumission d'un montant équivalant exactement à celui de la perte, plus les frais généraux et les bénéfices (et aurait obtenu le contrat). Cette hypothèse en contredit une autre sur laquelle le juge de première instance semble s'être fondé à

entered the contract had it known the true state of affairs.

The trial judge did not assess damages for breach of contract, whether for failure to clear the right-of-way or other contractual breaches (i.e., claims related to the costs of returned conductor material and fire-fighting costs that Hydro failed to pay). Although the trial judge did not clearly state why he was not awarding damages for breach of contract regarding the conductor material and fire-fighting costs, this result seems to be consistent with an assumption that but for the misrepresentation the plaintiff would not have entered into the contract with Hydro. Once damages in tort are awarded on that basis (taking into account the plaintiff's overall loss on the project), to also award the plaintiff damages for breach of contract regarding part of the plaintiff's losses on the contract would be to allow the plaintiff double recovery.

The majority in the Court of Appeal not only substituted a finding of negligent misrepresentation for a finding of fraudulent misrepresentation, but also made an express finding regarding what the plaintiff would have done had the misrepresentation not been made; contrary to the trial judge's apparent assumption, the plaintiff would have entered the contract but at a higher price. As Hinkson J.A., put it, writing for the majority:

> The effect of [the] negligent misrepresentation was to induce the plaintiff to enter into a contract at a price less than it would have had it known the true facts.

((1990), 44 B.C.L.R. (2d) 145, at p. 158.)

Hinkson J.A. went on to find that the increase in Checo's bid had it known the true facts would

d'autres endroits dans son jugement, selon laquelle Checo n'aurait pas conclu le contrat si elle avait été au courant de la situation véritable.

Le juge de première instance n'a pas évalué les dommages-intérêts qui résultent de l'inexécution de contrat, que ce soit pour le non-déboisement de l'emprise ou pour toute autre violation du contrat (c.-à-d., les demandes relatives aux coûts du matériel de conducteurs qui a été remis et aux coûts de la lutte contre les incendies qu'Hydro n'a pas payés). Bien que le juge de première instance n'ait pas clairement dit pour quelles raisons il n'accordait pas de dommages-intérêts pour l'inexécution de contrat en ce qui concerne les coûts relatifs au matériel de conducteurs et à la lutte contre les incendies, ce résultat semble correspondre à l'hypothèse que, n'eût été la déclaration inexacte, la demanderesse n'aurait pas conclu de contrat avec Hydro. Si l'on accorde des dommages-intérêts sur ce fondement en responsabilité délictuelle (en tenant compte de la perte globale de la demanderesse relativement au projet), il y aurait double recouvrement par la demanderesse si on lui accordait également des dommages-intérêts pour inexécution de contrat en ce qui concerne une partie de ses pertes qui découlent du contrat.

La Cour d'appel, à la majorité, a non seulement remplacé une conclusion de déclaration inexacte et frauduleuse par une conclusion de déclaration inexacte faite par négligence, mais elle a également tiré une conclusion expresse relativement à ce que la demanderesse aurait fait n'eût été la déclaration inexacte; contrairement à l'hypothèse que semble avoir formulée le juge de première instance, la demanderesse aurait conclu le contrat mais à un prix plus élevé. Comme le juge Hinkson le dit au nom de la majorité:

> [TRADUCTION] La déclaration inexacte faite par négligence a eu pour effet d'inciter la demanderesse à conclure un contrat à un prix inférieur à celui auquel elle aurait contracté si elle avait connu les faits véritables.

((1990), 44 B.C.L.R. (2d) 145, à la p. 158.)

Le juge Hinkson a conclu que l'augmentation de la soumission de Checo si elle avait connu les faits

have equalled the cost of the extra work made necessary by the improperly cleared work site, plus a 15 percent margin for overhead and profit.

As for breach of contract, the majority of the Court of Appeal referred the case back to trial for assessment of whether there was a breach of contract, and if so what is the proper assessment of damages. This referral back to trial was not stated to be limited to consideration of breaches of contract other than the failure to clear the right-of-way.

In the situation of concurrency, the main reason to expect a difference between tort and contract damages is the exclusion of the bargain elements in standard tort compensation. In the terminology of L. L. Fuller and W. R. Purdue, as set out in their article, "The Reliance Interest in Contract Damages" (1936-37), 46 *Yale L.J.* 52 and 373, contract is normally concerned with "expectation" damages while tort is concerned with "reliance" damages. The denial of "expectation" or "loss of bargain" damages in a misrepresentation case like the present will occur when it is concluded, for example, that but for the misrepresentation, no contract would have been entered at all; this was the situation that the Court found in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3. The *Rainbow* assessment of damages can obviously lead to a different quantum of damages because this method frees the parties from the burden or benefit of the rest of their bargain. The assessment of damages in a *Rainbow* situation could be lower or higher than the contract damages depending on whether the contract was a good or bad bargain; see D. W. McLauchlan, "Assessment of Damages for Misrepresentations Inducing Contracts" (1987), 6 *Otago L. Rev.* 370, at pp. 375-78. We note that a tendency towards similar damages in tort and contract can be identified even in *Rainbow* situations; see J. Blom, "Remedies in Tort and Contract: Where is the Dif-

véritables aurait correspondu au coût du travail supplémentaire rendu nécessaire par le déboisement incomplet des lieux, plus une marge de 15 pour 100 au titre des frais généraux et des bénéfices.

En ce qui concerne l'inexécution du contrat, la Cour d'appel, à la majorité, a renvoyé l'affaire en première instance pour en vérifier l'existence et, le cas échéant, pour déterminer le montant des dommages-intérêts. Ce renvoi en première instance ne devait pas être limité à l'examen des inexécutions de contrat autres que le non-déboisement de l'emprise.

Dans le cas de la concomitance, la principale raison de s'attendre à une différence entre les dommages-intérêts en responsabilité délictuelle et en responsabilité contractuelle est l'exclusion des éléments du marché en cause dans l'indemnisation habituelle en matière délictuelle. Selon la terminologie établie par L. L. Fuller et W. R. Purdue dans leur article «The Reliance Interest in Contract Damages» (1936-37), 46 *Yale L.J.* 52 et 373, en matière contractuelle les dommages-intérêts sont normalement fondés sur l'[TRADUCTION] «attente», tandis qu'en matière délictuelle ils sont fondés sur la [TRADUCTION] «confiance». Le refus des dommages-intérêts fondés sur l'«attente» ou la «perte d'un marché» dans une affaire de déclaration inexacte comme en l'espèce se présentera lorsque l'on conclut, par exemple, que, n'eût été la déclaration inexacte, il n'y aurait pas eu de contrat; c'est la situation à laquelle la Cour a conclu dans l'arrêt *Rainbow Industrial Caterers Ltd. c. Compagnie des chemins de fer nationaux du Canada*, [1991] 3 R.C.S. 3. L'évaluation faite dans *Rainbow* peut manifestement entraîner un montant différent de dommages-intérêts parce que cette méthode libère les parties de la charge ou du bénéfice du reste de leur marché. L'évaluation des dommages-intérêts faite dans une situation où s'applique l'arrêt *Rainbow* pourrait être plus élevée ou moins élevée que les dommages-intérêts résultant d'un contrat selon que le contrat constituait un bon ou un mauvais marché; voir D. W. McLauchlan, «Assessment of Damages for Misrepresentations Inducing Contracts» (1987), 6 *Otago L. Rev.* 370, aux pp. 375 à

ference?" in J. Berryman, ed., *Remedies: Issues and Perspectives* (1991), 395, at pp. 401-2.

This is not a case like *Rainbow*. Here the evidence at trial concerning Checo's desire to break into the B.C. market already provides solid support for the conclusion reached by the Court of Appeal. On the basis of that evidence, and in light of the absence in the trial judge's reasons of a clear conclusion as to what Checo would have done had the misrepresentation not been made, the Court of Appeal was in our view justified in making its own finding that Checo would have entered the contract in any event, albeit at a higher bid. This conclusion having been reached, one would expect that the quantum of damages in tort and contract would be similar because the elements of the bargain unrelated to the misrepresentation are reintroduced. This means not giving the plaintiff compensation for any losses not related to the misrepresentation, but resulting from such factors as the plaintiff's own poor performance, or market or other forces that are a normal part of business transactions.

In tort, Checo is entitled to be compensated for all reasonably foreseeable loss caused by the tort. The Court of Appeal was of the view that Checo, had it known the true facts (i.e., had the tort not been committed) would have increased its bid by an amount equal to the cost of the extra work made necessary by the improperly cleared work site plus profit and overhead. Such loss was not too remote, being reasonably foreseeable. But to compensate only for the direct costs of clearing is to suggest that the only tort was the failure to clear. The real fault is that Hydro misrepresented the situation and Checo may have relied on that representation in

378. Nous remarquons qu'une tendance à la similarité des dommages-intérêts en responsabilité délictuelle et en responsabilité contractuelle peut exister même dans les situations où s'applique l'arrêt *Rainbow*; voir J. Blom, «Remedies in Tort and Contract: Where is the Difference?», dans J. Berryman, dir., *Remedies: Issues and Perspectives* (1991), 395, aux pp. 401 et 402.

Il ne s'agit pas ici d'une affaire semblable à l'arrêt *Rainbow*. En l'espèce, la preuve présentée en première instance en ce qui concerne le désir de Checo d'entrer sur le marché de la Colombie-Britannique appuie fortement la conclusion à laquelle est arrivée la Cour d'appel. Sur le fondement de cette preuve et compte tenu de l'absence dans les motifs du juge de première instance d'une conclusion claire sur ce que Checo aurait fait n'eût été la déclaration inexacte, la Cour d'appel était justifiée, à notre avis, de dire que Checo aurait conclu le contrat de toute manière, mais à un prix plus élevé. Une fois que nous aboutissons à cette conclusion, on s'attendrait à ce que le montant des dommages-intérêts en responsabilité délictuelle et en responsabilité contractuelle soient semblables parce que les éléments du marché qui n'ont aucun lien avec la déclaration inexacte sont réintroduits. Cela signifie ne pas accorder au demandeur d'indemnisation pour des pertes qui n'ont rien à voir avec la déclaration inexacte, mais qui découlent de facteurs comme le mauvais rendement du demandeur lui-même ou les forces du marché ou d'autres forces qui interviennent habituellement dans les opérations commerciales.

En responsabilité délictuelle, Checo a droit à être indemnisée de toutes les pertes raisonnablement prévisibles causées par le délit. La Cour d'appel était d'avis que, si elle avait été au courant des faits véritables (c.-à-d., s'il n'y avait pas eu de délit), Checo aurait augmenté le montant de sa soumission du coût des travaux additionnels rendus nécessaires par le déboisement incomplet des lieux, plus les bénéfices et les frais généraux. Une perte de ce genre n'était pas trop indirecte puisque elle était raisonnablement prévisible. Toutefois, accorder une indemnisation seulement pour les coûts directs de déboisement équivaut à dire que le

performing its other obligations under the contract. For example, having to devote its resources to that extra work might have prevented Checo from meeting its original schedule, thereby resulting in Checo incurring acceleration costs in order to meet the contract completion date. Such costs would also arguably be reasonably foreseeable. In our view, the matter should be referred back to the trial division for determination of whether any such indirect losses were the foreseeable results of the misrepresentation.

There remains the issue of assessment of damages for breach of contract. As implied above, it appears that the majority of the Court of Appeal intended to remit all breach of contract claims to trial, including the breach of contract claim related to the obligation of Hydro to have the work site cleared by others. We agree that this is the most appropriate disposition with respect to the breach of contract claims. On the claim for breach of contract Checo is to be put in the position it would be in had the work site been cleared properly, and is therefore to be reimbursed for all expenses incurred as a result of the breach of contract, whether expected or not, except, of course, to the extent that those expenses may have been so unexpected that they are too remote to be compensable for breach of contract. We note that in this respect the test for remoteness in contract may be of no practical difference from the test of reasonable foreseeability applicable in tort: see *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 673, and *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228, at pp. 243-44. Viewed thus, the damages in contract would include not only the costs flowing directly from the improperly cleared work site, but also consequent indirect

délit consistait simplement à ne pas avoir déboisé. La véritable faute est qu'Hydro a fait une déclaration inexacte concernant la situation et que Checo peut s'être fiée à cette déclaration pour exécuter ses autres obligations découlant du contrat. Par exemple, le fait de devoir consacrer ses ressources à ces travaux additionnels peut avoir empêché Checo de respecter son calendrier initial, entraînant ainsi des coûts d'accélération des travaux pour lui permettre de suivre les échéances. On pourrait dire que ces coûts sont raisonnablement prévisibles. À notre avis, la question devrait être renvoyée au tribunal de première instance pour qu'il détermine si ces pertes indirectes étaient les résultats prévisibles de la déclaration inexacte.

Il reste à trancher la question de l'évaluation des dommages-intérêts qui résultent de l'inexécution de contrat. Comme nous l'avons laissé entendre précédemment, la Cour d'appel, à la majorité, semble avoir eu l'intention de renvoyer en première instance toutes les demandes fondées sur l'inexécution de contrat, y compris celle ayant trait à l'obligation d'Hydro de faire déboiser les lieux par d'autres. À notre avis, c'est la décision qui convient le mieux pour ce qui est des demandes fondées sur l'inexécution de contrat. Pour ce qui est de la réclamation pour inexécution de contrat, Checo doit être placée dans la situation qui aurait été la sienne si les lieux avaient été déboisés de façon adéquate, et elle doit donc recouvrer tous les frais engagés par suite de l'inexécution de contrat, prévus ou non, sauf, évidemment, dans la mesure où ces frais étaient si imprévus qu'ils sont trop indirects pour faire l'objet d'un remboursement pour inexécution de contrat. Nous remarquons qu'à cet égard le critère relatif au caractère indirect en matière contractuelle peut ne pas être différent, en pratique, du critère de la prévisibilité raisonnable en matière délictuelle: voir *Asamera Oil Corp. c. Sea Oil & General Corp.*, [1979] 1 R.C.S. 633, à la p. 673, et *B.D.C. Ltd. c. Hofstrand Farms Ltd.*, [1986] 1 R.C.S. 228, aux pp. 243 et 244. Ainsi, les dommages-intérêts en matière contractuelle comprendraient non seulement les frais découlant directement du déboisement incomplet des lieux, mais aussi les frais indirects corollaires comme les

costs such as acceleration costs due to delays in construction.

Conclusion

We would dismiss the appeal, allow the cross-appeal in part and refer the question of damages in tort and contract to the trial division to be reassessed in accordance with the principles set forth in these reasons.

The reasons of Sopinka and Iacobucci JJ. were delivered by

IACOBUCCI J. (dissenting in part)—The narrow question raised by this appeal is what remedy should be available for pre-contractual representations made during the tendering process. This question also raises a more general and more important issue. In light of the decision of this Court in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, can a plaintiff who is in a contractual relationship with the defendant sue the defendant in tort if the duty relied upon by the plaintiff in tort is also made a contractual duty by an express term of the contract?

I. Facts

The appellant and respondent on the cross-appeal, B.C. Hydro and Power Authority, is a British Columbia Crown corporation. The respondent and appellant on the cross-appeal, BG Checo International Ltd., is a large corporation in the business of constructing electrical transmission lines and distribution systems. I will refer to the parties as "Hydro" and "Checo", respectively.

In November of 1982, Hydro called for tenders to erect transmission towers and to string transmission lines. In December 1982, prior to submitting its tender for the contract, Checo's representative inspected the area by helicopter. He noted that the right-of-way had been partially cleared, and also noted evidence of ongoing clearing activity. The

frais d'accélération des travaux entraînés par les retards dans la construction.

Conclusion

Nous sommes d'avis de rejeter le pourvoi, d'accueillir le pourvoi incident en partie et de renvoyer la question des dommages-intérêts en responsabilité délictuelle et en responsabilité contractuelle devant le tribunal de première instance pour qu'ils soient réévalués conformément aux principes énoncés dans les présents motifs.

Version française des motifs des juges Sopinka et Iacobucci rendus par

LE JUGE IACOBUCCI (dissident en partie)—La question que soulève le présent pourvoi est celle, limitée, du recours possible dans le cas de déclarations précontractuelles faites dans le cadre d'un appel d'offres. Mais elle revêt également un aspect plus général et plus important. Compte tenu de l'arrêt de notre Cour *Central Trust Co. c. Rafuse*, [1986] 2 R.C.S. 147, le demandeur qui a des liens contractuels avec le défendeur peut-il exercer contre ce dernier un recours en responsabilité délictuelle si l'obligation sur laquelle il fonde son recours constitue également, aux termes mêmes du contrat, une obligation contractuelle?

I. Les faits

L'appelante et intimée dans le pourvoi incident, B.C. Hydro and Power Authority, est une société d'État de la Colombie-Britannique. L'intimée et appelante dans le pourvoi incident, BG Checo International Ltd., est une grande entreprise œuvrant dans la construction de lignes de transport d'électricité et de réseaux de distribution. Je les désignerai ci-après sous les noms de «Hydro» et «Checo», respectivement.

En novembre 1982, Hydro a lancé un appel d'offres pour l'érection de pylônes et la pose de lignes de transport d'électricité. En décembre 1982, avant que la soumission de l'entreprise soit présentée, un représentant de Checo a inspecté les lieux par hélicoptère. Il a observé que l'emprise avait été partiellement déboisée et que des activités

representative assumed that the right-of-way would be further cleared prior to the commencement of Checo's work. On January 2, 1983, Checo submitted its tender, and on February 15, 1983, Hydro accepted Checo's tender and the parties entered into a written contract. Checo contracted to construct 130 towers and install insulators, hardware and conductors over 42 kilometres of right-of-way near Sechelt, British Columbia.

In fact, no further clearing of the right-of-way ever took place. The "dirty" condition of the right-of-way caused Checo a number of difficulties in completing its work. Checo sued Hydro seeking damages for negligent misrepresentation, or, in the alternative, for breach of contract.

The evidence at trial indicated that Hydro had contracted the clearing out to another company, and that, to Hydro's knowledge, the work was not done adequately. There was no direct discussion between the representatives of Checo and Hydro concerning this issue. There was evidence led at trial that the contract between the parties did not specify clearing standards with the same degree of detail as was present in similar contracts entered into by Hydro.

During the trial, Hydro tendered documents in evidence which Checo had unsuccessfully attempted to discover. These documents indicated that Hydro was aware of the problem with the clearing and of the impact that these problems would have on the successful tenderer. As a result, Checo amended its statement of claim to include a claim in fraud.

The trial judge found that Hydro had acted fraudulently in its dealings with Checo and awarded Checo $2,591,580.56, being "the total loss suffered by [Checo] as a result of being fraudulently induced to enter into this contract". Hydro appealed to the Court of Appeal for British Columbia, which rejected the finding of fraud, but found that there had been a negligent misrepresentation which induced Checo to enter into the contract.

de déboisement s'y poursuivaient. Il a donc présumé que l'emprise serait plus amplement déboisée avant que Checo n'entreprenne les travaux. Checo a présenté sa soumission le 2 janvier 1983, Hydro l'a acceptée le 15 février 1983 et les parties ont conclu un contrat écrit. Checo s'engageait à construire 130 pylônes et à installer des isolants électriques, de l'équipement technique et des conducteurs sur une emprise longue de 42 kilomètres près de Sechelt, en Colombie-Britannique.

Dans les faits, l'emprise n'a jamais fait l'objet d'autres travaux de déboisement. La [TRADUCTION] «malpropreté» de l'emprise a occasionné à Checo de nombreuses difficultés dans l'exécution des travaux. Checo a poursuivi Hydro en dommages-intérêts pour déclaration inexacte faite par négligence ou, subsidiairement, pour inexécution de contrat.

Il est ressorti de la preuve présentée au procès qu'Hydro avait accordé un sous-contrat de déboisement à une autre compagnie, qui n'avait pas, à sa connaissance, effectué les travaux de façon satisfaisante. Il n'y a pas eu de discussions directes à ce sujet entre les représentants de Checo et d'Hydro. Selon la preuve présentée en première instance, le contrat intervenu entre les parties ne comportait pas, quant aux normes de déboisement, autant de précision que d'autres contrats analogues conclus par Hydro.

Au cours du procès, Hydro a déposé en preuve des documents que Checo avait vainement tenté d'obtenir. D'après ces documents, Hydro était au courant du problème de déboisement et des conséquences que cette situation risquait d'entraîner pour l'adjudicataire. Checo a en conséquence modifié sa déclaration pour y inclure une allégation de fraude.

Le juge de première instance a conclu qu'Hydro avait agi frauduleusement dans ses rapports avec Checo et a accordé à celle-ci 2 591 580,56 $, soit [TRADUCTION] «la perte totale subie par [Checo] pour avoir été frauduleusement amenée à conclure ce contrat». Hydro a interjeté appel auprès de la Cour d'appel de la Colombie-Britannique, qui a rejeté la conclusion relative à la fraude mais a estimé qu'il y avait eu déclaration inexacte faite

The Court of Appeal awarded the sum of $1,087,729.81, for the misrepresentation, and referred the question of breach of contract and damages flowing therefrom to the British Columbia Supreme Court. Checo's cross-appeal for punitive damages and for a higher scale of costs was dismissed: (1990), 44 B.C.L.R. (2d) 145, 4 C.C.L.T. (2d) 161, 41 C.L.R. 1, [1990] 3 W.W.R. 690.

It will be helpful to set out the relevant provisions of the contract. The terms of the contract, No. HA-8071, are identical to the tender documents. The critical clauses are 2.03, 4.04 and 6.01.03. I have highlighted that portion of clause 6.01.03 which Checo alleges founds the misrepresentation by Hydro.

2.03 TENDERER'S RESPONSIBILITY

It shall be the Tenderer's responsibility to inform himself of all aspects of the Work and no claim will be considered at any time for reimbursement for any expenses incurred as a result of any misunderstanding in regard to the conditions of the Work. Should any details necessary for a clear and comprehensive understanding be omitted or any error appear in the Tender Documents or should the Tenderer note facts or conditions which in any way conflict with the letter or spirit of the Tender Documents, it shall be the responsibility of the Tenderer to obtain clarifications before submitting his Tender. [There follows some technical details.]

Neither B.C. Hydro nor the Engineer shall be responsible for any instructions or information given to any Tenderer other than by the Purchasing Agent, in accordance with this Clause.

4.04 INSPECTION OF SITE AND SUFFICIENCY OF TENDER

The Contractor shall inspect and examine the Site and its surroundings and shall satisfy himself before submitting his Tender as to the nature of the ground and sub-soil, the form and nature of the Site, the quantities and nature of work and materials necessary for completion of the Work, the means of access to the Site, the accommodation and facilities he may require, and in general

Il est utile de reproduire les clauses pertinentes du contrat. Les clauses du contrat nº HA-8071 sont identiques à celles du dossier d'appel d'offres. Les clauses cruciales sont les clauses 2.03, 4.04 et 6.01.03. J'ai souligné la partie de la clause 6.01.03 sur laquelle Checo s'appuie pour alléguer qu'il y a eu déclaration inexacte de la part d'Hydro.

[TRADUCTION]

2.03 RESPONSABILITÉ DU SOUMISSIONNAIRE

Il est de la responsabilité du soumissionnaire de se renseigner sur tous les aspects des travaux, et aucune demande de remboursement des dépenses engagées par suite d'une méprise quant aux conditions d'exécution des travaux ne sera prise en considération. Advenant le cas où le dossier d'appel d'offres omettrait des détails nécessaires à une bonne compréhension de ses dispositions ou contiendrait des erreurs, ou encore si le soumissionnaire remarque des faits ou des conditions qui viennent en contradiction avec la lettre ou l'esprit du dossier, c'est au soumissionnaire qu'il incombe d'obtenir les explications voulues avant de présenter sa soumission. [Suivent certains détails techniques.]

Ni B.C. Hydro ni l'ingénieur ne sont responsables des consignes ou renseignements donnés au soumissionnaire par toute personne autre que l'acheteur, conformément à la présente clause.

4.04 EXAMEN DES LIEUX ET ADÉQUATION DE LA SOUMISSION

L'entrepreneur doit, par visite et examen des lieux et des environs, se renseigner, avant de présenter sa soumission, sur la nature du sol et du sous-sol, la morphologie des lieux, la quantité et la nature des travaux et des matériaux nécessaires à leur exécution, les voies d'accès aux lieux, les installations requises, et, de façon générale, obtenir tous les renseignements perti-

shall himself obtain all necessary information as to risks, contingencies, and other circumstances which may influence or affect his Tender. Without limiting the generality of the foregoing, the Contractor shall satisfy himself of any special risks, contingencies, regulations, safety requirements, and other circumstances which may be encountered.

The Contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his Tender for the Work and of the prices stated in the Schedule of Prices which prices shall (except insofar as it is otherwise provided in the Contract) cover all his obligations under the Contract and all matters and things necessary for the proper execution of the Work.

6.01.03 WORK DONE BY OTHERS

Clearing of the right-of-way and foundation installation has been carried out by others and will not form part of this Contract.

Standing trees and brush have not been removed from the right-of-way in certain valley and gully crossings. The Contractor shall be responsible for such further site preparation as required by Section 7.01. [Emphasis added.]

7.01.02 PREPARATION OF THE SITE

The Contractor shall carry out any preparation of the Site, including removal of logs, stumps and boulders, as is necessary to perform his operations.

The Contractor shall ensure that the transmission line is protected from possible slides, washouts or other hazards resulting from his road construction, grading, benching, and other site preparation work and operations. Surface drainage shall be directed away from any structure foundations and guy anchors.

Any condition resulting from the Contractor's work and which, in the opinion of the Engineer constitutes a hazard to the transmission line shall be corrected to the satisfaction of the Engineer.

nents quant aux risques, imprévus et autres circonstances susceptibles d'avoir une incidence sur sa soumission. Sans que soit limitée la portée générale de ce qui précède, l'entrepreneur doit s'informer sur tout risque, imprévu, exigence en matière de sécurité et règlement particuliers ainsi que toute autre circonstance à laquelle il peut avoir à faire face.

L'entrepreneur est réputé s'être assuré, avant de présenter sa soumission, qu'elle est exacte et complète en ce qui concerne les travaux et les prix indiqués en annexe, lesquels (sauf indication contraire du contrat) doivent couvrir toutes les obligations qui lui incombent en vertu du contrat et toute chose nécessaire à l'exécution des travaux.

6.01.03 TRAVAUX DÉJÀ EXÉCUTÉS

Le déboisement de l'emprise et l'installation des fondations ont été faits par d'autres et ne feront pas partie du présent contrat.

Les arbres sur pied et les broussailles n'ont pas été enlevés de l'emprise dans certaines vallées et ravins. L'entrepreneur est responsable de tous travaux supplémentaires de préparation des lieux exigés conformément à l'article 7.01. [Je souligne.]

7.01.02 PRÉPARATION DES LIEUX

L'entrepreneur doit veiller à la préparation des lieux, y compris à l'enlèvement des billes, des souches et des blocs rocheux, dans la mesure nécessaire à l'exécution des travaux.

L'entrepreneur doit veiller à ce que la ligne de transport d'électricité soit protégée contre tout glissement, érosion ou autre danger résultant de la construction de routes, du terrassement, de l'aménagement de banquettes et autres travaux préparatoires. Le drainage de surface ne doit pas s'effectuer en direction des fondations et des ancres de hauban.

Toute condition résultant des travaux de l'entrepreneur et qui, de l'avis de l'ingénieur, représente un danger pour la ligne de transport d'électricité doit être corrigée à la satisfaction de l'ingénieur.

II. Judgments in the Courts Below

A. *Supreme Court of British Columbia* (Vancouver Reg. No. C864116, June 10, 1988)

II. Décisions des instances inférieures

A. *Cour suprême de la Colombie-Britannique*, Reg. de Vancouver nº C864116, 10 juin 1988

The trial began in November of 1987 and ended in April of 1988, taking 28 days in total. Cohen J. delivered his reasons on June 10, 1988. Checo's original claim was for breach of contract or, in the alternative, negligent misrepresentation. In the middle of the trial, Checo amended its statement of claim to advance a claim of fraudulent misrepresentation.

The trial judge found that Hydro knew and failed to disclose to Checo the problems with the clearing contractors, that the right-of-way was improperly cleared, and that merchantable logs, which Hydro intended to salvage, remained on the right-of-way. The trial judge also found that Hydro knew that the effect of the inadequate clearing would be to increase the costs of construction. He then turned to a consideration of the issue of fraud. Citing the principles set out in *K.R.M. Construction Ltd. v. British Columbia Railway Co.* (1981), 18 C.L.R. 159 (B.C.S.C.), at p. 169; (1982), 18 C.L.R. 159 (B.C.C.A.), at p. 277, Cohen J. was satisfied that Hydro was guilty of fraudulent misrepresentation.

It was significant to him that, in another contract for similar installations, Hydro included, in a paragraph "virtually identical" to s. 6.01.03, the words "logs and old logging slash will be on the right-of-way in some areas". Cohen J. concluded (at pp. 61-62):

> ... the decision to remove any reference in clause 6.01.03 of [Checo's] contract to logs remaining on the right-of-way was deliberate. Foxall [an employee of Hydro] insisted that it was not necessary to include any words of warning in [Checo's] contract because the existence of logs on the right-of-way would be obvious to a tenderer viewing the right-of-way. However, when I consider that words warning of logs remaining on the right-of-way were excluded when [Hydro's] clearing standards allowed for logs to be left on the right-of-way, a fact not disclosed in the tender documents, [Hydro] knew merchantable logs were left on the right-of-way, knew of problems with clearing contractors not clearing to specifications, and knew of the delays and extra costs

Commencé en novembre 1987, le procès s'est terminé en avril 1988, pour un total de 28 jours d'audience. Le juge Cohen a prononcé ses motifs le 10 juin 1988. Dans sa déclaration initiale, Checo alléguait l'inexécution du contrat ou, subsidiairement, la déclaration inexacte faite par négligence. En cours d'audience, elle a apporté une modification pour alléguer la déclaration inexacte et frauduleuse.

Le juge de première instance a tenu pour avéré qu'Hydro savait qu'il y avait eu des problèmes avec les entrepreneurs en déboisement, que l'emprise n'était pas convenablement déboisée, et que des billes marchandes, qu'elle entendait récupérer, étaient restées sur le terrain, problèmes dont elle a omis de prévenir Checo. Le juge de première instance a également conclu qu'Hydro savait que le déboisement inadéquat aurait pour effet d'accroître les coûts de construction. Il a ensuite examiné la question de la fraude. Citant les principes énoncés dans l'affaire *K.R.M. Construction Ltd. c. British Columbia Railway Co.* (1981), 18 C.L.R. 159 (C.S.C.-B.), à la p. 169; (1982), 18 C.L.R. 159 (C.A.C.-B.), à la p. 277, le juge Cohen a acquis la conviction qu'Hydro s'était rendue coupable de déclaration inexacte et frauduleuse.

Il était révélateur, selon lui, que dans un autre contrat pour des installations similaires, Hydro a prévu, dans un paragraphe [TRADUCTION] «pratiquement identique» à la clause 6.01.03, qu'[TRADUCTION] «il y aura par endroits sur l'emprise des billes et des vieux déchets de coupe». Le juge Cohen a conclu (aux pp. 61 et 62):

> [TRADUCTION] ... la décision d'omettre à la clause 6.01.03 du contrat de [Checo] toute indication quant à la présence de billes sur l'emprise était délibérée. Foxall [un employé d'Hydro] a insisté sur le fait qu'il n'était pas nécessaire d'inclure un avertissement à cet effet dans le contrat de [Checo] puisque la présence des billes aurait été évidente pour le soumissionnaire examinant l'emprise. Cependant, si je considère que l'avertissement quant aux billes restant sur l'emprise a été exclu alors que, suivant les normes [d'Hydro] relatives au déboisement, des billes pouvaient être laissées sur l'emprise, fait qui n'était pas dévoilé dans le dossier d'appel d'offres, alors qu'[Hydro] savait que des billes marchandes étaient laissées sur l'emprise, qu'elle était au

experienced by [another contractor] due to logs on the right-of-way obstructing construction activities, the deliberate omission of these words in the tender documents amounted, in my opinion, to a form of tender by ambush.

The trial judge held that Hydro had a duty to be accurate in the information that it gave in its tender, and it was not open to it to say that Checo should not have assumed that the right-of-way would be cleared further, or that Checo should have made inquiries. Here, the "ordinary meaning" of the words used in clause 6.01.03 supported Checo's conclusion that the clearing was not yet complete. This representation in clause 6.01.03 was a false one, and was a representation that Checo relied upon. Cohen J. found that Checo would not have contracted on the basis that it did in the absence of the representation, and held Hydro liable for the "actual damages directly flowing from [its] fraud" (p. 72).

Cohen J. did not consider Checo's claim in breach of contract. He declined to make an award of punitive damages.

B. *Court of Appeal of British Columbia* (1990), 44 B.C.L.R. (2d) 145

Hydro appealed from the judgment of Cohen J. Checo cross-appealed seeking punitive damages and costs to be taxed on a higher scale.

The Court of Appeal considered the issues of fraudulent misrepresentation, negligent misrepresentation and breach of contract. Writing for the majority, Hinkson J.A. (Lambert, Toy and Cumming JJ.A. concurring) allowed Hydro's appeal on the issue of fraudulent misrepresentation. However, Hinkson J.A. found Hydro liable for negligent misrepresentation (which had not been considered in the judgment at trial). Hinkson J.A. remitted Checo's action for breach of contract back to the British Columbia Supreme Court. Hinkson J.A. dismissed Checo's cross-appeal.

courant du problème des entrepreneurs en déboisement qui ne s'étaient pas conformés au cahier des charges, ainsi que des retards et des coûts additionnels que la présence de billes gênant les travaux de construction avait occasionnés dans le cas [d'un autre entrepreneur], l'omission délibérée de ce passage dans le dossier d'appel d'offres équivalait, à mon avis, à un piège.

Le juge de première instance a jugé qu'Hydro avait l'obligation de veiller à l'exactitude des renseignements contenus dans l'offre et qu'elle ne pouvait soutenir que Checo n'aurait pas dû présumer que le déboisement de l'emprise se poursuivrait, ou qu'elle aurait dû demander des informations. En l'espèce, le «sens ordinaire» du libellé de la clause 6.01.03 vient appuyer la conclusion de Checo selon laquelle le déboisement n'était pas encore terminé. Or il s'agissait d'une déclaration fausse, à laquelle Checo s'est fiée. Estimant qu'en l'absence de cette déclaration Checo n'aurait pas contracté aux conditions où elle l'a fait, le juge Cohen a tenu Hydro responsable du [TRADUCTION] «préjudice réel résultant directement de [sa] fraude» (à la p. 72).

Le juge Cohen n'a pas examiné l'allégation de Checo quant à l'inexécution du contrat. Il a refusé d'accorder des dommages-intérêts punitifs.

B. *Cour d'appel de la Colombie-Britannique* (1990), 44 B.C.L.R. (2d) 145

Hydro a porté en appel le jugement du juge Cohen. Quant à Checo, elle a, par appel incident, demandé des dommages-intérêts punitifs et la taxation des dépens en fonction d'un barème plus élevé.

La Cour d'appel a examiné les questions de la déclaration inexacte et frauduleuse, de la déclaration inexacte faite par négligence et de l'inexécution du contrat. Au nom de la majorité, le juge Hinkson (aux motifs duquel ont souscrit les juges Lambert, Toy et Cumming) a accueilli l'appel d'Hydro sur la question de la déclaration inexacte et frauduleuse. Il a toutefois retenu sa responsabilité pour déclaration inexacte faite par négligence (point qui n'avait pas été examiné dans le jugement de première instance). Quant au recours de Checo fondé sur l'inexécution du contrat, le juge

Southin J.A., writing for herself, dissented in the result. While she agreed with Hinkson J.A. on the questions of fraudulent misrepresentation and breach of contract, she would have held that Hydro was not liable for negligent misrepresentation.

In the result, Hydro's appeal was allowed in part, in that the Court of Appeal held unanimously that Hydro was not liable for fraudulent misrepresentation. However, the Court of Appeal awarded damages against Hydro for negligent misrepresentation, but reduced the trial judge's damage award to $1,087,729.81. Checo's cross-appeal was dismissed.

(1) Reasons of Hinkson J.A.

Hinkson J.A. considered that the omission of the reference to logs and logging slash in clause 6.01.03 left "the meaning of 'clearing' unqualified" (p. 153). The majority of the Court held that the representation in clause 6.01.03 as to clearing "meant that logs and slash would be cleared from the right-of-way" (p. 155), and that the state of the right-of-way in November 1982 was not the state that the right-of-way would be in at the commencement of the contract. The majority concluded that "on the date of the contract [Hydro], while having represented that the right-of-way would have been cleared, knew that it had not been done" (p. 156), and held that this was, therefore, a misrepresentation.

Hinkson J.A. then turned to a consideration of the issue of negligent misrepresentation, which had not been considered by the trial judge. Hydro had a duty to advise Checo about the amount of clearing which would in fact be carried out. Hydro having failed to discharge this duty, it made a negligent misrepresentation, the effect of which "was to induce [Checo] to enter into a contract at a price less than it would have had it known the true facts" (p. 158). Hinkson J.A. held that Checo had established a claim for negligent misrepresentation

Hinkson l'a renvoyé devant la Cour suprême de la Colombie-Britannique. Il a enfin rejeté le pourvoi incident de Checo. Pour sa part, le juge Southin a exprimé sa dissidence quant au résultat. Souscrivant à l'opinion du juge Hinkson sur les questions de la déclaration inexacte et frauduleuse et de l'inexécution du contrat, elle aurait conclu à la non-responsabilité d'Hydro pour ce qui est de la déclaration inexacte faite par négligence.

En définitive, l'appel d'Hydro a été accueilli en partie, la Cour d'appel ayant conclu à l'unanimité à la non-responsabilité d'Hydro pour déclaration inexacte et frauduleuse. Elle l'a cependant condamnée à verser des dommages-intérêts pour déclaration inexacte faite par négligence, tout en réduisant à 1 087 729,81 $ la somme adjugée en première instance. Le pourvoi incident de Checo a été rejeté.

(1) Motifs du juge Hinkson

Le juge Hinkson a estimé qu'en raison du silence de la clause 6.01.03 quant aux billes et aux déchets de coupe, [TRADUCTION] «le terme «déboisement» n'était assorti d'aucune réserve» (à la p. 153). De l'avis de la majorité, la déclaration contenue à cette clause quant au déboisement [TRADUCTION] «signifiait que l'emprise serait dégagée des billes et des déchets» (à la p. 155), et que l'état de celle-ci en novembre 1982 ne correspondait pas à l'état dans lequel elle serait au début du contrat. La majorité a conclu que [TRADUCTION] «bien qu'elle ait affirmé que l'emprise serait déboisée, [Hydro] savait, à la date du contrat, que cela n'avait pas été fait» (à la p. 156) et, partant, qu'il s'agissait d'une déclaration inexacte.

Le juge Hinkson a ensuite examiné la question de la déclaration inexacte faite par négligence, que le juge de première instance n'avait pas prise en considération. Hydro avait l'obligation d'informer Checo de l'ampleur des travaux de déboisement qui seraient effectivement effectués. Faute de s'acquitter de cette obligation, elle a fait par négligence une déclaration inexacte dont le résultat a été [TRADUCTION] «d'inciter [Checo] à conclure un contrat à un prix inférieur à celui auquel elle aurait contracté si elle avait connu les faits véritables» (à

based on *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), and *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.).

In considering whether there was also liability for fraudulent misrepresentation, as the trial judge had found, Hinkson J.A. traced the development of the law of the tort of deceit. He noted that although deceit, as it applies to corporations, is an evolving tort, fundamentally, "the plaintiff must establish an intention to deceive on the part of the defendant" (p. 161) and referred to the principles enunciated in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1988), 30 B.C.L.R. (2d) 273 (C.A.). On the facts of this case, the majority concluded that the "evidence fell short of establishing the necessary basis for a finding of fraud" because there was no evidence of a dishonest intention (at pp. 161-62):

> In the present case, a committee of 12 prepared the specifications. The evidence does not reveal that any members of the committee were dishonest in the preparation of the specifications for this contract. Rather, it is possible to conclude that they mistakenly and negligently believed that the requirement that a tenderer should take a view of the site would remedy any shortcomings in the specifications included in the terms of the contract.

Hydro's appeal was accordingly allowed on the issue of fraudulent misrepresentation.

On the question of damages, the majority held that Checo was not entitled to recover the entire loss it suffered as a result of performing the contract. The majority held that the decision of the Court of Appeal, affirming the trial judgment in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1990), 43 B.C.L.R. (2d) 1, affirmed on appeal to the Supreme Court of Canada, [1991] 3 S.C.R. 3, could be distinguished

la p. 158). Le juge Hinkson a estimé que Checo avait établi le bien-fondé d'un recours pour déclaration inexacte faite par négligence fondé sur les arrêts *Donoghue c. Stevenson*, [1932] A.C. 562 (H.L.), et *Hedley Byrne & Co. c. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.).

Abordant la question de savoir s'il y avait aussi responsabilité pour déclaration inexacte et frauduleuse suivant la conclusion du juge de première instance, le juge Hinkson a brossé un tableau de l'évolution du droit de la responsabilité délictuelle en matière de dol. Quoique ce délit, en ce qui a trait aux personnes morales, soit encore appelé à se transformer, il a fait observer qu'essentiellement [TRADUCTION] «le demandeur doit établir une intention dolosive de la part du défendeur» (à la p. 161), et s'est référé aux principes énoncés dans l'arrêt *Rainbow Industrial Caterers Ltd. c. Canadian National Railway Co.* (1988), 30 B.C.L.R. (2d) 273 (C.A.). La majorité a conclu que, d'après les faits de l'espèce, [TRADUCTION] «le fondement nécessaire à une conclusion de dol ne ressortait pas de la preuve» parce qu'il n'y avait aucune preuve établissant l'intention malhonnête (aux pp. 161 et 162):

> [TRADUCTION] Dans la présente espèce, le cahier des charges a été préparé par un comité de 12 personnes. Rien dans la preuve n'indique que les membres du comité aient été malhonnêtes dans leurs travaux. En revanche, on peut conclure qu'ils ont cru de façon erronée et négligente que l'obligation pour le soumissionnaire d'aller voir les lieux remédierait à toute lacune dans les stipulations du cahier des charges incluses dans le contrat.

L'appel d'Hydro a en conséquence été accueilli quant à l'allégation de déclaration inexacte et frauduleuse.

Sur la question des dommages-intérêts, la majorité a jugé que Checo ne pouvait être indemnisée intégralement de la perte subie par suite de l'exécution du contrat. À son avis, il y avait lieu d'établir une distinction d'avec l'arrêt de la Cour d'appel confirmant le jugement de première instance rendu dans l'affaire *Rainbow Industrial Caterers Ltd. c. Canadian National Railway Co.* (1990), 43 B.C.L.R. (2d) 1, confirmé par notre Cour,

from the case at bar, on the grounds that in the present case it was clear that Checo "would have entered into a contract if it had known the true state of affairs but would have adjusted the price of doing the work to reflect that state of affairs" (pp. 163-64). The majority held that on the basis of the statement of claim and the evidence, the extra work attributable to an improperly cleared worksite cost Checo $945,852,01. The majority allowed an additional 15 percent for overhead and profit, making a total damage award of $1,087,729.81.

Hinkson J.A. ordered a new trial on the breach of contract issue (at p. 164):

> ... I would remit the action to the Supreme Court for determination as to whether or not a breach of contract occurred and, in the event that the defendant is found to have been in breach of contract, what damages flowed from such breach. As the parties led evidence at trial in respect of this issue and with respect to the claim of the plaintiff for damages asserted to flow from breach of contract, the trial judge will be in a position on the basis of the record at trial to determine the issue of breach of contract and to assess damages if he finds a breach of contract occurred. The question of whether further evidence should be permitted on this issue should be determined by the trial judge.

Checo's cross-appeal was dismissed, punitive damages being inappropriate in view of the conclusion of the majority that the trial judge's finding of fraud was in error.

(2) Dissenting Reasons of Southin J.A.

Southin J.A. was in agreement with the majority on the issue of fraud, and the disposition of the cross-appeal, but would not have awarded damages for negligent misrepresentation.

With respect to the issue of fraudulent misstatement, Southin J.A. noted that, in her view, "[b]ecause a conscious intention to deceive, i.e., mens rea, is a necessary ingredient of the tort of deceit, it follows that a corporation cannot be liable for this tort except upon the principle respon-

[1991] 3 R.C.S. 3, aux motifs que dans la présente affaire il était clair que Checo [TRADUCTION] «aurait conclu le contrat si elle avait connu la véritable situation mais qu'elle aurait révisé son prix en conséquence» (aux pp. 163 et 164). La majorité a conclu que, d'après la déclaration et la preuve, les travaux additionnels imputables au déboisement inadéquat des lieux avaient coûté à Checo 945 852,01 $. Elle a majoré cette somme de 15 pour 100 au titre des frais généraux et des profits, pour une somme totale de 1 087 729,81 $.

Le juge Hinkson a ordonné la tenue d'un nouveau procès sur la question de l'inexécution du contrat (à la p. 164):

> [TRADUCTION] ... je suis d'avis de renvoyer l'action devant la Cour suprême pour qu'y soit tranchée la question de savoir s'il y a eu inexécution du contrat et, le cas échéant, qu'il y soit procédé à l'évaluation des dommages-intérêts. Les parties ayant présenté lors du procès des éléments de preuve relativement à ces questions, le juge présidant l'audience sera en mesure de disposer de la question de l'inexécution du contrat et d'évaluer, le cas échéant, les dommages subis. C'est lui qui devrait se prononcer sur la recevabilité de nouveaux éléments de preuve à ce sujet.

Le pourvoi incident de Checo a été rejeté, des dommages-intérêts punitifs étant inappropriés vu l'opinion de la majorité selon laquelle la conclusion du juge de première instance quant à la fraude était erronée.

(2) Motifs dissidents du juge Southin

Tout en partageant l'opinion de la majorité sur la question de la fraude et sur la décision quant au pourvoi incident, le juge Southin n'aurait pas accordé de dommages-intérêts pour déclaration inexacte faite par négligence.

En ce qui concerne la question de la déclaration inexacte et frauduleuse, le juge Southin a souligné qu'à son avis [TRADUCTION] «[é]tant donné que l'intention consciente de tromper, c.-à-d. la mens rea, est un élément essentiel du délit civil de dol, il s'ensuit qu'une personne morale ne peut en être

deat superior" (p. 183). In this context, Southin J.A. looked to evidence of the intent of Mr. Foxall, who was the Hydro employee in charge of the project. For there to have been a fraudulent misrepresentation, Foxall would have to be shown to have consciously intended to deceive Checo. Southin J.A. held that the trial judge had not asked himself the right questions and that there was no finding of the required fraudulent intent, and that therefore the claim in fraud could not stand.

Southin J.A. then considered the issue of negligent misstatement. After reviewing the case law, she concluded on the facts of this case that clause 6.01.03 did "not impart the information that between the date of the tender call and the date of commencement of work [Hydro would] clear the right of way to a standard thought suitable either by [Checo] or by a reasonable man" (pp. 200-201). Further, clauses 2.03 and 4.04 were evidence of Hydro's intention not to assume any duty to Checo (at p. 201): "In my opinion, by cls. 2.03 and 4.04, [Hydro] was declaring that it was not assuming any duty of care to [Checo]." Southin J.A. stated she was reinforced in her conclusion by the decision of the Alberta Court of Appeal in *Catre Industries Ltd. v. Alberta* (1989), 99 A.R. 321 (C.A.), leave to appeal to the Supreme Court of Canada refused on March 8, 1990, [1990] 1 S.C.R. vi.

She did not agree with the majority that the measure of damages in this type of case is different depending on whether liability is founded in contract or in tort.

As the trial judge had made no findings as to breach of contract, Southin J.A. agreed with Hinkson J.A. that there should be a new trial on the claim for breach of contract.

tenue responsable sauf en vertu du principe respondeat superior» (à la p. 183). Dans ce contexte, le juge Southin a examiné la preuve quant à l'intention de M. Foxall, l'employé d'Hydro responsable du projet. Pour qu'il y ait eu déclaration inexacte et frauduleuse, il aurait fallu démontrer que Foxall avait consciemment formé l'intention de tromper Checo. Le juge Southin a conclu que le juge de première instance ne s'était pas posé les bonnes questions, qu'il n'y avait pas de conclusion relative à l'intention frauduleuse requise et qu'en conséquence, l'allégation de fraude ne pouvait être retenue.

Le juge Southin a examiné ensuite la question de la déclaration inexacte faite par négligence. Après avoir passé en revue la jurisprudence, elle a conclu d'après les faits de l'espèce, qu'il ne ressortait pas de la clause 6.01.03 [TRADUCTION] «qu'entre la date de l'appel d'offres et celle du début des travaux [Hydro allait] procéder au déboisement de l'emprise suivant une norme jugée acceptable soit par [Checo] soit par une personne raisonnable» (aux pp. 200 et 201). De plus, les clauses 2.03 et 4.04 attestaient de l'intention d'Hydro de n'assumer aucune obligation à l'endroit de Checo (à la p. 201): [TRADUCTION] «À mon avis, [Hydro] déclarait aux clauses 2.03 et 4.04 qu'elle n'assumait aucune obligation de diligence envers [Checo]». Le juge Southin a ajouté que l'arrêt de la Cour d'appel de l'Alberta, *Catre Industries Ltd. c. Alberta* (1989), 99 A.R. 321 (C.A.), autorisation de pourvoi à la Cour suprême du Canada refusée le 8 mars 1990, [1990] 1 R.C.S. vi, venait renforcer sa conclusion.

Elle a par ailleurs exprimé son désaccord avec l'opinion majoritaire selon laquelle l'évaluation des dommages-intérêts dans une affaire de ce genre dépend du fondement contractuel ou délictuel de la responsabilité.

Le juge de première instance n'étant parvenu à aucune conclusion quant à l'inexécution du contrat, la juge Southin a dit partager l'opinion du juge Hinkson sur la nécessité de tenir un nouveau procès sur cette question.

III. Issues

I would characterize the issues raised by Hydro's appeal as follows:

(1) Can a pre-contractual representation which becomes a contractual term found liability in negligent misrepresentation?

(2) If the answer to the first question is in the affirmative, did the terms of the contract nonetheless operate to exclude Hydro's potential liability for any misrepresentations?

(3) If the terms of the contract did not exclude Hydro's potential liability for any misrepresentations, is Hydro liable for negligent misrepresentation?

(4) Was there a breach of contract?

I would characterize the issues raised by Checo's cross-appeal as follows:

(1) Should Hydro be liable for fraudulent misrepresentation?

(2) Did the Court of Appeal correctly assess Checo's damages for negligent misrepresentation?

IV. Analysis

In the interests of simplicity and brevity, I will deal with the issues raised by the appeal and cross-appeal somewhat out of order. Because the issue of fraudulent misrepresentation can and should be resolved quickly, I will deal with it first. Then I will examine, following *Central Trust v. Rafuse*, *supra*, the scope of the right of a party to a contract to sue the other party in tort (the tort-contract concurrency problem). It will also be necessary for me to review the law of negligent misrepresentation (which was not at issue in *Central Trust v. Rafuse*), in order to determine the applicability of the prin-

III. Questions en litige

Je formulerais les questions que soulève le pourvoi d'Hydro de la manière suivante:

(1) Peut-on se fonder sur une déclaration précontractuelle qui devient une clause du contrat pour conclure à la responsabilité pour déclaration inexacte faite par négligence?

(2) Si l'on répond par l'affirmative à la première question, les clauses du contrat ont-elles néanmoins pour effet d'exclure la responsabilité potentielle d'Hydro pour toute déclaration inexacte?

(3) Si les clauses du contrat n'ont pas pour effet d'exclure la responsabilité potentielle d'Hydro pour toute déclaration inexacte, Hydro est-elle responsable par suite d'une déclaration inexacte faite par négligence?

(4) Y a-t-il eu inexécution du contrat?

Quant aux questions que soulève le pourvoi incident formé par Checo, je les formulerais ainsi:

(1) Hydro devrait-elle être tenue responsable d'avoir fait une déclaration inexacte et frauduleuse?

(2) La Cour d'appel a-t-elle correctement évalué le préjudice subi par Checo par suite de la déclaration inexacte faite par négligence?

IV. Analyse

Par souci de simplicité et de concision, je n'aborderai pas dans l'ordre les questions que soulèvent le pourvoi et le pourvoi incident. Comme la question de la déclaration inexacte et frauduleuse peut et devrait être résolue rapidement, j'en disposerai dès le départ. Puis j'examinerai, suivant l'arrêt *Central Trust c. Rafuse*, précité, la portée du droit d'une partie contractante de poursuivre son cocontractant en responsabilité délictuelle (la question de la responsabilité concomitante (aussi appelée concurrente) en matières délictuelle et contractuelle). Il me faudra également passer en revue le droit en matière de déclaration inexacte faite par négligence (point qui n'était pas en litige dans l'arrêt *Central Trust c. Rafuse*) en vue de déterminer

ciples in *Central Trust v. Rafuse* to pre-contractual representations.

Because of my conclusions on these issues, it will not be necessary for me to decide whether there was a negligent misrepresentation, or whether the Court of Appeal's assessment of Checo's damages for negligent misrepresentation was correct. It will, however, be necessary for me to consider the issue of breach of contract.

A. *Fraudulent Misrepresentation*

The trial judge found Hydro liable in deceit. The Court of Appeal allowed Hydro's appeal on this issue. In argument before us, Checo submitted that the trial judge's ruling on the question of deceit should be upheld. At the hearing of the appeal, we indicated that we did not find it necessary to hear Hydro's response on the issue of deceit.

In my view, there was insufficient evidence to support a finding of deceit (i.e. of fraudulent intention, as discussed further in these reasons) against Hydro, and the Court of Appeal correctly intervened to reverse the trial judge on this point. As Hinkson J.A. noted (at pp. 161-62):

> [A] committee of 12 prepared the specifications. The evidence does not reveal that any members of the committee were dishonest in the preparation of the specifications for this contract. Rather, it is possible to conclude that they mistakenly and negligently believed that the requirement that a tenderer should take a view of the site would remedy any shortcomings in the specifications included in the terms of the contract.

Consequently, Checo's cross-appeal on this point should be dismissed.

B. *Concurrent Liability in Tort and Contract*

(1) Introduction

It was Hydro's submission on this appeal that it ought to be liable, if at all, in contract and not in

l'applicabilité des principes énoncés dans cet arrêt aux déclarations précontractuelles.

En raison de mes conclusions sur ces questions, il n'y aura pas lieu de décider s'il y a eu déclaration inexacte faite par négligence ou si l'évaluation du préjudice subi par Checo à ce chapitre était exacte. Il me faudra toutefois examiner la question de l'inexécution du contrat.

A. *Déclaration inexacte et frauduleuse*

Le juge de première instance a conclu à la responsabilité d'Hydro pour cause de dol. La Cour d'appel a accueilli son appel sur ce point. Dans la plaidoirie qu'elle a présentée devant nous, Checo a soutenu que la décision du juge de première instance sur la question du dol devait être confirmée. À l'audience, nous avons indiqué qu'il n'y avait pas lieu à notre avis d'entendre la réponse d'Hydro à ce sujet.

À mon sens, les éléments de preuve présentés ne suffisaient pas à étayer une conclusion de dol (c'est-à-dire d'intention frauduleuse, analysée plus à fond dans les présents motifs) de la part d'Hydro, et la Cour d'appel est à bon droit intervenue pour infirmer la décision du juge de première instance sur ce point. Comme l'a souligné le juge Hinkson (aux pp. 161 et 162):

> [TRADUCTION] [L]e cahier des charges a été préparé par un comité de 12 personnes. Rien dans la preuve n'indique que les membres du comité aient été malhonnêtes dans leurs travaux. En revanche, on peut conclure qu'ils ont cru de façon erronée et négligente que l'obligation pour le soumissionnaire d'aller voir les lieux remédierait à toute lacune dans les stipulations du cahier des charges incluses dans le contrat.

En conséquence, il y a lieu de rejeter le pourvoi incident de Checo sur ce point.

B. *Responsabilité concomitante en matières délictuelle et contractuelle*

(1) Introduction

La prétention d'Hydro dans ce pourvoi est que si responsabilité il y a, il doit s'agir d'une responsa-

tort. For the reasons which I will set out, I agree that in the circumstances of the case, while Hydro may be liable in contract for the representations which Checo complains of, Hydro cannot be liable in tort. Given the importance of the general issue of tort-contract concurrency, I propose to explore it in some detail.

As a general rule, the existence of a contract between two parties does not preclude the existence of a common law duty of care. Subject to the substantive and procedural differences that exist between an action in contract and an action in tort, both the duty of care and the liability may be concurrent in contract and tort. In such circumstances, it is for the plaintiff to select the cause of action most advantageous to him or her. That was the position adopted by Le Dain J. in *Central Trust v. Rafuse*, *supra*. At pages 204-5, Le Dain J. said the following:

> The common law duty of care that is created by a relationship of sufficient proximity, in accordance with the general principle affirmed by Lord Wilberforce in *Anns v. Merton London Borough Council*, is not confined to relationships that arise apart from contract. Although the relationships in *Donoghue v. Stevenson*, *Hedley Byrne* and *Anns* were all of a non-contractual nature and there was necessarily reference in the judgments to a duty of care that exists apart from or independently of contract, I find nothing in the statements of general principle in those cases to suggest that the principle was intended to be confined to relationships that arise apart from contract. . . . [T]he question is whether there is a relationship of sufficient proximity, not how it arose. The principle of tortious liability is for reasons of public policy a general one.

Le Dain J.'s conclusion that a plaintiff is generally entitled to choose, as between contract and tort, the cause of action most favourable to him or her was supported by a long line of Canadian and English authority, some of which I will consider below. *Central Trust v. Rafuse*, *supra*, has since met with wide acceptance, and has been applied by

bilité contractuelle et non délictuelle. Pour les motifs que je vais exposer, je conviens que si, dans les circonstances de l'espèce, Hydro peut encourir une responsabilité contractuelle pour les déclarations que Checo lui reproche, elle ne peut encourir de responsabilité délictuelle. Étant donné l'importance de la question générale de la concomitance des responsabilités délictuelle et contractuelle, je me propose d'en faire une étude détaillée.

En règle générale, le fait que deux parties soient liées par contrat n'empêche pas l'existence d'une obligation de diligence en common law. Sous réserve des différences qui existent sur le plan du fond et de la procédure entre une action en responsabilité contractuelle et une action en responsabilité délictuelle, l'obligation de diligence et la responsabilité peuvent être concomitantes dans les deux cas. En pareilles circonstances, il appartient au demandeur de choisir la cause d'action qui lui est la plus avantageuse. C'est la position qu'a adoptée le juge Le Dain dans l'arrêt *Central Trust c. Rafuse*, précité, aux pp. 204 et 205:

> L'obligation de diligence en *common law* qui, conformément au principe général énoncé par lord Wilberforce dans l'arrêt *Anns v. Merton London Borough Council*, résulte de l'existence de rapports suffisamment étroits entre les intéressés, ne se limite pas aux relations qui ne tirent pas leur origine d'un contrat. Bien que les liens dont il s'agissait dans les arrêts *Donoghue v. Stevenson*, *Hedley Byrne* et *Anns* aient été de nature non contractuelle et que l'on ait nécessairement parlé dans les jugements d'une obligation de diligence qui existe indépendamment d'un contrat, je ne vois rien dans les énoncés d'un principe général dans ces arrêts qui laisse entendre que l'application du principe devait se limiter à des liens qui prenaient naissance indépendamment d'un contrat. [. . .] [L]a question est de savoir s'il existe des rapports suffisamment étroits, et non pas de savoir comment ils ont pris naissance. Pour des raisons d'intérêt public, le principe de la responsabilité délictuelle est général.

La conclusion du juge Le Dain selon laquelle il est de façon générale loisible au demandeur de choisir, entre la responsabilité contractuelle ou délictuelle, la cause d'action qui lui est la plus favorable, trouve appui dans une longue jurisprudence canadienne et anglaise, dont certaines décisions que j'examinerai ci-après. L'arrêt *Central*

a number of provincial Courts of Appeal. See *University of Regina v. Pettick* (1991), 90 Sask. R. 241 (C.A.); *Fletcher v. Manitoba Public Insurance Co.* (1989), 68 O.R. (2d) 193 (C.A.); *Pittman v. Manufacturers Life Insurance Co.* (1990), 76 D.L.R. (4th) 320 (Nfld. C.A.); *Clark v. Naqvi* (1989), 99 N.B.R. (2d) 271 (C.A.), and *Catre Industries Ltd. v. Alberta*, *supra*.

In *Central Trust v. Rafuse*, *supra*, Le Dain J. recognized two situations in which, notwithstanding what would otherwise be a breach of the duty of care in tort, a plaintiff's ability to sue in tort will be limited by the terms of the contract. In one situation it is the liability in tort which is avoided or modified; in the other it is the duty in tort which is affected.

Le Dain J. recognized that liability in tort can be limited or excluded by the terms of a contract. A plaintiff will not be permitted to plead in tort in order to circumvent a contractual clause which excludes or limits the defendant's liability (at p. 206):

> A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

In this case, Hydro argues that the terms of the contract operated to exclude its liability for the conduct of which Checo complains. If Hydro were correct, then Checo would no more be able to recover in tort than in contract. As I will discuss below, I am of the opinion that the contract does not exclude Hydro's liability.

As mentioned, Le Dain J. also recognized that the defendant's duty in tort could be affected by the terms of the contract. If the duty of care alleged in tort is also defined by a specific term of the contract, then the plaintiff will be entitled only to

Trust c. Rafuse, précité, a depuis été largement reconnu et appliqué par bon nombre de tribunaux d'appel provinciaux. Voir *University of Regina c. Pettick* (1991), 90 Sask. R. 241 (C.A.); *Fletcher c. Manitoba Public Insurance Co.* (1989), 68 O.R. (2d) 193 (C.A.); *Pittman c. Manufacturers Life Insurance Co.* (1990), 76 D.L.R. (4th) 320 (C.A.T.-N.); *Clark c. Naqvi* (1989), 99 R.N.-B. (2e) 271 (C.A.), et *Catre Industries Ltd. c. Alberta*, précité.

Dans l'arrêt *Central Trust c. Rafuse*, précité, le juge Le Dain reconnaît qu'il y a deux situations où, indépendamment de l'existence d'un manquement à une obligation de diligence en matière délictuelle, la capacité du demandeur d'exercer un recours en responsabilité délictuelle sera limitée par le contrat. Dans un cas, c'est la responsabilité délictuelle qui est écartée ou modifiée; dans l'autre, c'est l'obligation en responsabilité délictuelle qui est touchée.

Le juge Le Dain reconnaît que la responsabilité délictuelle peut être limitée ou exclue par le contrat. Ainsi, il ne sera pas permis au demandeur d'alléguer la responsabilité délictuelle dans le but de contourner une clause contractuelle excluant ou limitant la responsabilité du défendeur (à la p. 206):

> Une responsabilité délictuelle concurrente ou alternative ne sera pas admise si elle a pour effet de permettre au demandeur de contourner ou d'éluder une clause contractuelle d'exonération ou de limitation de responsabilité pour l'acte ou l'omission qui constitue le délit civil.

En l'espèce, Hydro fait valoir que les clauses du contrat ont pour effet d'exclure sa responsabilité pour la conduite que Checo lui impute. Si cette prétention est juste, Checo ne pourrait être indemnisée autant sur le plan délictuel que sur le plan contractuel. Comme je l'expliquerai ci-après, je suis d'avis que le contrat n'exclut pas la responsabilité d'Hydro.

Ainsi que je l'ai indiqué, le juge Le Dain convient également que l'obligation du défendeur en responsabilité délictuelle peut être modifiée par le contrat. En effet, si l'obligation de diligence invoquée en cette matière est également définie expres-

those remedies which may be available pursuant to the contract. The contractual relationship can bring the parties into sufficient proximity to give rise to a duty of care. However, no duty of care in tort can be concurrent with a duty of care created by an express term of the contract. In the words of Le Dain J. (at p. 205):

> What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. . . . A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract.

On the facts of *Central Trust v. Rafuse*, *supra*, Le Dain J. concluded that the defendant solicitors had concurrent duties of care in contract and in tort. The contract between the parties was a general retainer. Le Dain J. held that it was an implied term of the contract between solicitor and client that the solicitor perform his or her professional duties with "reasonable care, skill and knowledge" (p. 208). The duty of care imposed on a solicitor at common law was the same as, and concurrent with, that imposed as an implied term of the contract (at p. 210):

> While the solicitor's duty of care has generally been stated . . . as arising as an implied term of the contract or retainer, the same duty arises as a matter of common law from the relationship of proximity created by the retainer. In the absence of special terms in the contract determining the nature and scope of the duty of care in a particular case, the duties of care in contract and tort are the same.

sément au contrat, le demandeur ne disposera alors que des recours découlant du contrat. Il peut résulter des liens contractuels existant entre les parties des rapports suffisamment étroits pour donner naissance à une obligation de diligence. Toutefois, une obligation de diligence en matière délictuelle ne pourra coexister avec une autre créée expressément par le contrat. Selon le juge Le Dain, à la p. 205:

> Les engagements stipulés dans le contrat révèlent la nature des liens dont découle l'obligation de diligence en *common law*, mais la nature et la portée de l'obligation de diligence invoquée comme fondement de la responsabilité délictuelle ne doivent pas dépendre d'obligations ou de devoirs précis créés expressément par le contrat. C'est dans ce sens que l'obligation de diligence en *common law* doit être indépendante du contrat. [. . .] On ne saurait affirmer qu'une réclamation est en matière délictuelle si elle tient, en ce qui concerne la nature et la portée de l'obligation de diligence alléguée, à la façon dont une obligation a été expressément et précisément définie dans un contrat.

Compte tenu des faits de l'affaire *Central Trust c. Rafuse*, précitée, le juge Le Dain a conclu que les avocats défendeurs étaient soumis à une obligation de diligence concomitante en matières contractuelle et délictuelle. Le contrat intervenu entre les parties était de nature générale. Selon le juge Le Dain, une des conditions implicites du contrat entre un avocat et son client est que l'avocat doit, dans la prestation de ses services professionnels, faire preuve «de diligence, de compétence et de connaissances raisonnables» (à la p. 208). L'obligation de diligence imposée à l'avocat en common law est la même que celle qui découle d'une condition implicite du contrat, les deux obligations étant concomitantes (à la p. 210):

> Bien que [. . .] l'obligation de diligence de l'avocat ait généralement été décrite [. . .] comme découlant d'une condition implicite du contrat entre l'avocat et le client, la même obligation résulte en *common law* des liens étroits créées par ce contrat. En l'absence de stipulations contractuelles expresses précisant la nature et la portée de l'obligation de diligence dans un cas donné, l'obligation de diligence est la même en matière contractuelle et en matière délictuelle.

Given the nature of a solicitor's duties in contract and in tort, and given the particular contractual relationship between the parties, Le Dain J. concluded that the duty of care of the solicitors ran concurrently in tort and contract. Moreover, there was no clause in the contract excluding or limiting the solicitors' liability which could affect the solicitors' liability in tort.

In *Central Trust v. Rafuse*, *supra*, it was not necessary for Le Dain J. to test the boundaries of the situations he described in which a plaintiff's right to recover in tort would be limited. As I mentioned, the contract before him had no clauses excluding or limiting the liability of the solicitors. Moreover, the contract contained no express terms creating specific obligations or duties which might have excluded the solicitors' duty of care in tort.

The facts of this case require me to do what it was not necessary for Le Dain J. to do in *Central Trust v. Rafuse*, *supra*: I must interpret and apply the principles to a contractual relationship in which there are exclusion or limitation of liability clauses which may exclude or limit liability in tort, as well as in contract, and in which there are clauses which may operate to exclude some parts of the duty of care in tort entirely. To interpret and apply the principles in *Central Trust v. Rafuse* in the circumstances of this case, it will be necessary for me to review the authorities governing concurrency of obligations in tort and contract. It will also be necessary for me to review the law governing clauses which exclude or limit liability.

(2) Concurrency of Tort and Contract

The recent history of concurrency in tort and contract can be characterized as the development of a single regime of concurrency from two sets of

Compte tenu de la nature des obligations de l'avocat en matières contractuelle et délictuelle et des liens contractuels particuliers entre les parties, le juge Le Dain a conclu qu'il y avait concomitance de l'obligation de diligence des avocats sur les plans contractuel et délictuel. Qui plus est, le contrat ne comportait aucune clause d'exclusion ou de limitation de la responsabilité des avocats susceptible d'influer sur leur responsabilité délictuelle.

Dans l'arrêt *Central Trust c. Rafuse*, précité, le juge Le Dain n'avait nul besoin de circonscrire les situations évoquées où le droit du demandeur de recouvrer des dommages-intérêts en matière délictuelle serait restreint. Comme je viens de le dire, le contrat qui lui était soumis ne comportait pas de clauses d'exclusion ou de limitation de la responsabilité des avocats. Il ne contenait pas non plus de stipulations expresses créant des obligations précises ayant pu avoir pour effet d'exclure leur obligation de diligence en matière délictuelle.

En l'espèce toutefois, les faits m'obligent à procéder à une analyse que le juge Le Dain n'a pas eu à faire dans l'arrêt *Central Trust c. Rafuse*, *précité*: il me faut interpréter les principes et les appliquer à une relation contractuelle dans le cadre de laquelle sont prévues des clauses d'exclusion ou de limitation de responsabilité susceptibles d'exclure ou de limiter la responsabilité aussi bien délictuelle que contractuelle, de même que des clauses pouvant avoir pour effet d'exclure entièrement certains aspects de l'obligation de diligence en matière délictuelle. Pour interpréter et appliquer les principes de l'arrêt *Central Trust c. Rafuse* dans le cadre des circonstances de l'espèce, il me faudra examiner la jurisprudence concernant la concomitance des obligations d'ordre délictuel et contractuel. Je devrai également examiner le droit régissant les clauses d'exclusion ou de limitation de responsabilité.

(2) La concomitance sur les plans délictuel et contractuel

L'histoire récente de la concomitance de la responsabilité en matières contractuelle et délictuelle se caractérise par le développement d'un seul

rules governing concurrency in distinct circumstances. Until *Esso Petroleum Co. v. Mardon*, [1976] 2 All E.R. 5 (C.A.), there was one set of rules governing obligations in tort and contract for the so-called "status relationships" and another set of rules governing obligations in tort and contract for all other relationships. Since *Esso Petroleum*, *supra*, these two sets of rules have been assimilated into a single regime governing obligations in tort and contract for all relationships. The principles set out by Le Dain J. in *Central Trust v. Rafuse*, *supra*, are representative of that single regime. To understand better the principles articulated by Le Dain J. in *Central Trust v. Rafuse*, it will be helpful to review the process of development which preceded and informed the judgment of Le Dain J.

(a) *The Two Strands of Concurrent Liability in Tort and Contract*

The modern conception of a distinct tort of negligence is relatively recent. It has been argued that the genesis of negligence is to be found in the long series of "running down" cases in the eighteenth and nineteenth centuries, as ever increasing numbers of horses, carts and ships meant increasing numbers of accidents. See J. H. Baker, *An Introduction to English Legal History* (1979), at pp. 342-45. But it was not until the famous case of *Donoghue v. Stevenson*, *supra*, that a general tort of negligence was finally recognized.

Negligence was not, however, unknown to the law before *Donoghue v. Stevenson*, or even before such running down cases as *Leame v. Bray* (1803), 3 East 593 (K.B.), 102 E.R. 724. Beginning in a much earlier time, negligence was actionable if the defendant's status imposed upon him or her a duty to take care in the exercise of his or her profession. Persons with such status included bailees and those who practised a "common calling", including those of innkeeper and common carrier. The liabil-

régime à partir de deux séries de règles applicables selon les circonstances. Jusqu'à l'arrêt *Esso Petroleum Co. c. Mardon*, [1976] 2 All E.R. 5 (C.A.), un ensemble de règles régissait les obligations contractuelles et délictuelles en ce qui concerne les relations dites «créatrices de statut», tandis qu'un autre ensemble régissait les obligations contractuelles et délictuelles pour tous les autres types de relations. Depuis l'arrêt *Esso Petroleum*, précité, ces deux ensembles de règles ont été fondues en un régime unique applicable aux obligations contractuelles et délictuelles pour tous les types de relations. Les principes qu'a énoncés le juge Le Dain dans l'arrêt *Central Trust c. Rafuse*, précité, sont représentatifs de ce régime unique. Afin de mieux comprendre les principes articulés dans cet arrêt, il convient de passer en revue l'évolution qui a conduit au jugement du juge Le Dain.

a) *Les deux courants en matière de concomitance de la responsabilité en matières contractuelle et délictuelle*

La conception moderne d'un délit civil de négligence distinct est relativement récente. On peut, dit-on, en retracer la genèse dans la longue série d'affaires de «collision» des XVIII^e^ et XIX^e^ siècles au cours desquels on a assisté à une augmentation du nombre d'accidents dus au nombre croissant de chevaux, de voitures et de navires. Voir J. H. Baker, *An Introduction to English Legal History* (1979), aux pp. 342 à 345. Mais ce n'est qu'avec le célèbre arrêt *Donoghue c. Stevenson*, précité, que le délit général de négligence a finalement été reconnu.

La négligence n'était toutefois pas une notion inconnue en droit avant l'arrêt *Donoghue c. Stevenson*, ou même avant les affaires de collision, telle l'affaire *Leame c. Bray* (1803), 3 East 593 (K.B.), 102 E.R. 724. À une époque beaucoup plus ancienne, la négligence donnait ouverture à une action si, de par son statut, le défendeur se voyait imposer une obligation de diligence dans l'exercice de sa profession. Faisaient partie de cette catégorie les dépositaires et ceux qui pratiquaient une «profession publique», notamment l'hôtelier et le transporteur public. Leur responsabilité était engagée indépendamment de l'existence d'un contrat.

ity of such persons arose independently of contract. To quote Baker, *supra*, at pp. 277-78:

> Many callings were, in any case, controlled by the common law or custom independently of contract; an innkeeper, for instance, was liable under the 'custom of the realm' for his failure to look after a guest's goods or for refusing to accommodate a traveller. . . . [S]imilar duties could be imposed on professional men. . . . Another kind of status was that of bailee or custodian of property; it was held in 1487 that a shepherd having the custody of sheep was liable in *assumpsit* for failing to look after them, so that they were killed.

That a defendant who owed a duty to take care because of his or her status was liable in negligence even if there also existed a contract between the parties is confirmed by the judgment of Dallas C.J. in *Bretherton v. Wood* (1821), 3 Brod. & B. 54 (Ex. Ch.), 129 E.R. 1203, at p. 1206 E.R.:

> This action is on the case [i.e. in negligence] against a common carrier, upon whom a duty is imposed by the custom of the realm, or in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.
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> Nor is it material, whether redress might or might not have been had in an action of assumpsit [i.e. in contract]; that must depend on circumstances of which this Court has no knowledge; but, whether an action of assumpsit might or might not have been maintained, still this action on the case may be maintained. The action of assumpsit, as applied to cases of this kind, is of modern use. The action on the case is as early as the existence of the custom or common law as to common carriers. [Emphasis added.]

There has been some debate as to the extent of these status relationships. See *Central Trust v. Rafuse*, *supra*, at pp. 176-78; C. French, "The Con-

Pour reprendre les termes de Baker, *op. cit.*, aux pp. 277 et 278:

> [TRADUCTION] L'exercice d'un grand nombre de professions était, en tout état de cause, soumis à la common law ou à la coutume, indépendamment de l'existence d'un contrat; ainsi, un hôtelier pouvait, en vertu de la «coutume du royaume», être tenu responsable pour avoir omis de surveiller les biens d'un client ou refusé le gîte à un voyageur. [. . .] [D]es obligations semblables pouvaient être imposées aux personnes exerçant des professions libérales. [. . .] Le dépositaire ou gardien de biens jouissait d'un autre statut; on a décidé en 1487 qu'un berger était responsable en *assumpsit* pour avoir omis de surveiller les brebis dont il avait la garde et qui avaient été tuées.

Le principe suivant lequel le défendeur qui assumait une obligation de diligence en raison de son statut était responsable de négligence même s'il y avait également un contrat entre les parties a été confirmé par le juge en chef Dallas dans l'affaire *Bretherton c. Wood* (1821), 3 Brod. & B. 54, (Ex. Ch.), 129 E.R. 1203, à la p. 1206 E.R.:

> [TRADUCTION] Il s'agit d'une action en responsabilité délictuelle [pour négligence] contre un voiturier à qui la coutume du royaume ou, en d'autres termes, la common law, impose l'obligation d'assurer la sécurité des biens ou des passagers qu'il transporte, de sorte qu'ils ne subissent, par sa négligence ou sa faute, ni dommages ni blessures. Un manquement à cette obligation est un manquement à la loi, qui donne ouverture à une action fondée sur la common law, sans qu'il soit besoin d'invoquer l'existence d'un contrat.
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> . . .
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> Il importe peu qu'un redressement ait pu ou non être obtenu par la voie d'une action en assumpsit [fondée sur un contrat]; il s'agit-là de circonstances qui ne sont pas à la connaissance de cette cour; mais qu'une action en assumpsit soit ou non recevable, la présente action en responsabilité délictuelle peut être maintenue. L'action en assumpsit, telle qu'elle s'applique dans des affaires comme la présente espèce, est de conception moderne. L'action en responsabilité délictuelle est quant à elle aussi ancienne que la coutume ou la common law applicable aux voituriers. [Je souligne.]

L'étendue de cette notion de relations fondées sur le statut a suscité certains débats. Voir *Central Trust c. Rafuse*, précité, aux pp. 176 à 178;

tract/Tort Dilemma" (1983), 5 *Otago L. Rev.* 236, at pp. 273-78; and C. H. S. Fifoot, *History and Sources of the Common Law: Tort and Contract* (1949), at pp. 157-59. On what French calls the "traditional view", status relationships included carriers, innkeepers, surgeons, apothecaries, attorneys, veterinary surgeons, smiths, and barbers, together with the relationships of bailor/bailee and master/servant (at pp. 274-78). Whatever the proper scope of the status relationships might have been, it is clear that they attracted concurrent liability in contract and in tort. As Tindal C.J. expressed it in *Boorman v. Brown* (1842), 3 Q.B. 511 (Ex. Ch.), 114 E.R. 603, at pp. 608-9 E.R., aff'd *sub nom. Brown v. Boorman* (1844), 11 Cl. & Fin. 1 (H.L.), 8 E.R. 1003:

> That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render: actions against common carriers, against ship owners on bills of lading, against bailees of different descriptions: and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff.
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> . . .
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> The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort.

As the judgment of Tindal C.J. in *Boorman*, *supra*, indicates, the range of status relationships was seen in the nineteenth century as extensive (the profession at issue in *Boorman* was that of commodities broker). In fact, in the judgment of the House of Lords upholding the judgment of Tindal C.J., concurrency of tort and contract is stated as a general principle, without reference to

C. French, «The Contract/Tort Dilemma» (1983), 5 *Otago L. Rev.* 236, aux pp. 273 à 278; et C. H. S. Fifoot, *History and Sources of the Common Law: Tort and Contract* (1949) aux pp. 157 à 159. Suivant ce que French appelle le [TRADUCTION] «point de vue traditionnel», entraient dans cette catégorie le voiturier, l'hôtelier, le chirurgien, l'apothicaire, l'avocat, le chirurgien vétérinaire, le forgeron et le barbier, ainsi que les relations déposant/dépositaire et employeur/employé (aux pp. 274 à 278). Mais peu importe leur champ d'application exact, il était clair que ces relations donnaient ouverture à une responsabilité concomitante en matières contractuelle et délictuelle. Comme l'a dit le juge en chef Tindal dans l'affaire *Boorman c. Brown* (1842), 3 Q.B. 511 (Ex. Ch.), 114 E.R. 603, aux pp. 608 et 609 E.R., confirmé *sub nom. Brown c. Boorman* (1844), 11 Cl. & Fin. 1 (H.L.), 8 E.R. 1003:

> [TRADUCTION] On ne conteste pas qu'il existe une grande catégorie d'affaires dans lesquelles l'action est fondée sur le lien contractuel entre les parties, mais dans lesquelles, néanmoins, la rupture ou l'inexécution ouvrent indifféremment un recours en assumpsit ou un recours délictuel. Tombent dans cette catégorie les actions intentées contre des avocats, des chirurgiens et d'autres hommes exerçant une profession libérale, pour incompétence ou pour manque de diligence raisonnable dans la prestation des services qu'ils s'engagent à rendre: les actions contre des transporteurs publics, les actions contre des propriétaires de navire fondées sur des connaissements, les actions contre différentes sortes de dépositaires ne sont que quelques exemples parmi tant d'autres où l'action peut, au choix du demandeur, avoir un fondement délictuel ou contractuel.
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> . . .
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> Le principe sur lequel repose toutes ces affaires semble être que le contrat crée une obligation et que le défaut de remplir cette obligation, ou l'inexécution, donne ouverture à un recours délictuel.

Comme l'indique le juge en chef Tindal dans l'arrêt *Boorman*, précité, la catégorie des relations fondées sur le statut était considérée au XIX^e^ siècle comme très large (la profession en cause dans cette affaire était celle de courtier en marchandises). En fait, dans le jugement de la Chambre des lords confirmant la décision du juge en chef Tindal, la concomitance des responsabilités contractuelle et

status relationships at all (at pp. 1018-19 E.R., *per* Lord Campbell):

> . . . wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of a duty in the course of that employment, the plaintiff may either recover in tort or in contract.

However, in the twentieth century, there was a noticeable trend towards limiting the range of the status relationships. In *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399 (C.A.), Slesser L.J. found that a broker did not exercise a "common calling" (at pp. 406-7):

> In reference to the suggestion that a broker might be regarded as exercising a common calling in the same way as, for example, a carrier, in respect of whom it has been held that his duties to the public are imported so that a breach of these is necessarily a tort, I desire to add that no authority was cited to establish that a stockbroker is in such a position. . . . In my opinion a stockbroker does not exercise a "public calling" in the sense in which that term is used as applied to carriers and certain other occupations. In this case a personal relationship existed between the parties, and in my view the breach complained of was a breach of contract.

In *Groom v. Crocker*, [1939] 1 K.B. 194, the Court of Appeal held that the profession of solicitor was not among the status relationships, as those of doctor, architect and stockbroker also were not (at p. 222 *per* Scott L.J.):

> A solicitor, as a professional man, is employed by a client just as much as a doctor, an architect, or a stockbroker, and the mutual rights and duties of the two are regulated entirely by the contract of employment. . . . The retainer when given puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest and carry out his instructions in the matters in which the retainer relates, by all proper means. . . . But in all these aspects the tie between the two is contractual.

délictuelle a été énoncée sous forme de principe général, sans référence aucune à la notion de relations fondées sur le statut (Lord Campbell, aux pp. 1018 et 1019 E.R.):

> [TRADUCTION] . . . chaque fois qu'il y a un contrat et qu'un acte quelconque doit être accompli dans l'exécution du travail qui fait l'objet du contrat, le demandeur peut, en cas de manquement aux obligations qui se rattachent à l'exécution de ce travail, poursuivre sur un fondement soit délictuel, soit contractuel.

Au XX^e^ siècle toutefois, il y a eu une tendance manifeste à restreindre la catégorie des occupations donnant lieu à des relations fondées sur le statut. Dans l'arrêt *Jarvis c. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399 (C.A.), le lord juge Slesser a conclu, qu'un courtier n'exerçait pas une «profession publique» (aux pp. 406 et 407):

> [TRADUCTION] Quant à la prétention voulant qu'un courtier exerce une profession publique de la même façon, par exemple, qu'un transporteur, à l'égard duquel il a été décidé qu'il assumait des obligations envers le public, de sorte qu'un manquement à ces obligations constitue forcément un délit civil, je voudrais ajouter qu'aucune jurisprudence n'est venue l'étayer. [. . .] À mon avis, un courtier en valeurs mobilières n'exerce pas une «profession publique» au sens où cette expression s'applique aux transporteurs et à certaines autres occupations. En l'espèce, des relations personnelles existaient entre les parties et, à mon avis, la violation alléguée était celle du contrat.

Dans l'arrêt *Groom c. Crocker*, [1939] 1 K.B. 194, la Cour d'appel a statué que la profession d'avocat ne faisait pas partie de la catégorie des occupations donnant lieu à des relations fondées sur le statut, pas plus que la profession de médecin, d'architecte et de courtier en valeurs mobilières, (le lord juge Scott, à la p. 222):

> [TRADUCTION] À titre de personne exerçant une profession libérale, l'avocat est employé par un client, tout comme le médecin, l'architecte ou le courtier en valeurs mobilières, les droits et obligations respectifs des deux parties étant entièrement régis par le contrat de travail. [. . .] Une fois le contrat conclu, entrent en jeu les clauses contractuelles normales, et, en particulier, l'obligation de l'avocat de protéger les intérêts de son client et de se conformer aux directives qu'il en reçoit sur les questions faisant l'objet du contrat, par tous les moyens

There is to-day no common-law duty similar to that which survives in the case of a bailee or carrier, and no action lies in tort for the breach of the above duties. . . .

The judgment of Diplock L.J. in *Bagot v. Stevens Scanlan & Co.*, [1966] 1 Q.B. 197, was to a similar effect. Diplock L.J. held that the relationship of architect and client was not a "status relationship" (at p. 206):

. . . I can see nothing in the relationship of architect and client which can be said to give rise to the kind of status obligation which arises from the origins of the common law in the case of master and servant, common carrier, innkeeper, bailor and bailee.

For those who were not in one of the status relationships, on the other hand, a different regime governed the tort liabilities of parties to a contract. For all those who were not in status relationships, an action in negligence lay only if the duty relied upon in negligence was "independent" of the duty imposed by contract. Before the causes of action were abolished by the *Judicature Act*, the principle was stated to be that if no cause of action remained if the allegation of a contract were struck out, then the action was founded on contract alone: *Williamson v. Allison* (1802), 2 East. 446 (K.B.), 102 E.R. 439. In *Legge v. Tucker* (1856), H. & N. 500 (Ex.), 156 E.R. 1298, all the judges were unanimously of the opinion that an action in tort would lie only if there was a duty existing apart from the contract. In the words of Pollock C.B. (at p. 1299 E.R.): "Where the foundation of the action is a contract, in whatever way the declaration is framed, it is an action of assumpsit; but where there is a duty ultra the contract, the plaintiff may declare in case." In the words of Watson B. (at p. 1299 E.R.): "[T]he true question is, whether, if [the allegation of a contract] were struck out, any ground of action would remain. . . . There is no duty independently of the contract, and therefore it is an action of assumpsit." The judgment of Smith L.J. in *Turner*

appropriés. [. . .] Mais sur tous ces points, le lien entre les deux parties est d'ordre contractuel. Il n'existe plus de nos jours d'obligation en common law analogue à celle qui a survécu dans le cas du dépositaire ou du transporteur, et l'inexécution des obligations précitées ne donne ouverture à aucune action ayant un fondement délictuel . . .

Le jugement du lord juge Diplock dans *Bagot c. Stevens Scanlan & Co.*, [1966] 1 Q.B. 197, va dans le même sens. Lord Diplock y a estimé que les relations entre un architecte et son client n'étaient pas «fondées sur le statut» (à la p. 206):

[TRADUCTION] . . . je ne vois rien dans les relations entre un architecte et son client qui puisse donner naissance au genre d'obligation découlant d'un statut qu'on reconnaît depuis l'origine de la common law dans le cas de l'employeur et de l'employé, du transporteur public, de l'hôtelier, ainsi que du déposant et du dépositaire.

Quant à ceux, par ailleurs, qui n'avaient pas de relations fondées sur le statut, la responsabilité délictuelle des parties à un contrat obéissait à un régime différent. Dans leur cas, il n'y avait ouverture à un recours fondé sur la négligence que si l'obligation alléguée était «indépendante» de l'obligation imposée par le contrat. Avant l'abolition des causes d'action par la *Judicature Act*, le principe voulait que si la radiation de l'allégation relative au contrat entraînait la disparition de la cause d'action, l'action n'avait alors qu'un fondement purement contractuel: *Williamson c. Allison* (1802), 2 East. 446 (K.B.), 102 E.R. 439. Dans la décision *Legge c. Tucker* (1856), H. & N. 500 (Ex.), 156 E.R. 1298, les juges ont été unanimes à dire qu'une action en responsabilité délictuelle n'était recevable que si l'obligation existait indépendamment du contrat. D'après le baron en chef Pollock (à la p. 1299 E.R.), [TRADUCTION] «[l]orsque l'action repose sur un contrat, il s'agit d'une action en assumpsit, quel que soit le libellé de la déclaration; mais lorsque l'obligation excède le contrat, le demandeur peut exercer un recours délictuel». Selon le baron Watson (à la p. 1299 E.R.), [TRADUCTION] «[L]a véritable question est de savoir si, [l'allégation relative au contrat] étant radiée, la cause d'action demeurerait [. . .] Il n'y a pas d'obligation indépendamment du contrat, et il s'agit donc d'une action en

v. Stallibrass, [1898] 1 Q.B. 56 (C.A.), is to the same effect (at p. 58):

> The rule of law on the subject, as I understand it, is that, if in order to make out a cause of action it is not necessary for the plaintiff to rely on a contract, the action is one founded on tort; but, on the other hand, if, in order successfully to maintain his action, it is necessary for him to rely upon and prove a contract, the action is one founded upon contract.

See also *Edwards v. Mallan*, [1908] 1 K.B. 1002 (C.A.), *per* Vaughan Williams L.J.

The "independent tort" requirement was applied and refined in more modern cases. In *Elder, Dempster & Co. v. Paterson, Zochonis & Co.*, [1924] A.C. 522 (H.L.), Viscount Finlay stated, at p. 548, that for an action in tort to lie in a contractual setting, there must be "an independent tort unconnected with the performance of the contract". In this Court, Pigeon J. said in *J. Nunes Diamonds Ltd. v. Dominion Electric Protection Co.*, [1972] S.C.R. 769, at pp. 777-78, relying on *Elder, Dempster & Co., supra*, that no action for negligent misrepresentation would lie in "any case where the relationship between the parties is governed by a contract, unless the negligence relied on can properly be considered as 'an independent tort' unconnected with the performance of that contract. . .". In *Dominion Chain Co. v. Eastern Construction Co.* (1976), 68 D.L.R. (3d) 385 (Ont. C.A.), Wilson J.A. (as she then was), dissenting in part, held that no action in tort would lie where the acts complained of by the plaintiff were in relation to the "very matters covered by the contract" (at p. 408):

> . . . where the person to whom the duty is owed, the scope of the duty and the standard of care have all been expressly or impliedly agreed upon by the parties, it appears to me somewhat artificial to rely upon Lord Atkin's "neighbour" test [as set out in *Donoghue v. Stevenson, supra*] to determine whether or not the duty is owed to the particular plaintiff and as to the requisite standard of care the defendant must attain. In other words, it would appear that if the acts or omissions com-

assumpsit.» Le lord juge Smith en est venu à la même conclusion dans la décision *Turner c. Stallibrass*, [1898] 1 Q.B. 56 (C.A.), à la p. 58:

> [TRADUCTION] Si je ne m'abuse, la règle de droit pertinente est la suivante: si, d'une part, le demandeur n'a pas, pour établir le bien-fondé d'une cause d'action, à invoquer l'existence d'un contrat, l'action a un fondement délictuel; mais si, d'autre part, il lui faut, pour avoir gain de cause, s'appuyer sur un contrat et en faire la preuve, l'action a un fondement contractuel.

Voir également *Edwards c. Mallan*, [1908] 1 K.B. 1002 (C.A.), le lord juge Vaughan Williams.

L'exigence d'une «délit civil indépendant» a été appliquée et raffinée dans des décisions plus récentes. Dans *Elder, Dempster & Co. c. Paterson, Zochonis & Co.*, [1924] A.C. 522 (H.L.), le vicomte Finlay a dit, à la p. 548, que, pour qu'il y ait ouverture à une action en responsabilité délictuelle dans un cadre contractuel, il devait y avoir [TRADUCTION] «un délit civil indépendant n'ayant aucun rapport avec l'exécution du contrat». En notre Cour, le juge Pigeon, se fondant sur cet arrêt, a déclaré dans l'arrêt *J. Nunes Diamonds Ltd. c. Dominion Electric Protection Co.*, [1972] R.C.S. 769, aux pp. 777 et 778, qu'il ne pourra y avoir action par suite d'une déclaration inexacte faite par négligence «lorsque les relations entre les parties sont régies par un contrat, à moins qu'il soit possible de considérer que la négligence imputée constitue un délit civil indépendant n'ayant aucun rapport avec l'exécution du contrat . . .» Dans l'arrêt *Dominion Chain Co. c. Eastern Construction Co.* (1976), 68 D.L.R. (3d) 385 (C.A. Ont.), le juge Wilson (plus tard juge de notre Cour), dissidente en partie, a conclu qu'une action ne peut avoir un fondement délictuel lorsque les actes reprochés par le demandeur sont reliés [TRADUCTION] «aux questions mêmes visées par le contrat» (à la p. 408):

> [TRADUCTION] . . . lorsqu'il y a eu entente expresse ou implicite des parties quant à la personne envers qui l'obligation existe, à la portée de cette obligation et à la norme de diligence applicable, il m'apparaît quelque peu artificiel de recourir au critère du «prochain» qu'a énoncé lord Atkin [dans l'arrêt *Donoghue v. Stevenson*, précité] pour décider si l'obligation existe envers le demandeur en cause et déterminer quelle est la norme de diligence applicable au défendeur. En d'autres

plained of by the plaintiff are in relation to the very matters covered by the contract, the essence of the plaintiff's action is breach of the contractual duty of care rather than breach of the general duty of care owed to one's "neighbour" in tort.

(b) *The Emergence of a Single Theory of Concurrent Liability*

Since *Esso Petroleum*, *supra*, the law in England and in Canada has ceased to apply a rule of concurrency for status relationships different from that in other relationships, although in *Esso Petroleum* it was not clear that this was the case. In finding that an architect was concurrently liable in contract and in tort, Lord Denning M.R. relied on the decision of Tindal C.J. in *Boorman v. Brown*, *supra*, a case based on status. However, any ambiguity was resolved by the judgment of Megaw L.J. in *Batty v. Metropolitan Property Realisations Ltd.*, [1978] Q.B. 554 (C.A.). Megaw L.J. held that the rule in *Esso Petroleum* was not limited to "common callings", but was a rule of general application (at p. 566):

The distinction to which I have referred which Mr. Brown seeks to make is this: that the right of a plaintiff who sues in contract, where the facts giving rise to the breach of contract would also constitute a breach of common law duty apart from contract, to have the judgment entered on both heads is limited to cases where the common law duty is owed by one who conducts a common calling and thus is under a special type of legal liability, and to cases where the duty is owed by a professional man in respect of his professional skill. Mr. Brown contends that, though there is no affirmative authority for limiting the right in that way, it ought to be treated as being so limited because there is no case in the English books, going back over many years, which shows that the right has been allowed, or possibly even claimed, in cases other than the special types of case to which he referred, and in particular the professional skill types of case. In *Esso Petroleum Co. Ltd. v. Mardon* [1976] Q.B. 801 the right was held to arise in a case where the breach of duty was a breach of an expert in siting filling stations involving his professional skill. I see no reason, in logic or on practical grounds, for putting any such limitation on the scope of the right. It

termes, il semblerait que, si les actes ou les omissions reprochés par le demandeur sont reliés aux questions mêmes visées par le contrat, l'action du demandeur repose essentiellement sur le manquement à une obligation contractuelle de diligence plutôt que sur le manquement à l'obligation générale de diligence envers son «prochain» qui existe en matière délictuelle.

b) *L'émergence d'une théorie unique en matière de responsabilité concomitante*

Depuis l'arrêt *Esso Petroleum*, précité, on a cessé, en droit anglais et canadien, d'appliquer une règle de concomitance différente pour les relations fondées sur le statut et les autres types de relations, bien que cela ne ressorte pas clairement de cet arrêt. En concluant à la responsabilité délictuelle et contractuelle concomitante d'un architecte, le maître des rôles lord Denning s'est appuyé sur la décision rendue par le juge en chef Tindal dans l'arrêt *Boorman c. Brown*, précité, affaire fondée sur le statut. Cependant, toute ambiguïté a été levée par l'arrêt *Batty c. Metropolitan Property Realisations Ltd.*, [1978] Q.B. 554 (C.A.). Le lord juge Megaw y dit que la règle énoncée dans l'arrêt *Esso Petroleum* ne se limite pas aux «professions publiques», mais est d'application générale (à la p. 566):

[TRADUCTION] La distinction que j'évoque et que M. Brown cherche à établir est celle-ci: lorsque les faits donnant lieu à l'inexécution du contrat constitueraient également la violation d'une obligation en common law indépendante du contrat, le droit du demandeur qui exerce un recours contractuel d'obtenir jugement à ces deux titres se limite aux cas où celui à qui incombe l'obligation en common law exerce une profession publique et encourt donc un type particulier de responsabilité légale, ainsi qu'aux cas où cette obligation incombe à une personne exerçant une profession libérale en ce qui touche sa compétence professionnelle. Monsieur Brown soutient que, bien que la jurisprudence ne puisse être invoquée à l'appui d'une telle limitation, on doit considérer que le droit est ainsi restreint parce que les recueils anglais depuis de nombreuses années ne contiennent aucun exemple de décision où le droit a été reconnu ou même réclamé dans des cas autres que les cas particuliers dont il a fait mention, et notamment les cas mettant en cause la compétence professionnelle. Dans l'arrêt *Esso Petroleum Co. Ltd. c. Mardon*, [1976] Q.B. 801, ce droit a été reconnu dans une affaire où le manquement reproché était celui d'un expert dans le

would, I think, be an undesirable development in the law if such an artificial distinction, for which no sound reason can be put forward, were to be held to exist.

More generally, in *Anns v. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.), Lord Wilberforce acknowledged that the duty of care in tort is now a general one, arising as a result of proximity, and not of the particular class of relationship between the parties (at p. 498):

> Through the trilogy of cases in this House, *Donoghue v Stevenson, Hedley Byrne & Co Ltd v Heller & Partners Ltd* and *Home Office v Dorset Yacht Co Ltd*, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. . . .

This trend towards a single theory of concurrent liability in tort and contract was recognized in Canada by La Forest J.A. (as he then was) in *New Brunswick Telephone Co. v. John Maryon International Ltd.* (1982), 43 N.B.R. (2d) 469 (C.A.). After an extensive review of the case law, La Forest J.A. concluded that an architect was concurrently liable in contract and in tort. La Forest J.A. based his conclusion on the concept of a general tort of negligence (at p. 520): "[W]hile I could dispose of this case by simply adding the profession of structural engineer to the list of common

choix d'emplacements de stations-service exigeant sa compétence professionnelle. Je ne vois aucune raison, logique ou pratique, de restreindre ainsi le droit. J'estime que ce serait une évolution non souhaitable du droit que de reconnaître une distinction aussi artificielle dont aucun motif valable ne peut justifier l'existence.

De façon plus générale, lord Wilberforce a reconnu, dans l'arrêt *Anns c. London Borough of Merton*, [1977] 2 All E.R. 492 (H.L.), que l'obligation de diligence en matière délictuelle a maintenant une portée générale résultant d'un lien étroit et non de la catégorie particulière de relations existant entre les parties (à la p. 498):

> [TRADUCTION] Les trois arrêts suivants de la présente cour, *Donoghue c. Stevenson*, *Hedley Byrne & Co. Ltd. c. Heller & Partners Ltd.* et *Home Office c. Dorset Yacht Co. Ltd.*, ont établi le principe selon lequel, lorsqu'il s'agit de prouver qu'il existe une obligation de diligence dans une situation donnée, il n'est pas nécessaire de démontrer que les faits de cette situation sont semblables aux faits de situations antérieures où il a été jugé qu'une telle obligation existait. Il faut plutôt aborder cette question en deux étapes. En premier lieu, il faut se demander s'il existe, entre l'auteur allégué de la faute et la personne qui a subi le préjudice, un lien suffisamment étroit de proximité ou de voisinage pour que le manque de diligence de la part de l'auteur de la faute puisse raisonnablement être perçu par celui-ci comme étant susceptible de causer un préjudice à l'autre personne—auquel cas il existe à première vue une obligation de diligence. Si on répond par l'affirmative à la première question, il faut se demander en second lieu s'il existe des motifs de rejeter ou de restreindre la portée de l'obligation, la catégorie de personnes qui en bénéficient ou les dommages qui peuvent découler de l'inexécution de cette obligation . . .

Cette tendance en faveur d'une théorie unique de responsabilité concomitante en matières contractuelle et délictuelle a été reconnue au Canada par le juge La Forest (maintenant juge de notre Cour) dans l'arrêt *New Brunswick Telephone Co. c. John Maryon International Ltd.* (1982), 43 N.B.R. (2d) 541 (C.A.). Après un examen fouillé de la jurisprudence, le juge La Forest a conclu qu'un architecte encourait une responsabilité à la fois contractuelle et délictuelle. Il s'est fondé, à la p. 591 sur la notion de délit civil général de négligence: «[B]ien que je puisse trancher cette cause

callings and skilled professions, I prefer to base my judgment on the generalized tort of negligence".

In *Central Trust v. Rafuse*, *supra*, Le Dain J. also rejected any distinction between status relationships and other relationships in determining whether parties to a contract can also recover in tort. Instead, Le Dain J. found that a single rule applied to all relationships (at p. 205): "[T]he question is whether there is a relationship of sufficient proximity, not how it arose." The rule of concurrency which Le Dain J. adopted was a compromise between two strands of authority.

In one strand of authority, that governing the status relationships, any duty arising in tort had always been concurrent with duties arising under the contract: *Brown v. Boorman*, *supra*. In the other strand of authority, the duty in tort was only concurrent with the duty in contract if the negligence complained of was unconnected with the performance of the contract: *J. Nunes Diamonds*, *supra*. The compromise position adopted by Le Dain J. was that any duty arising in tort will be concurrent with duties arising under the contract, unless the duty which the plaintiff seeks to rely on in tort is also a duty defined by an express term of the contract. If the duty is defined by an express term of the contract, the plaintiff will be confined to whatever remedies are available in the law of contract (at p. 205):

> ... the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by express terms of the contract. ... Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract. ... The same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.

In my opinion, the compromise struck by Le Dain J. is an appropriate one. If the parties to a

en ajoutant simplement la profession d'ingénieur en construction à la liste des métiers communs et des métiers spécialisés, je préfère fonder mon jugement sur le délit civil de négligence qui a une portée générale».

Dans l'arrêt *Central Trust c. Rafuse*, précité, le juge Le Dain a lui aussi rejeté la distinction entre les relations fondées sur le statut et les autres pour décider si les parties à un contrat peuvent exercer un recours en responsabilité délictuelle. À son avis, toutes les relations obéissent à une seule règle (à la p. 205): «[L]a question est de savoir s'il existe des rapports suffisamment étroits, et non pas de savoir comment ils ont pris naissance.» La règle de concomitance qu'il a adoptée était un compromis entre deux courants jurisprudentiels.

Selon le premier courant, auquel se rattachaient les relations fondées sur le statut, il y avait toujours eu concomitance des obligations de nature délictuelle et des obligations résultant du contrat: *Brown c. Boorman*, précité. Suivant le second courant, il n'y avait concomitance que si la négligence reprochée n'était pas liée à l'exécution du contrat: *J. Nunes Diamonds*, précité. Suivant la position de compromis du juge Le Dain, les obligations délictuelles et contractuelles seront concomitantes sauf si l'obligation en responsabilité délictuelle qu'invoque le demandeur constitue également une obligation expressément prévue au contrat. En pareil cas, les recours du demandeur seront limités à ceux prévus par le droit des contrats (à la p. 205):

> ... la nature et la portée de l'obligation de diligence invoquée comme fondement de la responsabilité délictuelle ne doivent pas dépendre d'obligations ou de devoirs précis créés expressément par le contrat. [...] Lorsque l'obligation de diligence en *common law* coïncide avec celle qui résulte d'une condition implicite du contrat, il est évident qu'elle ne dépend pas des conditions de ce contrat [...] Il en va de même de la possibilité de se fonder sur une obligation de diligence en *common law* qui ne correspond pas à une obligation précise imposée expressément par un contrat.

À mon avis, le compromis auquel est arrivé le juge Le Dain est opportun. Si les parties à un con-

contract choose to define a specific duty as an express term of the contract, then the consequences of a breach of that duty ought to be determined by the law of contract, not by tort law. Whether or not an implied term of a contract can define a duty of care in such a way that a plaintiff is confined to a remedy in contract is not at issue in this case. I leave that determination to another day. While the rule articulated by Le Dain J. is a rule of law which does not depend on the presumed or actual intention of the parties, the intention which can be inferred from the fact that the parties have made the duty an express term of the contract provides policy support for the rule. If a duty is an express term of the contract, it can be inferred that the parties wish the law of the contract to govern with respect to that duty. This is of particular significance given that the result of a breach of a contractual duty may be different from that of a breach of a duty in tort. As Wilson J.A. noted in *Dominion Chain Co.*, *supra*, a plaintiff's substantive rights may be different in contract and in tort (at p. 409):

> His cause of action may arise later in tort resulting in a later expiry of the limitation period. His damage may be greater in quantum and different in kind if he sues in tort. On the other hand his action in contract may survive him or be the subject of a set-off or counterclaim, neither of which would be so if his action were framed in tort.

The fact that damages may be assessed differently in contract from in tort was recently affirmed by this Court in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3.

A further policy rationale for the rule advanced by Le Dain J. is that contracts have become, particularly in commercial contexts, increasingly complex. Commercial contracts allocate risks and fix the mutual duties and obligations of the parties. Where there is an express term creating a contrac-

trat choisissent de faire d'une obligation particulière une condition expresse, les conséquences de la violation de cette obligation devraient être déterminées par le droit des contrats et non par le droit de la responsabilité délictuelle. Qu'une condition implicite d'un contrat puisse être ou non déterminative d'une obligation de diligence de sorte que le demandeur est limité à un recours contractuel n'est pas en litige en l'espèce. Je m'abstiens, pour le moment, de me prononcer sur cette question. Bien que la règle formulée par le juge Le Dain soit une règle de droit qui ne dépend pas de l'intention réelle ou présumée des parties, elle se justifie, sur le plan des principes, par l'intention qu'on peut déduire du fait que les parties ont érigé l'obligation au rang de condition expresse du contrat. Si une obligation constitue une condition expresse du contrat, on peut en inférer que les parties ont voulu que ce soit le droit des contrats qui s'applique à cet égard. Cela est particulièrement important étant donné la possibilité que le résultat de l'inexécution d'une obligation en matière contractuelle diffère de celui de la violation d'une obligation en matière délictuelle. Ainsi que l'a fait observer le juge Wilson dans l'arrêt *Dominion Chain Co.*, précité, les droits du demandeur peuvent différer en matières contractuelle et délictuelle (à la p. 409):

> [TRADUCTION] Sa cause d'action peut prendre naissance plus tard en matière délictuelle, d'où une date ultérieure de prescription. Les dommages-intérêts peuvent être plus élevés et différer quant à leur nature. En revanche, une action en matière contractuelle peut lui survivre et faire l'objet d'une compensation ou d'une demande reconventionnelle, ce qui ne serait pas le cas si le recours avait un fondement délictuel.

Notre Cour a confirmé récemment, dans l'arrêt *Rainbow Industrial Caterers Ltd. c. Compagnie des chemins de fer nationaux du Canada*, [1991] 3 R.C.S. 3, qu'il peut y avoir évaluation différente des dommages suivant le fondement contractuel ou délictuel du recours.

La règle posée par le juge Le Dain se justifie en outre, quant au principe, par la complexité de plus en plus grande des contrats, surtout en matière commerciale. Les contrats commerciaux prévoient la répartition des risques et fixent les devoirs et obligations respectifs des parties. Si une obligation

tual duty, it is appropriate that the parties be held to the bargain which they have made. Tort duties are of "uncertain definition and scope": H. Johnson, "Contract and Tort: Orthodoxy Reasserted!" (1990), 9 *Int'l Banking L.* 306. Commercial parties ought to be able to fix their respective rights and obligations in a particular transaction with certainty. Contractual certainty is a *sine qua non* without which reliance and the execution of obligations are seriously impaired. Moreover, without certainty, the transaction costs associated with a given commercial arrangement would most likely increase, perhaps drastically. In *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271, Wilson J. alluded to these considerations stating, at p. 282, that "much of the value of commercial contracts lies in their ability to produce certainty. Parties are enabled to regulate their relationship by means of words rather than by means of their understanding of what each other's actions are intended to imply."

résulte d'une condition expresse du contrat, il convient que les parties soient régies par l'entente qu'elles ont conclue. Quant aux obligations délictuelles, elles ont [TRADUCTION] «une définition et une portée incertaines»: H. Johnson, «Contract and Tort: Orthodoxy Reasserted!» (1990), 9 *Int'l Banking L.* 306. Les parties doivent être en mesure, dans une opération commerciale donnée, de déterminer avec certitude leurs droits et obligations respectifs. La certitude en matière contractuelle est une condition sine qua non sans laquelle la fiabilité et l'exécution des obligations sont sérieusement compromises. De plus, dans l'incertitude, on risquerait fort d'assister à une augmentation, voire radicale, des coûts reliés à la conclusion d'une entente commerciale. Dans l'arrêt *V.K. Mason Construction Ltd. c. Banque de Nouvelle-Écosse*, [1985] 1 R.C.S. 271, le juge Wilson a évoqué ces considérations en affirmant, à la p. 282, que «l'utilité principale des contrats commerciaux [. . .] est de procurer une certitude. Les parties sont en mesure de déterminer leurs rapports au moyen d'écrits plutôt qu'en essayant de déchiffrer ce que l'autre a voulu signifier par ses actes.»

However, I do not believe that the rule advanced by Le Dain J. that forecloses a claim in tort is absolute in all circumstances. In this respect, I would favour a contextual approach which takes into account the context in which the contract is made, and the position of the parties with respect to one another, in assessing whether a claim in tort is foreclosed by the terms of a contract. The policy reasons in favour of the rule advanced by Le Dain J. are strongest where the contractual context is commercial and the parties are of equal bargaining power. There was no question of unconscionability or inequality of bargaining power in *Central Trust v. Rafuse*, *supra*, as there is no such question in this case. If such issues, or others analogous to them, were to arise, however, a court should be wary not to exclude too rapidly a duty of care in tort on the basis of an express term of the contract, especially if the end result for the plaintiff would be a wrong without a remedy.

Je ne crois pas, toutefois, que la règle avancée par le juge Le Dain à l'encontre du recours en responsabilité délictuelle soit absolue dans tous les cas. À cet égard, pour savoir si un recours en responsabilité délictuelle est exclu en raison des clauses du contrat, j'adopterais une méthode permettant de tenir compte du contexte dans lequel le contrat est intervenu, ainsi que de la position des parties l'une par rapport à l'autre. C'est dans un contexte commercial où les parties ont un pouvoir de négociation égal que la règle établie par le juge Le Dain a le plus sa raison d'être. Il n'était pas question d'iniquité ni de pouvoir de négociation inégal dans l'arrêt *Central Trust c. Rafuse*, précité, pas plus qu'en l'espèce. Mais si ces questions ou d'autres semblables devaient être soulevées, le tribunal devrait se garder d'exclure trop rapidement l'existence d'une obligation de diligence en matière délictuelle en invoquant une condition expresse du contrat, surtout si cela signifiait l'absence de recours pour le demandeur lésé.

(3) Contractual Terms Excluding or Limiting Liability or Duty

As noted above, contractual exclusion or limitation clauses can operate either to exclude or limit liability, or to limit the duty owed by one party to the other. In neither case will the plaintiff be permitted to use an action in tort to circumvent the limitation of liability or of duty in the contract. Terms going to duty are of particular importance where one party is alleging negligent misrepresentation, as Checo is in this case.

It is well-settled that a clause limiting liability in contract can, in appropriate circumstances, also have the effect of limiting liability in tort: see, for example, *ITO—International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, and *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299. In the words of Scrutton L.J. in *Hall v. Brooklands Auto Racing Club*, [1933] 1 K.B. 205 (C.A.), at p. 213:

> . . . where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort: *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co.*, per Lord Cave, Lord Finlay and Lord Sumner.

The rule that liability in tort cannot be used to circumvent a contractual limitation of liability is supported by recent Canadian authority, including *Central Trust v. Rafuse*, *supra*, itself. In *New Brunswick Telephone Co. v. John Maryon International Ltd.*, *supra*, La Forest J.A. stated that (at p. 506):

> . . . the law of negligence will not be used to give a remedy to a person for a breach of contract for which he is absolved under the contract. . . . Parties are free to con-

(3) Les clauses contractuelles excluant ou limitant la responsabilité ou les obligations

Comme je l'ai dit précédemment, les clauses contractuelles d'exclusion ou de limitation peuvent avoir pour effet d'exclure ou de limiter la responsabilité, ou encore de limiter les obligations qu'une des parties a envers l'autre. Dans l'un ou l'autre cas, il ne sera pas permis au demandeur de se servir du recours en responsabilité délictuelle pour contourner la limitation de la responsabilité ou des obligations prévue au contrat. Les clauses relatives aux obligations revêtent une importance particulière lorsqu'une partie allègue qu'il y a eu déclaration inexacte faite par négligence, comme le fait Checo en l'espèce.

Il est bien établi qu'une clause contractuelle de limitation de la responsabilité peut, selon les circonstances, avoir également pour effet de limiter la responsabilité délictuelle: voir, à titre d'exemple, *ITO—International Terminal Operators Ltd. c. Miida Electronics Inc.*, [1986] 1 R.C.S. 752, et *London Drugs Ltd. c. Kuehne & Nagel International Ltd.*, [1992] 3 R.C.S. 299. Pour reprendre les mots du lord juge Scrutton dans l'arrêt *Hall c. Brooklands Auto Racing Club*, [1933] 1 K.B. 205 (C.A.), à la p. 213 :

> [TRADUCTION] . . . lorsque le défendeur jouit d'une protection en vertu d'un contrat, il n'est pas permis de faire abstraction du contrat et d'alléguer une responsabilité délictuelle plus grande: *Elder, Dempster & Co.* c. *Paterson, Zochonis & Co.*, lord Cave, lord Finlay et lord Sumner.

La règle suivant laquelle la responsabilité délictuelle ne peut servir à contourner la limitation contractuelle de responsabilité trouve appui dans la jurisprudence canadienne récente, y compris dans l'arrêt *Central Trust c. Rafuse*, précité. Dans l'arrêt *New Brunswick Telephone Co. c. John Maryon International Ltd.*, précité, le juge La Forest dit à la p. 575:

> . . . le droit de la négligence ne sera pas utilisé pour donner un recours à une personne en raison d'une violation de contrat dont le défendeur est déchargé aux termes du contrat. [. . .] Les parties sont libres de passer des contrats comportant des clauses de non-responsabilité,

tract out of liabilities, tortious or otherwise, and the courts should not interfere with their agreements.

The point was reiterated by Le Dain J. in *Central Trust v. Rafuse* (at p. 206):

> A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

See, on this question, *London Drugs Ltd.*, *supra*, where I deduce from this principle one of many reasons for permitting employees, in certain circumstances, to obtain directly the benefit of their employer's contractual limitation of liability clause so as to limit their liability for the breach of a common law duty of care. See also *Peters v. Parkway Mercury Sales Ltd.* (1975), 10 N.B.R. (2d) 703 (C.A.).

Contractual terms may also operate to limit the duty (as distinct from the liability ensuing from a breach of duty), tortious or otherwise, owed by one party to the other. To quote B. M. McLachlin and W. J. Wallace, *The Canadian Law of Architecture and Engineering* (1987), at p. 134:

> . . . it may now be said that courts have come to accept the concurrency of obligations imposed by tort law and obligations imposed by contract. However, this is subject to an important limitation. Where the parties have defined their duties by contract, the court will not impose contrary obligations on them. A contract defining the parties' rights and responsibilities will be a factor limiting the scope of the duty in tort.

Clauses limiting the duty owed by one party to the other are often important in cases where negligent misrepresentation is alleged. Such disclaimers or "non-reliance clauses", as they are sometimes described, may be contractual or extra-contractual. It should not be forgotten that in the leading case, *Hedley Byrne*, *supra*, the defendant bank was found not liable because the representation had been accompanied by the following disclaimer:

délictuelle ou autre, et les tribunaux ne devraient pas intervenir dans leurs conventions.

Le juge Le Dain a repris ce point dans l'arrêt *Central Trust c. Rafuse* (à la p. 206):

> Une responsabilité délictuelle concurrente ou alternative ne sera pas admise si elle a pour effet de permettre au demandeur de contourner ou d'éluder une clause contractuelle d'exonération ou de limitation de responsabilité pour l'acte ou l'omission qui constitue le délit civil.

Voir, sur cette question, *London Drugs Ltd.*, précité, où j'ai déduit de ce principe l'une des nombreuses raisons de permettre aux employés, dans certaines circonstances, de bénéficier directement de la clause contractuelle de limitation de responsabilité de leur employeur de façon à limiter leur propre responsabilité pour manquement à une obligation de diligence en common law. Voir également *Peters c. Parkway Mercury Sales Ltd.* (1975), 10 N.B.R. (2d) 703 (C.A.).

Les clauses contractuelles peuvent aussi avoir pour effet de limiter l'obligation (distincte de la responsabilité résultant du manquement à une obligation), en responsabilité délictuelle ou autre, qu'une partie a envers l'autre. B. M. McLachlin et W. J. Wallace, *The Canadian Law of Architecture and Engineering* (1987), s'expriment comme suit à la p. 134:

> [TRADUCTION] . . . on peut maintenant dire que les tribunaux en sont venus à accepter la concomitance des obligations découlant du droit de la responsabilité délictuelle et des obligations imposées par contrat. Ce principe est toutefois soumis à une importante réserve: lorsque les parties ont défini leurs obligations par contrat, le tribunal ne leur imposera pas d'obligations contraires. Le contrat précisant les droits et responsabilités des parties sera un facteur limitant la portée de l'obligation en responsabilité délictuelle.

Les clauses limitant les obligations d'une partie envers l'autre s'avèrent souvent importantes dans les cas où on allègue qu'il y a eu déclaration inexacte faite par négligence. Ces dénégations, parfois appelées «clauses de protection», peuvent être contractuelles ou extracontractuelles. N'oublions pas que dans l'arrêt de principe *Hedley Byrne*, précité, la responsabilité de la banque défenderesse n'a pas été retenue parce que la

"CONFIDENTIAL. For your private use and without responsibility on the part of this bank or its officials." There was no contract between the parties. Lord Morris found that the effect of the disclaimer was to negate any duty of care which would otherwise have been owed by the defendant (at p. 504):

. . . in my judgment, the bank in the present case, by the words which they employed, effectively disclaimed any assumption of a duty of care. They stated that they only responded to the inquiry on the basis that their reply was without responsibility. If the inquirers chose to receive and act upon the reply they cannot disregard the definite terms upon which it was given.

Disclaimers or "non-reliance clauses" may also be contractual. In *Carman Construction Ltd. v. Canadian Pacific Railway Co.*, [1982] 1 S.C.R. 958, the defendant successfully raised a contractual disclaimer clause as a defence to an action for negligent misrepresentation. The relevant clause of the contract was in the following terms (at p. 961):

3.1. It is hereby declared and agreed by the Contractor that this Agreement has been entered into by him on his own knowledge respecting the nature and conformation of the ground upon which the work is to be done, the location, character, quality and quantities of the material to be removed, the character of the equipment and facilities needed, the general and local conditions and all other matters which can in any way affect the work under this Agreement, and the Contractor does not rely upon any information given or statement made to him in relation to the work by the Company. [Emphasis added.]

Martland J. was careful to characterize the clause as a "non-reliance provision" negating the existence of a duty of care, as distinct from a clause limiting liability for the breach of a duty (at p. 973):

déclaration était accompagnée de la dénégation suivante: [TRADUCTION] «CONFIDENTIEL. Pour votre usage personnel et sous toutes réserves de la part de la banque ou de ses représentants.» Il n'y avait pas de contrat entre les parties. Lord Morris a jugé que la dénégation avait pour effet d'écarter toute obligation de diligence qu'aurait eue par ailleurs la défenderesse (à la p. 504):

[TRADUCTION] . . . à mon avis, la banque a effectivement en l'espèce, de par les mots employés, écarté toute obligation potentielle de diligence. Ses représentants ont affirmé n'avoir répondu à la demande de renseignements qu'à la condition que leur responsabilité ne soit pas engagée. Si ceux qui ont demandé les renseignements ont choisi d'accepter la réponse et d'agir en conséquence, ils ne peuvent faire abstraction des conditions expresses dans lesquelles elle a été donnée.

Les dénégations ou «clauses de protection» peuvent également être d'origine contractuelle. Dans l'arrêt *Carman Construction Ltd. c. Compagnie du chemin de fer canadien du Pacifique*, [1982] 1 R.C.S. 958, la défenderesse a invoqué avec succès une clause contractuelle de dénégation en défense à une action pour déclaration inexacte faite par négligence. La clause pertinente était ainsi libellée (à la p. 961):

[TRADUCTION]

3.1. Par les présentes, l'entrepreneur reconnaît qu'il a signé le présent contrat en fonction de sa propre connaissance de la nature et de la configuration du sol où doivent être exécutés les travaux, de l'emplacement, de la nature, de la qualité et du volume du matériau à enlever, du genre d'équipement et d'installations nécessaires, des conditions générales et locales et de toutes les autres questions qui peuvent influer, de quelque manière que ce soit, sur les travaux à exécuter en vertu du présent contrat, et l'entrepreneur ne se fie à aucun renseignement que la Compagnie lui a donné ni à aucune déclaration qu'elle lui a faite concernant les travaux. [Je souligne.]

Le juge Martland a pris soin de qualifier la clause de «disposition de protection» écartant l'existence d'une obligation de diligence, et de la distinguer d'une clause de limitation de responsabilité en cas d'inexécution d'une obligation (à la p. 973):

... I do not regard s. 3.1 as being a clause exempting from liability. It is what the Court of Appeal described as a non-reliance provision, the effect of which was to prevent liability arising on the part of C.P.R. in respect of statements made or information given by its employees.

To summarize, if the liability of a party to a contract is limited or excluded by a term of the contract, or if a contractual term limits or negates the duty owed by one party to the other (whether in contract or in tort), the other party to the contract may not use an action in tort to impose a wider liability on the first party than would be available under the contract.

C. *Negligent Misrepresentation*

Checo alleges that Hydro negligently misrepresented the state of the right-of-way. The majority of the British Columbia Court of Appeal agreed. In *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, a case involving issues somewhat similar to those in the present appeal, I reviewed many aspects of the tort of negligent misrepresentation including the required elements for such an action. The specific question I should like to address in this case is: if the parties are in a contractual relationship, under what circumstances will it be open to one of the parties to allege that the other was guilty of negligent misrepresentation? In other words, when will the existence of a contract preclude a tort action for negligent misrepresentation?

The action for negligent misrepresentation was first recognized by the decision of the House of Lords in *Hedley Byrne*, *supra*. The ingredients of a negligent misrepresentation set out in that case remain good law today. To quote from the speech of Lord Morris (at pp. 502-3):

My Lords, I consider that it follows and that it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract,

... je ne considère pas que la clause 3.1 est une clause d'exonération de responsabilité. C'est ce que la Cour d'appel a décrit comme une disposition de protection qui avait pour effet d'empêcher le C.P. d'être tenu responsable des déclarations faites ou des renseignements donnés par ses employés.

En résumé, si la responsabilité d'une partie est limitée ou exclue par le contrat, ou si une clause contractuelle limite ou écarte l'obligation (de nature contractuelle ou délictuelle) qu'une partie a envers l'autre, il n'est pas loisible à l'autre partie de recourir à une action en responsabilité délictuelle pour imposer à son cocontractant une responsabilité plus grande que ne le permet le contrat.

C. *Déclaration inexacte faite par négligence*

Checo prétend qu'Hydro lui a fait une déclaration inexacte par négligence à propos de l'état de l'emprise, allégation à laquelle s'est ralliée à la majorité la Cour d'appel de la Colombie-Britannique. Dans l'arrêt *Queen c. Cognos Inc.*, [1993] 1 R.C.S. 87, où des questions semblables à celles soulevées dans le présent pourvoi sont en cause, je passe en revue de nombreux aspects du délit civil résultant d'une déclaration inexacte faite par négligence, et notamment les éléments requis pour intenter une action sur ce fondement. En l'espèce, la question particulière que j'aimerais aborder est la suivante: si les parties ont entre elles des liens contractuels, dans quelles circonstances l'une d'elles pourra-t-elle alléguer que l'autre s'est rendue coupable d'avoir fait une déclaration inexacte par négligence? En d'autres termes, à quel moment l'existence d'un contrat exclura-t-elle l'action en responsabilité délictuelle par suite d'une déclaration inexacte faite par négligence?

L'action en responsabilité pour déclaration inexacte faite par négligence a été pour la première fois reconnue dans l'arrêt de la Chambre des lords *Hedley Byrne*, précité. Dans un passage considéré encore aujourd'hui comme un bon exposé du droit, lord Morris énumère les éléments constitutifs du délit (aux pp. 502 et 503):

[TRADUCTION] Je considère, chers collègues, qu'il s'ensuit et qu'il devrait maintenant être considéré comme établi que, lorsque quelqu'un qui possède une

to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.

habileté particulière s'engage, tout à fait indépendamment d'un contrat, à mettre cette habileté au service d'une autre personne qui se fie à cette habileté, une obligation de diligence est créée. Le fait que le service doit être rendu à l'aide ou au moyen de mots ne peut faire de différence. De plus, lorsqu'une personne, qui occupe dans un domaine déterminé une place propre à inciter les gens à avoir raisonnablement confiance en son jugement ou en son habileté, ou en son aptitude à faire des recherches minutieuses, prend sur elle de donner un renseignement ou un conseil, ou permet que ce renseignement ou ce conseil soit transmis à un tiers qui, comme elle le sait ou devrait le savoir, s'y fiera, une obligation de diligence est créée.

The rule in *Hedley Byrne*, *supra*, has been adopted in numerous Canadian cases, some of which will be discussed below. Although *Hedley Byrne* was considered revolutionary when it was decided, the case was in fact the culmination of a series of majority and dissenting judgments extending back into the last century. Like *Donoghue v. Stevenson*, *supra*, *Hedley Byrne* needs to be understood in its context. An understanding of this context is particularly important to assessing the role of negligent misrepresentation where the parties are in a contractual relationship.

La règle de l'arrêt *Hedley Byrne*, précité, a été reprise dans un grand nombre de décisions canadiennes, dont quelques-unes auxquelles nous nous arrêterons. Bien que cet arrêt ait été considéré comme révolutionnaire au moment où il a été rendu, ce n'était en fait que le point culminant d'une série d'opinions majoritaires et dissidentes remontant au siècle dernier. Tout comme l'arrêt *Donoghue c. Stevenson*, précité, l'arrêt *Hedley Byrne* doit être replacé dans son contexte. Il est particulièrement important de bien comprendre ce contexte pour déterminer l'incidence d'une déclaration inexacte faite par négligence lorsque les parties ont entre elles des liens contractuels.

Before *Hedley Byrne*, *supra*, it was settled law that a misrepresentation could give rise to damages only if it was fraudulent, or if the representation was a collateral warranty to a contract. An "innocent" misrepresentation (which included what would now, since *Hedley Byrne*, be characterized as a negligent misrepresentation) was not actionable in itself, but only if it formed part of a valid contract.

Avant l'arrêt *Hedley Byrne*, précité, il était établi qu'une déclaration inexacte ne pouvait donner ouverture à des dommages-intérêts que si elle était frauduleuse, ou encore si elle constituait une garantie accessoire à un contrat. Une déclaration inexacte faite «de bonne foi» (y compris ce qu'on appellerait maintenant, depuis l'arrêt *Hedley Byrne*, une déclaration inexacte faite par négligence) n'ouvrait pas droit à une action en soi, mais seulement si elle faisait partie d'un contrat valide.

The leading case in fraudulent misrepresentation was *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.). In *Derry v. Peek*, the Court of Appeal held that a negligent misrepresentation—one made without due care as to its truth or falsehood—gave rise to an action in damages for deceit for anyone to whom the statement was directed and who relied on the statement to his or her detriment. The House of Lords rejected the suggestion that a false state-

L'arrêt de principe sur la question des déclarations inexactes et frauduleuses était l'arrêt *Derry c. Peek* (1889), 14 App. Cas. 337 (H.L.). Dans cet arrêt, la Cour d'appel a jugé qu'une déclaration inexacte faite par négligence—avec insouciance quant à son exactitude ou à sa fausseté—donnait ouverture à une poursuite en dommages-intérêts pour dol par toute personne à qui la déclaration s'adressait et qui s'y était fiée à son détriment. La

ment made negligently was actionable. In the words of Lord Herschell, "making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds" (p. 375). The House held that for an action in deceit or fraud to lie, the person making the statement must either know the statement to be false, or be reckless as to its truth or falsehood. This principle was reaffirmed by the House in *Nocton v. Lord Ashburton*, [1914] A.C. 932, where Viscount Haldane L.C. said this (at pp. 953-54): "It must now be taken to be settled that nothing short of proof of a fraudulent intention in the strict sense will suffice for an action of deceit."

Although actions on warranties were originally actions in tort, actions for breach of warranty had become, by the nineteenth century, actions in contract. See Baker, *supra*, at pp. 293-95. The leading case of *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30 (H.L.), settled the rule that for a representation to be actionable as a warranty, it must have been made with promissory intent.

The appellants in *Heilbut, Symons* were rubber merchants, who were promoting shares in what they represented was a rubber company. The respondent bought a large number of shares. The company turned out to be other than as it had been described, and the respondent brought an action in fraud and for breach of warranty. At trial, the jury found that the company had not been correctly represented by the appellants, but that the misrepresentation was not fraudulent. The jury did, however, find that the appellants had warranted that the company was a rubber company. The House of Lords allowed the appeal. In his speech, Lord Moulton held that no liability can flow from a rep-

Chambre des lords a rejeté la prétention voulant qu'une fausse déclaration faite négligemment puisse ouvrir droit à une poursuite. Selon lord Herschell, [TRADUCTION] «faire une fausse déclaration par imprudence n'équivaut pas à une fraude et en est même très différente, et l'on peut en dire autant d'une fausse déclaration à laquelle on a ajouté foi honnêtement mais pour des motifs insuffisants» (à la p. 375). La Chambre des lords a conclu que pour qu'il y ait ouverture à une action pour dol ou fraude, celui qui fait la déclaration doit ou bien savoir qu'elle est fausse, ou être insouciant quant à son exactitude ou à sa fausseté. Ce principe a été réaffirmé par la Chambre dans l'arrêt *Nocton c. Lord Ashburton*, [1914] A.C. 932, où le vicomte Haldane, lord Chancelier, a dit, (aux pp. 953 et 954): [TRADUCTION] «On doit maintenant tenir pour établi que rien de moins que la preuve d'une intention frauduleuse au sens strict du terme ne suffira à fonder une action pour dol».

Bien que l'action fondée sur une garantie ait été à l'origine une action en responsabilité délictuelle, l'action en violation de garantie est devenue, au XIX^e siècle, une action en responsabilité contractuelle. Voir Baker, *op. cit.*, aux pp. 293 à 295. L'arrêt de principe *Heilbut, Symons & Co. c. Buckleton*, [1913] A.C. 30 (H.L.), a établi la règle suivant laquelle pour que la déclaration donne lieu à une action fondée sur une garantie, elle doit avoir été présentée comme une promesse.

Dans cette affaire, les appelants étaient des négociants en caoutchouc qui faisaient la promotion d'actions dans ce qu'ils disaient être une compagnie de caoutchouc. L'intimé avait acheté un grand nombre de ces actions. La compagnie s'étant avérée différente de la description qui en avait été faite, l'intimé a intenté une action pour fraude et violation de garantie. Au procès, le jury a estimé que les appelants n'avaient pas décrit correctement la compagnie mais que cette déclaration inexacte n'était pas frauduleuse. Il a conclu, cependant, que les appelants avaient garanti qu'il s'agissait d'une compagnie de caoutchouc. La Chambre des lords a accueilli l'appel. Dans ses motifs, lord Moulton a jugé qu'aucune responsabilité ne pouvait résulter d'une déclaration non frauduleuse, à moins que

resentation which is not fraudulent, unless it is made with promissory intent (at p. 51):

It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made. In the present case the statement was made in answer to an inquiry for information. There is nothing which can by any possibility be taken as evidence of an intention on the part of either or both of the parties that there should be a contractual liability in respect of the accuracy of the statement. It is a representation as to a specific thing and nothing more.

Between *Derry v. Peek* and *Heilbut, Symons, supra*, it was settled that a negligent misrepresentation which was not made with promissory intent was not actionable, as it fell between deceit and warranty. To succeed, a plaintiff was required to prove fraud or a collateral warranty. As Lord Denning M.R. observed in *Esso Petroleum*, *supra*, at p. 13:

Ever since *Heilbut Symons & Co v Buckleton* we have had to contend with the law as laid down by the House of Lords that an innocent misrepresentation gives no right to damages. In order to escape from that rule, the pleader used to allege—I often did it myself—that the misrepresentation was fraudulent, or alternatively a collateral warranty.

Heilbut, Symons and *Derry v. Peek*, *supra*, were equally the law in Canada. The rule in *Derry v. Peek* that misrepresentations must be made with intent to deceive in order to be actionable in deceit was applied by this Court in *De Vall v. Gorman, Clancey & Grindley Ltd.* (1919), 58 S.C.R. 259. Similarly, in *Kinsman v. Kinsman* (1912), 3 O.W.N. 966 (H.C.), Riddell J. noted at p. 968 that, "[o]f course, fraud – fraudulent intent — must be proved in an action for deceit: Derry v. Peek. . . ." See also *Howse v. Quinnell Motors Ltd.*, [1952] 2 D.L.R. 425 (B.C.C.A.), and *Chapman v. Warren*, [1936] O.R. 145 (H.C.). The rule in *Heilbut, Symons* that a misrepresentation which falls short of being fraudulent is not actionable

celle-ci n'ait été présentée comme une promesse (à la p. 51):

[TRADUCTION] Chers collègues, il est à mon avis de la plus haute importance que notre Chambre maintienne dans toute son intégrité le principe selon lequel nul ne doit être tenu responsable des dommages résultant d'une déclaration inexacte faite de bonne foi, peu importe la forme sous laquelle elle est attaquée. En l'espèce, la déclaration a été faite en réponse à une demande de renseignements. Il n'y a rien qui puisse tenir lieu de preuve de l'intention d'une des parties ou des deux que soit engagée une responsabilité contractuelle à l'égard de la justesse de la déclaration. Il ne s'agit que d'une déclaration relative à un fait particulier, rien de plus.

Entre les arrêts *Derry c. Peek* et *Heilbut, Symons*, précités, on a établi qu'une déclaration inexacte faite par négligence mais non sous forme de promesse ne donnait pas lieu à une action car elle se situait entre le dol et la garantie. Pour avoir gain de cause, le demandeur était tenu de prouver la fraude ou l'existence d'une garantie accessoire. Ainsi que le fait observer le maître des rôles lord Denning dans l'arrêt *Esso Petroleum*, précité, à la p. 13:

[TRADUCTION] Depuis l'arrêt *Heilbut, Symons & Co. c. Buckleton*, nous avons dû tenir compte du droit énoncé par la Chambre des lords selon lequel une déclaration inexacte faite de bonne foi ne donne pas droit à des dommages-intérêts. Afin de contourner cette règle, le plaideur alléguait — comme je l'ai souvent fait moi-même — que la déclaration inexacte était frauduleuse, ou subsidiairement, équivalait à une garantie accessoire.

Les arrêts *Heilbut, Symons* et *Derry c. Peek*, précités, représentaient également le droit au Canada. La règle formulée dans ce dernier arrêt, suivant laquelle il faut qu'une déclaration inexacte ait été faite avec une intention dolosive pour donner ouverture à poursuite, a été appliquée par notre Cour dans l'arrêt *De Vall c. Gorman, Clancey & Grindley Ltd.* (1919), 58 R.C.S. 259. De même, dans la décision *Kinsman c. Kinsman* (1912), 3 O.W.N. 966 (H.C.), le juge Riddell a souligné, à la p. 968: [TRADUCTION] «Il va sans dire qu'il faut, dans une action pour dol, prouver la fraude — l'intention frauduleuse: Derry c. Peek . . .» Voir également *Howse c. Quinnell Motors Ltd*, [1952] 2 D.L.R. 425 (C.A.C.-B.), et *Chapman c. Warren*,

unless it is incorporated into a contract as a warranty was applied *inter alia* in *Gardner v. Merker* (1918), 43 O.L.R. 411 (C.A.); *Kennedy v. Anderson* (1919), 50 D.L.R. 105 (Sask. C.A.); *Gilmour v. Trustee Co. of Winnipeg*, [1923] 3 W.W.R. 177 (Man. C.A.); *Thurston v. Streilen* (1950), 59 Man. R. 55 (K.B.); and in *Scholte v. Richardson*, [1951] O.R. 58 (H.C.).

It was against this backdrop that the House of Lords decided *Hedley Byrne*, *supra*. Through their bank, the appellants had obtained the opinion of the respondent merchant bankers as to the creditworthiness of E. Ltd. There was no contract between the appellants and the respondent. E. Ltd. subsequently went bankrupt, and it was found at trial that the respondent had been negligent in giving the opinion. Their Lordships, expressly distinguishing *Derry v. Peek*, *supra*, and implicitly distinguishing *Heilbut, Symons*, *supra*, held that a negligent misrepresentation may, even if not made with promissory intent, give rise to liability for damages. Lord Reid described those relationships in which a duty to take care in the making of representations will arise as follows (at p. 486):

> . . . all those relationships where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him. I say "ought to have known" because in questions of negligence we now apply the objective standard of what the reasonable man would have done.

In reaching this result, their Lordships relied on an alternate line of authority reaching back through the dissenting judgment of Denning L.J. in *Candler v. Crane Christmas & Co.*, [1951] 1 All E.R. 426 (C.A.), and the decisions of the House of Lords in *Donoghue v. Stevenson*, *supra*, and *Nocton v. Lord Ashburton*, *supra*, to the nineteenth

[1936] O.R. 145 (H.C.). La règle formulée dans l'arrêt *Heilbut, Symons*, suivant laquelle une déclaration inexacte qui n'est pas frauduleuse n'ouvre pas droit à poursuite à moins qu'elle ne soit incorporée dans un contrat à titre de garantie, a été appliquée notamment dans les arrêts *Gardner c. Merker* (1918), 43 O.L.R. 411 (C.A.); *Kennedy c. Anderson* (1919), 50 D.L.R. 105 (C.A. Sask.); *Gilmour c. Trustee Co. of Winnipeg*, [1923] 3 W.W.R. 177 (C.A. Man.); *Thurston c. Streilen* (1950), 59 Man. R. 55 (B.R.); et enfin *Scholte c. Richardson*, [1951] O.R. 58 (H.C.).

C'est dans ce contexte que la Chambre des lords a tranché l'affaire *Hedley Byrne*, précité. Par l'entremise de leur banque, les appelants avaient obtenu l'avis de la banque d'affaires intimée au sujet de la solvabilité de E. Ltd. Il n'y avait pas de contrat entre les appelants et l'intimée. E. Ltd. a subséquemment fait faillite, et il a été établi au procès que l'intimée avait fait preuve de négligence en donnant son opinion. Établissant une distinction explicite d'avec l'arrêt *Derry c. Peek*, précité, et implicite d'avec l'arrêt *Heilbut, Symons*, précité, les lords juges ont conclu qu'une déclaration inexacte faite par négligence peut, même si elle n'est pas présentée sous forme de promesse, engager la responsabilité en dommages-intérêts. Lord Reid a décrit ainsi les relations donnant naissance à une obligation de diligence à l'égard des déclarations (à la p. 486):

> [TRADUCTION] . . . toutes les relations où il est manifeste que la partie demandant les renseignements ou les conseils se fiait que l'autre partie exercerait la prudence voulue dans les circonstances, lorsque cette confiance était raisonnable, et que l'autre partie a donné les renseignements ou les conseils alors qu'elle savait ou aurait dû savoir que la partie qui les demandait se fiait à elle. J'emploie les mots «aurait dû» car en matière de négligence nous appliquons maintenant le critère objectif du comportement de l'homme raisonnable.

Pour arriver à ce résultat, les lords juges se sont appuyés sur un autre courant de jurisprudence qui, de la dissidence du lord juge Denning dans l'arrêt *Candler c. Crane Christmas & Co.*, [1951] 1 All E.R. 426 (C.A.), en passant par les arrêts de la Chambre des lords *Donoghue c. Stevenson* et *Nocton c. Lord Ashburton*, précités, remontait jus-

century decisions of *Cann v. Willson* (1888), 39 Ch. D. 39; *Heaven v. Pender* (1883), 11 Q.B.D. 503 (C.A.); and *George v. Skivington* (1869), L.R. 5 Ex. 1.

With the exception of *Nocton v. Lord Ashburton*, *supra*, the cases relied upon by their Lordships were all cases in which the relationship between the plaintiff and the defendant was not contractual, but the court (or the dissenting judge) nonetheless held that the defendant owed a duty of care to the plaintiff. That is, in each case, no contractual remedy was available to the plaintiff, but the action was allowed in tort. *Nocton v. Lord Ashburton* is the exception: in that case there was a contract between the plaintiff and the defendant (who was his solicitor). However, *Nocton v. Lord Ashburton* is readily distinguishable. In that case, an action for breach of contract was barred by the *Statute of Limitation*. Moreover, the plaintiff succeeded not in tort but for breach of fiduciary duty.

It was not clear from *Hedley Byrne*, *supra*, that an action for negligent misrepresentation would lie where the parties subsequently entered into a contract. In *Hedley Byrne* and in the cases upon which it relied (with the exception of *Nocton v. Lord Ashburton*, *supra*) there was no contract between the parties. A dictum of Lord Reid in *Hedley Byrne* hinted that if the parties were in a contractual relationship, the proper remedy was an action for breach of warranty (at p. 483): "Where there is a contract there is no difficulty as regards the contracting parties: the question is whether there is a warranty." The cases decided immediately after *Hedley Byrne* held that an action for negligent misrepresentation was barred if the parties were in a contractual relationship: *Bagot v. Stevens Scanlan & Co.*, *supra*, and *Clark v. Kirby-Smith*, [1964] 2 All E.R. 835 (Ch. D.). See also D. W. McLauchlan, "Pre-Contract Negligent Misrepresentation" (1977), 4 *Otago L. Rev.* 23.

qu'aux décisions du XIX^e siècle, *Cann c. Willson* (1888), 39 Ch. D. 39; *Heaven c. Pender* (1883), 11 Q.B.D. 503 (C.A.); et *George c. Skivington* (1869), L.R. 5 Ex. 1.

Sauf pour ce qui est de l'arrêt *Nocton c. Lord Ashburton*, précité, dans toutes les autres affaires invoquées par les lords juges les parties n'avaient pas entre elles de liens contractuels, mais la cour (ou le juge dissident) a néanmoins jugé que le défendeur avait envers le demandeur une obligation de diligence. C'est-à-dire que, dans chaque cas, aucun recours contractuel n'était ouvert au demandeur, mais que l'action a été autorisée en responsabilité délictuelle. L'arrêt *Nocton c. Lord Ashburton* est l'exception: il y avait dans cette affaire un contrat entre le demandeur et le défendeur (l'avocat du premier). Il est toutefois aisé d'établir une distinction d'avec cet arrêt, car l'action pour inexécution de contrat y était prescrite en vertu du *Statute of Limitation*. De plus, le demandeur a eu gain de cause non pas sur le plan de la responsabilité délictuelle mais sur le fondement du manquement à une obligation fiduciaire.

Il n'était pas clair, d'après l'arrêt *Hedley Byrne*, précité, qu'il y aurait ouverture à une action par suite d'une déclaration inexacte faite par négligence dans le cas où les parties se sont subséquemment liées par contrat. Dans cet arrêt et dans les décisions sur lesquelles il s'appuie (à l'exception de l'arrêt *Nocton c. Lord Ashburton*, précité), il n'y avait pas de contrat entre les parties. Dans une opinion incidente, lord Reid laisse entendre, dans l'arrêt *Hedley Byrne*, que, si les parties avaient entre elles des liens contractuels, le recours indiqué était l'action en violation de garantie (à la p. 483): [TRADUCTION] «Lorsqu'il y a un contrat, la question ne pose aucune difficulté quant aux cocontractants: il s'agit de savoir s'il existe une garantie». Dans les décisions rendues immédiatement après l'arrêt *Hedley Byrne*, on a jugé qu'une action pour déclaration inexacte faite par négligence était exclue si les parties étaient liées par contrat: *Bagot c. Stevens Scanlan & Co.*, précité, et *Clark c. Kirby-Smith*, [1964] 2 All E.R. 835 (Ch. D.). Voir également D. W. McLauchlan, «Pre-Contract Negligent Misrepresentation» (1977), 4 *Otago L. Rev.* 23.

However, it was settled by *Esso Petroleum*, *supra*, that the existence of a contract is not a bar to a remedy for negligent misrepresentation. In the words of Shaw L.J. (at p. 26):

> It is difficult to see why, in principle, a right to claim damages for negligent misrepresentation which has arisen in favour of a party to a negotiation should not survive the event of the making of a contract as the outcome of that negotiation. It may, of course, be that the contract ultimately made either expressly or by implication shows that, once it has been entered into, the rights and liabilities of the parties are to be those and only those which have their origin in the contract itself.

For a list of Canadian cases applying *Esso Petroleum*, see *Kingu v. Walmar Ventures Ltd.* (1986), 38 C.C.L.T. 51 (B.C.C.A.), at p. 59.

The principle that an action for negligent misrepresentation will survive the making of a contract between the parties was affirmed in this Court in *Carman Construction*, *supra*. Martland J., writing for the Court, held that the respondent was not liable on the basis of negligent misrepresentation because the contract that was made between the parties contained a "non-reliance provision" or disclaimer which had the effect that the respondent did not assume any duty of care. It is clear from Martland J.'s reasons that the fact that the alleged negligent misrepresentation had induced the contract would not have been a reason for disallowing the claim in negligence. The same proposition can be deduced from the recent decision of this Court in *Rainbow Industrial Caterers Ltd.*, *supra*. Although the narrow issue was the appropriate measure of damages where a plaintiff is induced to enter into a contract with the defendant by the defendant's negligent misrepresentation, both Sopinka J. (for the majority) and McLachlin J. (dissenting), agreed that damages for negligent misrepresentation could be awarded where the misrepresentation induces a contract.

Cependant, il a été établi dans l'arrêt *Esso Petroleum*, précité, que l'existence d'un contrat n'exclut pas le recours pour déclaration inexacte faite par négligence. Selon le lord juge Shaw (à la p. 26):

> [TRADUCTION] Il est difficile de voir pourquoi, en principe, le droit de réclamer des dommages-intérêts en cas de déclaration inexacte faite par négligence, qui a pris naissance en faveur d'une partie à la négociation, ne devrait pas survivre à la conclusion d'un contrat résultant de cette négociation. Il se peut, naturellement, qu'il ressorte expressément ou implicitement du contrat finalement intervenu qu'une fois celui-ci conclu, les droits et les obligations des parties sont ceux et uniquement ceux qui tirent leur origine du contrat lui-même.

Pour une énumération des décisions canadiennes ayant suivi l'arrêt *Esso Petroleum*, voir *Kingu c. Walmar Ventures Ltd.* (1986), 38 C.C.L.T. 51 (C.A.C.-B.), à la p. 59.

Le principe selon lequel l'action pour déclaration inexacte faite par négligence survivra à la conclusion d'un contrat entre les parties a été confirmé par notre Cour dans l'arrêt *Carman Construction*, précité. Au nom de la Cour, le juge Martland a conclu que l'intimé ne pouvait pas être tenu responsable d'avoir fait une déclaration inexacte par négligence parce que le contrat intervenu entre les parties contenait une «disposition de protection» ou dénégation ayant eu pour effet de dégager l'intimé de toute obligation de diligence. Il ressort clairement des motifs du juge Martland que le fait que la déclaration inexacte faite par négligence qui était alléguée ait mené à la conclusion du contrat n'aurait pas été un motif pour rejeter l'action fondée sur la négligence. On peut déduire le même principe de l'arrêt récent de notre Cour, *Rainbow Industrial Caterers Ltd.*, précité. Quoique la question en litige n'ait porté que sur les dommages-intérêts susceptibles d'être accordés lorsque le demandeur a été amené à conclure un contrat avec le défendeur par suite d'une déclaration inexacte que ce dernier a faite par négligence, les juges Sopinka (pour la majorité) et McLachlin (dissidente) ont tous deux convenu que des dommages-intérêts pouvaient être accordés lorsqu'une déclaration inexacte faite par négligence a mené à la conclusion d'un contrat.

It is clear that the fact that the parties are in a contractual relationship is not in itself a bar to an action in tort for negligent misrepresentation. As in other areas of negligence, the plaintiff may have the option of concurrent actions in tort and contract. However, concurrency must be viewed in light of the principles articulated above. Where a duty arising in tort is co-extensive with a duty created by an express term of the contract, the plaintiff will be limited to whatever remedies are available under the contract. Moreover, if the liability or duty of the defendant is excluded or limited by the terms of the contract, the plaintiff may not allege a wider liability in tort in order to circumvent the terms of the contract.

D. *Application of the Law to the Facts of this Case*

Checo alleges that Hydro negligently misrepresented the state of the right-of-way, and that Checo suffered damages as a result of this misrepresentation. In the alternative, Checo has alleged that Hydro was in breach of its contractual duties.

(1) The Claim for Negligent Misrepresentation

I will assess Checo's claim in tort for negligent misrepresentation first. Because Checo and Hydro are in a contractual relationship, Checo's claim in tort immediately raises two issues. First, is there a specific contractual duty created by an express term of the contract which is co-extensive with the common law duty of care which Checo alleges Hydro has breached? If there is such a contractual duty, then Checo is precluded from bringing an action in tort against Hydro for breach of the common law duty of care. In such a case, Checo would be confined to whatever remedies are available under the law of contract. Second, if the answer to the first question is negative, is Hydro's liability or duty in tort limited or excluded by the terms of the contract?

Il est clair que l'existence de liens contractuels entre les parties n'empêche pas en soi le recours en responsabilité délictuelle pour déclaration inexacte faite par négligence. Comme dans d'autres domaines de la négligence, il se peut que le demandeur dispose de recours concomitants en matières contractuelle et délictuelle. Toutefois, la concomitance doit être considérée à la lumière des principes examinés précédemment. Lorsqu'une obligation en responsabilité délictuelle coïncide avec une obligation créée expressément par le contrat, les recours du demandeur seront limités à ceux prévus au contrat. De plus, s'il y a exclusion ou limitation contractuelle de la responsabilité ou des obligations du défendeur, le demandeur ne peut pas alléguer une responsabilité délictuelle plus grande de façon à contourner les clauses du contrat.

D. *Application du droit aux faits de l'espèce*

Checo allègue qu'Hydro lui a présenté de façon inexacte et négligente l'état de l'emprise et qu'elle a, en conséquence, subi des dommages. Subsidiairement, Checo soutient qu'Hydro a manqué à ses obligations contractuelles.

(1) La demande fondée sur la déclaration inexacte faite par négligence

J'examinerai d'abord la réclamation de Checo fondée sur le délit civil de déclaration inexacte faite par négligence. Étant donné la présence d'un lien contractuel entre Checo et Hydro, l'allégation d'un délit civil soulève immédiatement deux questions. En premier lieu, y a-t-il une obligation spécifique créée expressément par le contrat qui coïncide avec l'obligation de diligence en common law à laquelle, selon Checo, Hydro aurait contrevenu? S'il existe une telle obligation contractuelle, Checo ne peut pas intenter contre Hydro une action en responsabilité délictuelle pour manquement à l'obligation de diligence en common law. En pareil cas, les recours dont Checo disposerait seraient limités à ceux qui découlent du droit des contrats. En second lieu, si la réponse à la première question est négative, la responsabilité ou l'obligation en matière délictuelle d'Hydro est-elle limitée ou exclue par le contrat?

(a) *Is there a Contractual Duty Excluding a Common Law Duty of Care?*

The question whether there is a contractual duty defined by an express term of the contract which would operate to exclude the common law duty of care upon which Checo relies in its action for negligent misrepresentation is shortly answered: there is such a duty. Checo bases its claim for negligent misrepresentation on the alleged representation made in clause 6.01.03 of the tender documents. Clause 6.01.03 of the tender documents was incorporated verbatim as an express term (also numbered 6.01.03) of the contract between Hydro and Checo after Hydro accepted Checo's tender. On Checo's interpretation of clause 6.01.03 of the tender documents, it is a representation as to the state of the right-of-way. If clause 6.01.03 of the tender documents is such a representation (and I am of the opinion that it is, as I will discuss below), then clause 6.01.03 of the contract is an express warranty as to the state of the right-of-way. Whatever duty is imposed in tort on Hydro by the clause in the tender documents is co-extensive with the duty imposed in contract by the express clause in the contract. In consequence, subject to any overriding considerations arising from the context in which the transaction occurred, Checo is limited to whatever remedies may be available to it in contract for Hydro's breach of clause 6.01.03 of the contract. Checo cannot rely on a breach by Hydro of any duty created by clause 6.01.03 of the tender documents to found an action in tort.

As I indicated, context is important in assessing whether a claim in tort is foreclosed by the terms of the contract. This transaction occurred in a commercial context. The parties are both large corporations, and there is no allegation or indication of any inequality of bargaining power or unconscionability. I would also note that the contract which was concluded by the parties was included as part of the tender documents. That is, Checo knew when it was preparing its bid that if its bid were accepted, the representation as to the condition of

a) *Y a-t-il une obligation contractuelle excluant l'obligation de diligence en common law?*

À la question de savoir s'il existe une obligation contractuelle expressément prévue au contrat dont l'effet serait d'exclure l'obligation de diligence en common law sur le fondement de laquelle Checo a intenté sa poursuite pour déclaration inexacte faite par négligence, on peut répondre brièvement: cette obligation existe. Checo appuie sa demande d'indemnisation sur la déclaration que constituerait la clause 6.01.03 du dossier d'appel d'offres. Cette clause a été incorporée telle quelle à titre de stipulation expresse (portant aussi le numéro 6.01.03) du contrat intervenu entre Hydro et Checo après qu'Hydro eut accepté l'offre de Checo. Suivant l'interprétation de Checo, la clause 6.01.03 du dossier d'appel d'offres constitue une déclaration quant à l'état de l'emprise. Or, si la clause 6.01.03 du dossier d'appel d'offres constitue une telle déclaration (ce dont je suis d'avis, comme nous le verrons plus loin), elle est alors une garantie expresse quant à l'état de l'emprise. Toute obligation en responsabilité délictuelle imposée à Hydro par la clause du dossier d'appel d'offres coïncide avec l'obligation d'ordre contractuel imposée par la clause expresse du contrat. Par conséquent, sous réserve de toute considération prépondérante résultant du contexte dans lequel l'entente est intervenue, les recours de Checo se limitent à ceux qui découlent du droit des contrats en cas de violation par Hydro de la clause 6.01.03. Checo ne peut donc invoquer l'inexécution par Hydro d'une obligation créée par la clause 6.01.03 du dossier d'appel d'offres comme fondement d'une action en responsabilité délictuelle.

Comme je l'ai indiqué, le contexte est un élément important pour déterminer si un recours en responsabilité délictuelle est exclu en raison des clauses du contrat. En l'espèce, l'entente s'inscrivait dans un contexte commercial. Les parties sont deux grandes entreprises et il n'y a pas eu d'allégation ou d'indication d'inégalité dans la négociation ni d'iniquité. Soulignons également que le contrat conclu par les parties faisait partie du dossier d'appel d'offres. C'est-à-dire que Checo savait, au moment de préparer sa soumission que, si celle-ci

the right-of-way would be a term of the contract. Checo knew, or ought to have known, that disputes as to the condition of the right-of-way would potentially be governed by the contract. Knowing this, Checo decided to make a bid, hoping that its bid would be accepted. I would conclude that an assessment of the context strengthens my initial conclusion that Checo should be limited to any remedies which might be available to it under the contract.

(b) *Is Hydro's Liability or Duty Limited or Excluded?*

In light of my answer to the first question, it is unnecessary for the purposes of this appeal to consider whether Hydro's liability or duty in tort is limited or excluded by a term of the contract. Simply put, Checo's claim in tort is barred by the contract. However, I shall proceed at this stage to consider the effect of clauses 2.03 and 4.04 of the tender documents, which were incorporated into the contract, on Checo's rights under the contract.

In argument before this Court, Hydro submitted that clauses 2.03 and 4.04 operated to exempt Hydro from contractual liability for its representations. The representation relied upon by Checo is contained in clause 6.01.03, which is in the following language:

6.01.03 WORK DONE BY OTHERS

> Clearing of the right-of-way and foundation installation has been carried out by others and will not form part of this Contract.

The two clauses which Hydro argues exclude its liability are as follows:

2.03 TENDERER'S RESPONSIBILITY

> It shall be the Tenderer's responsibility to inform himself of all aspects of the Work and no claim will be considered at any time for reimbursement for any expenses incurred as a result of any misunderstanding in regard to the conditions of the Work. Should any details necessary for a clear

était acceptée, la déclaration relative à la condition de l'emprise deviendrait une clause du contrat. Checo savait, ou aurait dû savoir, que tout litige concernant l'état de l'emprise serait assujetti au contrat. Le sachant, Checo a décidé de présenter sa soumission dans l'espoir qu'elle serait acceptée. Je terminerais en disant que l'analyse du contexte vient renforcer ma conclusion initiale voulant que les recours de Checo soient limités à ceux dont elle dispose en vertu du contrat.

b) *Y a-t-il limitation ou exclusion de la responsabilité d'Hydro?*

Étant donné ma réponse à la première question, il n'y a pas lieu, aux fins du présent pourvoi, d'examiner si la responsabilité d'Hydro en matière délictuelle est limitée ou exclue par une clause du contrat. Tout simplement, le contrat interdit à Checo le recours en responsabilité délictuelle. Cependant, j'examinerai maintenant l'incidence sur les droits de Checo en vertu du contrat des clauses 2.03 et 4.04 du dossier d'appel d'offres, qui ont été incorporées au contrat.

Dans l'argumentation qu'elle a présentée devant notre Cour, Hydro soutient que les clauses 2.03 et 4.04 ont pour effet d'exclure sa responsabilité contractuelle quant aux déclarations. Celle sur laquelle Checo s'appuie est contenue à la clause 6.01.03, que voici:

[TRADUCTION]

6.01.03 TRAVAUX DÉJÀ EXÉCUTÉS

> Le déboisement de l'emprise et l'installation des fondations ont été faits par d'autres et ne feront pas partie du présent contrat.

Les deux clauses qu'invoque Hydro à l'appui de l'exclusion de sa responsabilité sont les suivantes:

[TRADUCTION]

2.03 RESPONSABILITÉ DU SOUMISSIONNAIRE

> Il est de la responsabilité du soumissionnaire de se renseigner sur tous les aspects des travaux, et aucune demande de remboursement des dépenses engagées par suite d'une méprise quant aux conditions d'exécution des travaux ne sera prise en considération. Advenant le cas où le dossier

and comprehensive understanding be omitted or any error appear in the Tender Documents or should the Tenderer note facts or conditions which in any way conflict with the letter or spirit of the Tender Documents, it shall be the responsibility of the Tenderer to obtain clarifications before submitting his Tender. . . .

Neither B.C. Hydro nor the Engineer shall be responsible for any instructions or information given to any Tenderer other than by the Purchasing Agent, in accordance with this Clause.

4.04 INSPECTION OF SITE AND SUFFICIENCY OF TENDER

The Contractor shall inspect and examine the Site and its surroundings and shall satisfy himself before submitting his Tender as to the nature of the ground and sub-soil, the form and nature of the Site, the quantities and nature of work and materials necessary for completion of the Work, the means of access to the Site, the accommodation and facilities he may require, and in general shall himself obtain all necessary information as to risks, contingencies, and other circumstances which may influence or affect his Tender. Without limiting the generality of the foregoing, the Contractor shall satisfy himself of any special risks, contingencies, regulations, safety requirements, and other circumstances which may be encountered.

The Contractor shall be deemed to have satisfied himself before tendering as to the correctness and sufficiency of his Tender for the Work and of the prices stated in the Schedule of Prices which prices shall (except insofar as it is otherwise provided in the Contract) cover all his obligations under the Contract and all matters and things necessary for the proper execution of the Work.

Clause 6.01.03 is a representation that the site would be cleared as of the date of the contract. It is an express contractual warranty as to the state of the right-of-way. The trial judge found that, in all the circumstances, "clearing" meant the right-of-way would be clear of logs and debris. Cohen J. stated (at p. 67):

d'appel d'offres omettrait des détails nécessaires à une bonne compréhension de ses dispositions ou contiendrait des erreurs, ou encore si le soumissionnaire remarque des faits ou des conditions qui viennent en contradiction avec la lettre ou l'esprit du dossier, c'est au soumissionnaire qu'il incombe d'obtenir les explications voulues avant de présenter sa soumission. . . .

Ni B.C. Hydro ni l'ingénieur ne sont responsables des consignes ou renseignements donnés au soumissionnaire par toute personne autre que l'acheteur, conformément à la présente clause.

4.04 EXAMEN DES LIEUX ET ADÉQUATION DE LA SOUMISSION

L'entrepreneur doit, par visite et examen des lieux et des environs, se renseigner, avant de présenter sa soumission, sur la nature du sol et du sous-sol, la morphologie des lieux, la quantité et la nature des travaux et des matériaux nécessaires à leur exécution, les voies d'accès aux lieux, les installations requises, et, de façon générale, obtenir tous les renseignements pertinents quant aux risques, imprévus et autres circonstances susceptibles d'avoir une incidence sur sa soumission. Sans que soit limitée la portée générale de ce qui précède, l'entrepreneur doit s'informer sur tout risque, imprévu, exigence en matière de sécurité et règlement particuliers ainsi que toute autre circonstance à laquelle il peut avoir à faire face.

L'entrepreneur est réputé s'être assuré, avant de présenter sa soumission, qu'elle est exacte et complète en ce qui concerne les travaux et les prix indiqués en annexe, lesquels (sauf indication contraire du contrat) doivent couvrir toutes les obligations qui lui incombent en vertu du contrat et toute chose nécessaire à exécution des travaux.

Si l'on s'en tient à la clause 6.01.03, les lieux devaient être déboisés à la date du contrat. Il s'agit d'une garantie contractuelle expresse quant à l'état de l'emprise. Le juge de première instance a tenu pour avéré que, compte tenu de toutes les circonstances, «déboisement» signifiait que l'emprise serait dégagée des billes et des débris. Le juge Cohen a dit, à la p. 67:

Kosty acknowledged that tenderers rely on information contained in the tender documents and the defendant intended that the plaintiff would prepare its bid based on the representations contained in the tender documents. Clause 6.01.03 does not define the word "clearing" and the tender documents do not contain the defendant's clearing standards or clearing contracts. In my opinion, based on what they observed and their past experience, the natural and ordinary meaning to be given to the word "clearing" in clause 6.01.03 was the one understood by Lemieux and Campeau, that the right-of-way would be free of logs and debris. I accept the evidence of Lemieux and Campeau, who I found to be honest and forthright, that they formed an honest belief in December 1982, after reading the tender documents and viewing the right-of-way, that clearing was not yet complete.

[TRADUCTION] Kosty a reconnu que les soumissionnaires se fient sur les renseignements contenus dans le dossier d'appel d'offres et la défenderesse s'attendait à ce que la demanderesse prépare son offre en se fondant sur ce que contenait le dossier d'appel d'offres. La clause 6.01.03 ne définit pas le terme «déboisement» et le dossier d'appel d'offres ne comprend pas les normes de déboisement ni les contrats de déboisement. À mon avis, selon ce qu'ils ont observé et selon leur expérience, le sens naturel et ordinaire à donner au terme «déboisement» à la clause 6.01.03 était celui qu'avaient compris Lemieux et Campeau, c'est-à-dire, que l'emprise serait dégagée des billes et des débris. J'accepte le témoignage de Lemieux et Campeau, que j'estime honnêtes et francs, selon lequel ils croyaient honnêtement en décembre 1982, après avoir lu le dossier d'appel d'offres et examiné l'emprise, que le déboisement n'était pas encore terminé.

The trial judge also found as a fact that the right-of-way was incompletely and improperly cleared as of the date of the contract. In my opinion, clauses 4.04 and 2.03 do not limit or exclude Hydro's liability flowing from clause 6.01.03 of the contract and of the tender documents. Clause 6.01.03 is a specific provision which is not displaced by clauses 4.04 and 2.03.

Le juge de première instance a également tenu pour avéré le fait que l'emprise n'avait pas été déboisée complètement et de façon convenable à la date du contrat. À mon avis, les clauses 4.04 et 2.03 ne limitent ni n'excluent la responsabilité d'Hydro découlant de la clause 6.01.03 du contrat et du dossier d'appel d'offres. La clause 6.01.03 est une disposition expresse qui n'est pas écartée par les clauses 4.04 et 2.03.

Clauses 2.03 and 4.04 do not operate to limit Hydro's liability in contract for the representation relied on. Clause 4.04 required Checo to inspect the contract "Site", and specified that the contract price would cover all Checo's obligations under the contract. "Site" is defined by clause 4.01 of the contract as "the land upon which the Work is to be done [by the Contractor—Checo] and any area or areas adjacent thereto used in connection with the Work and, unless the context otherwise requires, shall include all materials, supplies, tools, equipment and structures thereon" (emphasis added). The representation relied on by Checo, however, is that clearing of the right-of-way "has been carried out by others and will not form part of this Contract" (emphasis added). The ordinary meaning of the emphasized words suggests that the "Site" referred to in clause 4.04 of the contract does not encompass the right-of-way, which is the subject matter of the representation at issue. Thus, clause

Les clauses 2.03 et 4.04 n'ont pas pour effet de limiter la responsabilité contractuelle d'Hydro pour les déclarations qu'elle a faites. La clause 4.04 impose à Checo l'obligation d'inspecter les «lieux» faisant l'objet du contrat et précise que le prix couvrira toutes les obligations qui découlent du contrat. Selon la définition inscrite à la clause 4.01 du contrat, on entend par «lieux» [TRADUCTION] «le terrain sur lequel les travaux sont exécutés [par l'entrepreneur—Checo] et tout terrain adjacent utilisé accessoirement aux travaux et, sauf indication contraire du contexte, les matériaux, l'outillage, l'équipement et les structures qui s'y trouvent» (je souligne). La déclaration à laquelle Checo s'est fiée, toutefois, est celle selon laquelle le déboisement de l'emprise [TRADUCTION] «[a] été fait[. . .] par d'autres et ne fer[a] pas partie du présent contrat» (je souligne). Il ressort du sens ordinaire des mots soulignés que le terme «lieux» employé à la clause 4.04 du contrat ne vise pas

4.04 is not relevant to Checo's action in tort or to its action for breach of contract.

The key phrase in clause 2.03 is, "should the Tenderer note facts or conditions which in any way conflict with the letter or spirit of the Tender Documents, it shall be the responsibility of the Tenderer to obtain clarifications before submitting his Tender." The representation made in clause 6.01.03 was that the right-of-way would be cleared as of the date of the contract. Accordingly, although Checo did note the "dirty" condition of the right-of-way at the time it was carrying out the inspection mandated by clause 2.03, the condition of the "Site" was not in conflict with the representation that the right-of-way would be cleared as of the date of the contract, and Checo's obligation under clause 2.03 to obtain clarification from Hydro on this point was not triggered. Moreover, the well-known principles governing the interpretation of contractual exclusion and limitation of liability clauses suggest that neither clause 2.03 nor clause 4.04 is sufficiently clear to limit or exclude Hydro's liability in contract for the representation relied on.

I would accordingly conclude that there is no clause in the contract or in the tender documents which serves either to limit or exclude Hydro's liability for the representation contained in clause 6.01.03.

(2) The Claim for Breach of Contract

I have found that it was an express term of the contract that the right-of-way would be cleared. As found by the trial judge, the right-of-way was not cleared. Therefore, Hydro breached the contract. I have also found that there is no exclusion or limitation clause that would affect Hydro's liability in contract. Given that he found Hydro liable for fraudulent misrepresentation, the trial judge did not consider the question of damages for breach of

l'emprise, objet de la déclaration en cause en l'espèce. La clause 4.04 n'est donc pas pertinente quant à l'action de Checo en responsabilité délictuelle ou à son action en inexécution de contrat.

Le passage clé de la clause 2.03 est le suivant: [TRADUCTION] «si le soumissionnaire remarque des faits ou des conditions qui viennent en contradiction avec la lettre ou l'esprit du dossier, c'est au soumissionnaire qu'il incombe d'obtenir les explications voulues avant de présenter sa soumission.» La déclaration contenue à la clause 6.01.03 était que l'emprise serait déboisée à la date du contrat. Par conséquent, bien que Checo ait noté la [TRADUCTION] «malpropreté» de l'emprise au moment où elle procédait à l'inspection requise par la clause 2.03, la condition des «lieux» ne venait pas en contradiction avec la déclaration suivant laquelle l'emprise serait déboisée à la date du contrat, ce qui n'a pu faire naître l'obligation de Checo d'obtenir des explications sur ce point auprès d'Hydro. De plus, si l'on s'en tient aux principes bien connus régissant l'interprétation des clauses contractuelles d'exclusion et de limitation de responsabilité, ni la clause 2.03 ni la clause 4.04 ne sont suffisamment claires pour limiter ou exclure la responsabilité contractuelle d'Hydro quant à la présentation des faits.

Je conclurais donc à l'absence de clause au contrat ou au dossier d'appel d'offres susceptible de limiter ou d'exclure la responsabilité d'Hydro quant à la déclaration contenue à la clause 6.01.03.

(2) La demande fondée sur l'inexécution du contrat

J'ai conclu qu'il était expressément prévu au contrat que l'emprise serait déboisée, ce qui, suivant la constatation du juge de première instance, n'a pas été fait. Hydro a donc contrevenu au contrat. J'ai également conclu qu'il n'y a pas de clause d'exclusion ou de limitation susceptible d'avoir une incidence sur la responsabilité contractuelle d'Hydro. Étant donné qu'il a tenu Hydro responsable d'avoir fait une déclaration inexacte et frauduleuse, le juge de première instance n'a pas examiné la question des dommages résultant de l'inexécu-

contract. I would return the matter to trial on the question of damages for the breach of contract.

At the original trial, Checo also claimed damages for breach of contract for items which would appear to be unconnected with the failure to clear the right-of-way. As the trial judge did not consider the issue of breach of contract, there are no findings of fact with respect to these items. Accordingly, if Checo establishes at the new trial that Hydro breached its contract in any other respect, unconnected with the failure to clear the right-of-way, and that Checo suffered damages therefrom, Checo is entitled to recover damages for these items in accordance with the applicable law of damages.

V. Disposition

I would accordingly allow Hydro's appeal in part and dismiss Checo's cross-appeal. I would order a new trial on the issue of breach of contract. I have found that Hydro breached the contract in that the right-of-way was not properly cleared. Damages for this breach should be assessed at the new trial. In addition, Checo is entitled to recover for any breaches of the contract unconnected with the condition of the right-of-way which it may establish at the new trial.

Under the circumstances, each party should bear its own costs, here and in the courts below.

Appeal dismissed and cross-appeal allowed in part, SOPINKA *and* IACOBUCCI JJ. *dissenting in part.*

Solicitors for British Columbia Hydro and Power Authority: Singleton, Urquhart, MacDonald, Vancouver.

Solicitors for BG Checo International Ltd.: Swinton & Company, Vancouver.

tion du contrat. Je renverrais donc l'affaire à procès sur cette question.

Au procès initial, Checo réclamait également des dommages-intérêts pour inexécution du contrat sur des points qui semblaient non reliés au défaut de déboiser l'emprise. Le juge de première instance n'ayant pas examiné la question de l'inexécution du contrat, il n'a tiré aucune conclusion de faits relativement à ces points. Par conséquent, si Checo établit au nouveau procès qu'Hydro a violé son contrat sous tout autre aspect non relié au non-déboisement de l'emprise, et qu'elle en a subi des dommages, elle aura droit de recouvrer des dommages-intérêts en conformité avec le droit applicable à cet égard.

V. Dispositif

Je suis donc d'avis d'accueillir en partie le pourvoi d'Hydro et de rejeter le pourvoi incident de Checo. J'ordonnerais la tenue d'un nouveau procès sur la question de l'inexécution de contrat. J'estime qu'Hydro a contrevenu au contrat en ce que l'emprise n'a pas été convenablement déboisée. Les dommages-intérêts résultant de cette inexécution devraient être évalués au nouveau procès. De plus, Checo a droit d'être indemnisée pour toute violation du contrat non reliée à l'état de l'emprise et dont elle pourra faire la preuve au nouveau procès.

Dans les circonstances, chaque partie supportera ses propres dépens, dans toutes les cours.

Pourvoi rejeté et pourvoi incident accueilli en partie, les juges SOPINKA *et* IACOBUCCI *sont dissidents en partie.*

Procureurs de British Columbia Hydro and Power Authority: Singleton, Urquhart, MacDonald, Vancouver.

Procureurs de BG Checo International Ltd.: Swinton & Company, Vancouver.

TAB 6

CITATION: Cline Mining Corporation (Re), 2015 ONSC 622
COURT FILE NO.: CV-14-10781-00CL
DATE: 2015-01-30

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 AND ARRANGEMENT OF CLINE MINING CORPORATION, NEW ELK COAL COMPANY LLC AND NORTH CENTRAL ENERGY COMPANY

BEFORE: Regional Senior Justice G.B. Morawetz

COUNSEL: *Robert J. Chadwick* and *Logan Willis*, for the Applicants Cline Mining Corporation et al.

Michael DeLellis and *David Rosenblatt*, for the FTI Consulting Canada Inc., Monitor of the Applicants

Jay Swartz, for the Secured Noteholders

HEARD: January 27, 2015

ENDORSEMENT

[1] Cline Mining Corporation, New Elk Coal Company LLC and North Central Energy Company (collectively, the "Applicants") seek an order (the "Sanction Order"), among other things:

a. sanctioning the Applicants' Amended and Restated Plan of Compromise and Arrangement dated January 20, 2015 (the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"); and

b. extending the stay, as defined in the Initial Order granted December 3, 2014 (the "Initial Order"), to and including April 1, 2015.

[2] Counsel to the Applicants submits that the Recapitalization is the result of significant efforts by the Applicants to achieve a resolution of their financial challenges and, if implemented, the Recapitalization will maintain the Applicants as a unified corporate enterprise

and result in an improved capital structure that will enable the Applicants to better withstand prolonged weakness in the global market for metallurgical coal.

[3] Counsel submits that the Applicants believe that the Recapitalization achieves the best available outcome for the Applicants and their stakeholders in the circumstances and achieves results that are not attainable under any other bankruptcy, sale or debt enforcement scenario.

[4] The position of the Applicants is supported by the Monitor, and by Marret, on behalf of the Secured Noteholders.

[5] The Plan has the unanimous support from the creditors of the Applicants. The Plan was approved by 100% in number and 100% in value of creditors voting in each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class.

[6] The background giving rise to (i) the insolvency of the Applicants; (ii) the decision to file under the CCAA; (iii) the finding made that the court had the jurisdiction under the CCAA to accept the filing; (iv) the finding of insolvency; and (v) the basis for granting the Initial Order and the Claims Procedure Order was addressed in *Cline Mining Corporation (Re)*, 2014 ONSC 6998 and need not be repeated.

[7] The Applicants report that counsel to the WARN Act Plaintiffs in the class action proceedings (the "Class Action Counsel") submitted a class proof of claim on behalf of the 307 WARN Act Plaintiffs in the aggregate amount of U.S. $3.7 million. Class Action Counsel indicated that the WARN Act Plaintiffs were not prepared to vote in favour of the Plan dated December 3, 2014 (the "Original Plan") without an enhancement of the recovery. The Applicants report that after further discussions, agreement was reached with Class Action Counsel on the form of a resolution that provides for an enhanced recovery for the WARN Act Plaintiffs Class of $210,000 (with $90,000 paid on the Plan implementation date) as opposed to the recovery offered in the Original Plan of $100,000 payable in eight years from the Plan implementation date.

[8] As a result of reaching this resolution, the Original Plan was amended to reflect the terms of the WARN Act resolution.

[9] The Applicants served the Amended Plan on the Service List on January 20, 2015.

[10] The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicants.

[11] Equity claimants will not receive any consideration or distributions under the Plan.

[12] The Plan provides for the release of certain parties (the "Released Parties"), including:

(i) the Applicants, the Directors and Officers and employees of contractors of the Applicants; and

(ii) the Monitor, the Indenture Trustee and Marret and their respective legal counsel, the financial and legal advisors to the Applicants and other parties employed by or associated with the parties listed in sub-paragraph (ii), in each case in respect of claims that constitute or relate to, *inter alia*, any Claims, any Directors/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA Proceedings, the Chapter 15 Proceedings, the business or affairs of the Applicants or certain other related matter (collectively, the "Released Claims").

[13] The Plan does not release:

(i) the right to enforce the Applicants' obligations under the Plan;

(ii) the Applicants from or in respect of any Unaffected Claim or any Claim that is not permitted to be released pursuant to section 19(2) of the CCAA; or

(iii) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[14] The Plan does not release Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the Applicants' applicable Insurance Policies.

[15] The Meetings Order authorized the Applicants to convene a meeting of the Secured Noteholders, a meeting of Affected Unsecured Creditors and a meeting of WARN Act Plaintiffs to consider and vote on the Plan.

[16] The Meetings were held on January 21, 2015. At the Meetings, the resolution to approve the Plan was passed unanimously in each of the three classes of creditors.

[17] None of the persons with Disputed Claims voted at the Meetings, in person or by proxy. Consequently, the results of the votes taken would not change based on the inclusion or exclusion of the Disputed Claims in the voting results.

[18] Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the plan. The effect of the court's approval is to bind the company and its creditors.

[19] The general requirements for court approval of the CCAA Plan are well established:

a. there must be strict compliance with all statutory requirements;

b. all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done, which is not authorized by the CCAA; and

c. the plan must be fair and reasonable.

(see *Re SkyLink Aviation Inc.*, 2013 ONSC 2519)

[20] Having reviewed the record and hearing submissions, I am satisfied that the foregoing test for approval has been met in this case.

[21] In arriving at my conclusion that the Plan is fair and reasonable in the circumstances, I have taken into account the following:

a. the Plan represents a compromise among the Applicants and the Affected Creditors resulting from discussions among the Applicants and their creditors, with the support of the Monitor;

b. the classification of the Applicants' creditors into three voting classes was previously approved by the court and the classification was not opposed at any time;

c. the results of the Sale Process indicate that the Secured Noteholders would suffer a significant shortfall and there would be no residual value for subordinate interests;

d. the Recapitalization provides a limited recovery for unsecured creditors and the WARN Act Plaintiffs;

e. all Affected Creditors that voted on the Plan voted for its approval;

f. the Plan treats Affected Creditors fairly and provides for the same distribution among the creditors within each of the Secured Noteholders Class, the Affected Unsecured Creditors Class and the WARN Act Plaintiffs Class;

g. Unaffected Claims, which include, *inter alia*, government and employee priority claims, claims not permitted to be compromised pursuant to sections 19(2) and 5.1(2) of the CCAA and prior ranking secured claims, will not be affected by the Plan;

h. the treatment of Equity Claims under the Plan is consistent with the provisions of the CCAA; and

i. the Plan is supported by the Applicants (Marret, on behalf of the Secured Noteholders), the Monitor and the creditors who voted in favor of the Plan at the Meetings.

[22] The CCAA permits the inclusion of third party releases in a plan of compromise or arrangement where those releases are reasonably connected to the proposed restructuring (see: *ATB Financial* v. *Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587

("*ATB Financial*"); *SkyLink*, *supra;* and *Re Sino-Forest Corporation*, 2012 ONSC 7050, leave to appeal denied, 2013 ONCA 456).

[23] The court has the jurisdiction to sanction a plan containing third party releases where the factual circumstances indicate that the third party releases are appropriate. In this case, the record establishes that the releases were negotiated as part of the overall framework of the compromises in the Plan, and these releases facilitate a successful completion of the Plan and the Recapitalization. The releases cover parties that could have claims of indemnification or contribution against the Applicants in relation to the Recapitalization, the Plan and other related matters, whose rights against the Applicants have been discharged in the Plan.

[24] I am satisfied that the releases are therefore rationally related to the purpose of the Plan and are necessary for the successful restructuring of the Applicants.

[25] Further, the releases provided for in the Plan were contained in the Original Plan filed with the court on December 3, 2014 and attached to the Meetings Order. Counsel to the Applicants submits that the Applicants are not aware of any objections to the releases provided for in the Plan.

[26] The Applicants also contend that the releases of the released Directors/Officers are appropriate in the circumstances, given that the released Directors and Officers, in the absence of the Plan releases, could have claims for indemnification or contribution against the Applicants and the release avoids contingent claims for such indemnification or contribution against the Applicants. Further, the releases were negotiated as part of the overall framework of compromises in the Plan. I also note that no Director/Officer Claims were asserted in the Claims Procedure.

[27] The Monitor supports the Applicants' request for the sanction of the Plan, including the releases contained therein.

[28] I am satisfied that in these circumstances, it is appropriate to grant the releases.

[29] The Plan provides for certain alterations to the Cline Articles in order to effectuate certain corporate steps required to implement the Plan, including the consolidation of shares and the cancellation of fractional interests of the Cline Common Shares. I am satisfied that these amendments are necessary in order to effect the provisions of the Plan and that it is appropriate to grant the amendments as part of the approval of the Plan.

[30] The Applicants also request an extension of the stay until April 1, 2015. This request is made pursuant to section 11.02(2) of the CCAA. The court must be satisfied that:

(i) circumstances exist that make the order appropriate; and

(ii) the applicant has acted, and is acting in good faith and with due diligence.

[31] The record establishes that the Applicants have made substantial progress toward the completion of the Recapitalization, but further time is required to implement same. I am satisfied that the test pursuant to section 11.02(2) has been met and it is appropriate to extend the stay until April 1, 2015.

[32] Finally, the Monitor requests approval of its activities and conduct to date and also approval of its Pre-Filing Report, the First Report dated December 16, 2014 and the Second Report together with the activities described therein. No objection was raised with respect to the Monitor's request, which is granted.

[33] For the foregoing reasons, the motion is granted and an order shall issue in the form requested, approving the Plan and providing certain ancillary relief.

R.S.J. Morawetz

Date: January 30, 2015

TAB 7

Dumbrell v. The Regional Group of Companies Inc. et al.

[Indexed as: Dumbrell v. The Regional Group of Companies Inc.]

85 O.R. (3d) 616

Court of Appeal for Ontario,
Doherty, Moldaver and Sharpe JJ.A.
January 31, 2007

Contracts -- Breach of contract -- Damages -- Employment contract providing that employee was entitled to 50 per cent of profits received by employer for particular project as defined in agreement -- Nothing in language of contract limiting employee's potential remuneration to projects that were completed and closed as of date of termination of his employment contract -- Trial judge properly finding employer liable under contract for 50 per cent of profit earned by employer but erring in awarding employee 50 per cent of profit earned by investors brought into project by employer.

Contracts -- Breach of contract -- Liability -- Trial judge finding that corporate employer breached employment contract and that G was personally liable as president and directing mind of employer -- Trial judge erring in finding G personally liable -- Employment contract between employee and corporate employer -- Employee having no reasonable expectation of recovery upon breach of contract from any entity other than corporate employer -- Employee not pleading that G induced employer's breach of contract and adducing no evidence capable of establishing such inducement.

Contracts -- Interpretation -- Employment contract providing that employee was entitled to 50 per cent of profits received by employer for particular project as defined in agreement --

Nothing in language of contract limiting employee's potential remuneration to projects that were completed and closed as of date of termination of his employment contract -- Context in which contract was made contraindicating imposing any such limitation on profits.

R Inc. operated a real estate business. G was the president, CEO and directing mind of R Inc. The plaintiff had expertise in finding commercial real estate projects. He was employed by R Inc. for about one year. His position involved investigating and, where appropriate, bringing potentially profitable large-scale commercial developments to R Inc. The employment agreement contemplated that the plaintiff would receive nothing unless he brought projects to R Inc. which earned profits for R Inc. If he did, his compensation was to be 50 per cent of the profits. After leaving R Inc.'s employ, the plaintiff sued R Inc. and G, claiming that he was owed 50 per cent of the profit earned on a particular commercial real estate transaction (the "project"). The action was allowed. The trial judge found that the plaintiff was contractually entitled to 50 per cent of the profit earned on the project even though the profit was earned long after the termination of his employment contract. The defendants appealed, arguing that the trial judge erred in reaching that conclusion and also erred in awarding the plaintiff 50 per cent of the profit earned by entities other than R Inc. or G, and in holding G personally liable for the breach of contract.

Held, the appeal should be allowed in part. [page617]

In interpreting a contract, the focus is on the meaning of the words used in the contract. At least in the context of commercial relationships, it is not helpful to frame the analysis in terms of the subjective intention of the parties at the time the contract was drawn. Emphasis on subjective intention denudes the contractual arrangement of the certainty that reducing an arrangement to writing was intended to achieve. Moreover, many contractual disputes involve issues on which there is no common subjective intention between the parties. The purpose of the interpretation of a contract is not to discover how the parties understood the language of the text

which they adopted, but rather to determine the meaning of the contract against its objective contextual scheme. The text of the contract must be read as a whole and in the context of the circumstances as they existed when the agreement was created. The circumstances include facts that were known or reasonably capable of being known by the parties when they entered into the agreement.

In this case, the parties who negotiated the agreement were sophisticated, experienced, successful businessmen who could reasonably be expected to negotiate a commercially sensible and workable agreement. The agreement contemplated a relatively short working relationship of between six months and a year. In tying the plaintiff's compensation to profits as opposed to, for example, fees earned by R Inc., the parties anticipated that the plaintiff's entitlement to commissions would not be known until a project was complete and R Inc.'s net profit on the project could be determined. Nothing in the language of the contract limited the plaintiff's potential remuneration to projects that were completed and closed as of the date of termination of the employment contract. The context in which the contract was made contraindicated imposing any limitation of this kind on profits. Reasonable people in the position of the parties would have appreciated that R Inc.'s involvement in the kind of complex large-scale commercial projects that it was anticipated the plaintiff would bring to it might well not be completed within the relatively short time span contemplated by the employment contract. The trial judge did not err in finding that the plaintiff was contractually entitled to 50 per cent of R Inc.'s profits even if the profits were earned after the employment contract was terminated.

The trial judge erred in awarding the plaintiff 50 per cent of the profit earned by investors who were brought into the project by G.

The trial judge erred in finding G personally liable. The contract was between the plaintiff and R Inc. There was no basis for piercing the corporate veil. The plaintiff knew that he was contracting with R Inc., and could only reasonably expect to look to R Inc. for compensation in the event of a

breach of the terms of the contract. G could not be liable for inducing a breach of the contract. That cause of action was not pleaded and no evidence was adduced which was capable of establishing inducement.

Cases referred to

Eli Lilly & Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129, [1998] S.C.J. No. 59, 161 D.L.R. (4th) 1, 227 N.R. 201, 80 C.P.R. (3d) 321, apld

Other cases referred to

BG Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] 1 S.C.R. 12, [1993] S.C.J. No. 1, 75 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577, 147 N.R. 81, [1993] 2 W.W.R. 321, 14 C.C.L.T. (2d) 233; Charles P. Rowen & Associates Inc. v. Ciba-Geigy Canada Inc. (1994), 19 O.R. (3d) 205, [1994] O.J. No. 1233, 14 B.L.R. (2d) 125, [1994] I.L.R. I-3068 (C.A.) [Leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 400]; Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133, 112 D.L.R. (3d) 49, 32 N.R. 488, [1980] I.L.R. I-1176; [page618] H.W. Liebig & Co. v. Leading Investments Ltd., [1986] 1 S.C.R. 70, [1986] S.C.J. No. 6, 14 O.A.C. 159, 25 D.L.R. (4th) 161, 65 N.R. 209, 38 R.P.R. 201; Investors Compensation Scheme Ltd. v. West Bromwich Building Society, [1998] 1 All E.R. 98, [1998] 1 W.L.R. 896 (H.L.); Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc., [1998] O.J. No. 4368, 114 O.A.C. 357, 41 B.L.R (2d) 42, 83 A.C.W.S. (3d) 382 (C.A.); Kepic v. Tecumseh Road Builders, [1987] O.J. No. 890, 23 O.A.C. 72 (C.A.); Mount Joy Farms Ltd. v. Kiwi South Island Co- operative Dairies Ltd., [2001] NZCA 372; Pagnan SpA v. Tradax Ocean Transportation SA, [1987] 3 All E.R. 565, [1987] 2 Lloyd's Rep 342 (C.A.), affg [1987] 1 All E.R. 81(Q.B.); Prenn v. Simmonds, [1971] 1 W.L.R. 1381, [1971] 3 All E.R. 237 (H.L.); Said v. Butt, [1920] 3 K.B. 497 (H.L.); ScotiaMcLeod Inc. v. Peoples Jewellers Ltd. (1995), 26 O.R. (3d) 481,

[1995] O.J. No. 3556, 129 D.L.R. (4th) 711 (C.A.); Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (1999), 45 O.R. (3d) 417, [1999] O.J. No. 3290, 178 D.L.R. (4th) 634, 50 B.L.R. (2d) 64 (C.A.); Truckers Garage Inc. v. Krell, [1993] O.J. No. 3141, 68 O.A.C. 106 (C.A.)

Authorities referred to

Hall, G.R., "A Curious Incident in the Law of Contract: The Impact of 22 Words from the House of Lords" (2004) 40 Can. Bus. L.J. 20
Lewison, K., The Interpretation of Contracts, 3rd ed. (London: Sweet & Maxwell, 2004)
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Staughton, Sir C., "How Do the Courts Interpret Commercial Contracts?" (1998) 58 Cambridge L.J. 303
Steyn, L.J., "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25 Sydney L. Rev. 5
Swan, J., Canadian Contract Law (Markham, Ont.: Butterworths, 2006)
Sullivan, R., "Contract Interpretation in Practice and Theory" (2000) 13 S.C.L.R. (2d) 369
Welling, B.L., Corporate Law in Canada: The Governing Principles, 2nd ed. (Markham, Ont.: Butterworths, 1991)

APPEAL from the order of Mtivier J., [2005] O.J. No. 2609, [2005] O.T.C. 525 (S.C.J.), for the plaintiff in an action for damages for breach of contract.

Benjamin Zarnett and Alexa Abiscott, for appellants.

R.G. Slaght, Q.C., for respondent.

The judgment of the court was delivered by

DOHERTY J.A.:--

I

Overview

[1] The respondent, J. Michael B. Dumbrell ("Dumbrell"), was employed by the appellant, the Regional Group of Companies Inc. ("Regional"), for about one year beginning in November 1998. [page619] The appellant, Steven H. Gordon ("Gordon"), was the president, CEO and directing mind of Regional.

[2] Dumbrell left Regional's employment in November 1999. He subsequently sued Regional and Gordon claiming he was owed 50 per cent of the profit earned on a commercial real estate transaction referred to as the "Queen Street project". The trial judge found that Dumbrell was entitled, under the terms of his employment contract, to 50 per cent of the $1 million profit earned on the Queen Street project.

[3] Regional and Gordon appeal. Counsel raises three issues:

-- Did the trial judge err in holding that Dumbrell was entitled to 50 per cent of the profit earned on the Queen Street project even though that profit was earned long after the termination of his employment contract?

-- Even if Dumbrell was entitled to the profits under the terms of the employment contract, did the trial judge err in awarding him 50 per cent of the profit earned by entities other than Regional or Gordon? [See Note 1 below]

-- Did the trial judge err in holding Gordon personally liable?

[4] I would allow Regional's appeal in part. I would hold Regional liable under the contract but only for commission on profits earned by Gordon's company and his wife and children. I would not hold Regional liable for commission on profits earned by other investors brought into the project by Gordon.

[5] I would allow Gordon's appeal. Dumbrell alleged various causes of action against Regional and Gordon at trial. The

trial judge found a breach of contract, but rejected the other claims made by Dumbrell. Dumbrell's contract was with Regional and only Regional. He could have no reasonable expectation of recovery upon breach of the contract from any entity other than Regional. I see no legal basis upon which Gordon could be found personally liable for a breach of the contract made between Dumbrell and Regional. Nor can Gordon be liable for inducing Regional's breach of contract. Dumbrell did not plead that cause of action and did not adduce evidence capable of establishing that Gordon induced a breach of contract. [page620]

II

The Facts

[6] The trial lasted two weeks. The trial judge heard different versions of many events, some of which are not relevant to this appeal. I will summarize only those facts germane to the issues raised on appeal. My summary also reflects the trial judge's findings of fact and her credibility assessments. Neither are challenged on appeal. The trial judge preferred Dumbrell's version of events over Gordon's whose evidence she found to be unworthy of belief in many respects.

(a) Dumbrell's employment with regional

[7] In the summer of 1998, Dumbrell was living in British Colombia. He had spent most of his working life in the real estate development business and was looking for an opportunity to get back into that business in Ottawa where he had previously worked for many years.

[8] Regional operated a large, well-established real estate business in the Ottawa area. Gordon had been Regional's CEO since 1984. He held all the voting shares. Regional provided a variety of services, including property management, property appraisals, land acquisitions, land development and consulting.

[9] Regional would sometimes put together groups of investors or syndicates to purchase and develop properties. The

properties would be located by Regional and purchased in trust by a shell company for the investors. Regional would earn various fees for arranging the purchase, syndication, management and development of the property. Investors in the syndicate often were officers or employees of Regional or relatives of Gordon. Gordon sometimes took an equity position in these developments through Regional or various other corporate entities he controlled.

[10] Gordon had the final say in respect of all facets of Regional's operation. He decided which projects in which Regional would become involved, the fees Regional would charge, which corporate entities would be used, the roles those entities would play in a transaction and which investors would be invited to join which syndicates.

[11] Dumbrell met with an employee of Regional in the summer of 1998 to discuss the possibility of Dumbrell working with Regional. Dumbrell met with Gordon either at the same meeting or in a subsequent meeting shortly afterward. Dumbrell had considerable expertise in the commercial real estate field, an area in which Gordon wanted Regional to become more involved. [page621]

[12] Gordon and Dumbrell agreed that Dumbrell would work for Regional and would have the title Vice-President, Commercial Development. Dumbrell understood that he would find commercial real estate projects, bring them to Regional and that Regional would then become involved in the purchase and development of those properties. Dumbrell would be paid a commission on the profits earned from the projects that he brought to Regional.

[13] On Gordon's instructions, Regional's lawyer drafted an employment contract between Dumbrell and Regional. Three drafts were prepared and reviewed by Dumbrell, Gordon and their respective lawyers. There were several changes made in the various drafts of the contract. Almost all of these changes reflected Gordon's and not Dumbrell's preferences. Eventually, in November 1998, they agreed on the terms and both signed the agreement. Gordon signed as president of Regional.

[14] Some of the contract terms are set out in full below. Generally speaking, the contract provided that Dumbrell would be compensated exclusively on a commission basis. His commission would be calculated as a percentage of the profit generated from projects that he brought to Regional.

(b) The Queen Street property

[15] Like most people familiar with the Ottawa real estate market, Dumbrell knew of the Queen Street property in November 1998. The property was owned by Canadian Real Estate Investment Trust ("CREIT"). It occupied a full downtown city block in Ottawa and in late 1998 was being used as a parking lot. It was zoned for use as office space. Dumbrell believed that the price of the property would increase dramatically in the immediate future as the need for office space increased in Ottawa. He also believed that the property was ripe for development in late 1998. The property was not on the market, but Dumbrell mentioned it to Gordon as a potential project for development by Regional. Gordon encouraged him to look into the possibility of acquiring the Queen Street property.

[16] In early 1999, Dumbrell began to assemble a file on the Queen Street property. He received information from an employee of CREIT pertaining to possible development plans for the property and certain rent schedules. CREIT gave the information to Dumbrell on the undertaking that it would be kept confidential.

[17] Shortly after Dumbrell acquired information from CREIT, he contacted an architect who had worked on development plans for that property some years earlier. Dumbrell and the architect [page622] spoke at length and the architect gave Dumbrell a great deal of background information pertaining to the property. Based on the information he had accumulated, Dumbrell concluded that the Queen Street property was under priced and presented an excellent opportunity for a profitable development as an office tower. Regional decided to proceed with efforts to acquire the Queen Street property.

[18] In February 1999, on Gordon's instructions, Dumbrell

prepared and submitted an offer to purchase the Queen Street property for $7,745,000. That offer was in the name of Canadian Gateway, a consortium of five companies, including Regional, that had been assembled by Gordon. CREIT was not interested in selling the property on the terms of the offer.

[19] Gordon instructed Dumbrell to submit a second offer in February 1999. This offer, also in the name of Canadian Gateway in the amount of $9 million, was rejected by CREIT. In March 1999, a third offer, also at $9 million, but providing for a shorter due diligence period, was submitted by Dumbrell on Gordon's instructions. This offer was also rejected.

[20] The trial judge described, at para. 35, Dumbrell's role in these three offers as follows:

> Mr. Dumbrell was the point man in these negotiations, drafting these offers at Mr. Gordon's direction and reporting back the reactions of Mr. Dansereau [the vendors' representative] who communicated only with Mr. Dumbrell.

[21] Some time after the third offer was rejected, some of the partners in Canadian Gateway decided they were no longer interested in purchasing the Queen Street property. In July 1999, Dumbrell, on Gordon's direction, prepared a fourth offer. This offer showed Regional as the purchaser at a purchase price of $9.3 million. It also provided for a $300,000 commission payable to Regional on closing by CREIT. The corporate identity of the purchaser was irrelevant to Dumbrell. As far as he was concerned, he was working on a "Regional" project and it was up to Gordon to decide what corporate entities would be used to effect the transactions and subsequent development of the property.

[22] CREIT knew that Regional would not be the ultimate purchaser and developer of its property. It, therefore, wanted to know the identity of Regional's investors. Negotiations broke down when Regional could not or would not identify its investors. The July offer was rejected in August 1999.

[23] In August, Gordon told Dumbrell that he was no longer

interested in the Queen Street property. Dumbrell had spent [page623] most of his time since he commenced employment with Regional in November 1998 working on the Queen Street property. His interest in the property continued even after Gordon told him that he was no longer interested in the property.

[24] In October 1999, Gordon spoke with a government official who told him that there would be a significant increase in the demand for downtown office space in Ottawa in the immediate future. This information made the Queen Street property more attractive.

[25] In late October 1999, Mr. Samuel Grosz, a friend of Gordon's and a real estate developer whose Ottawa properties were managed by Regional, visited Ottawa primarily to look at his properties. Gordon showed Mr. Grosz the Queen Street property and gave him all of the information that Dumbrell had assembled, including the confidential information that had been provided to him by CREIT in January 1999. Mr. Grosz soon became interested in the Queen Street property.

[26] Shortly after Gordon alerted Mr. Grosz to the possibility of purchasing the Queen Street property, Mr. Grosz learned that Philip Reichman and his company, O. & Y. Properties Inc. ("O. & Y."), were about to make an offer to purchase the Queen Street property. Mr. Grosz and Mr. Reichman knew each other well and decided to proceed by way of a joint venture with each holding a 50 per cent interest in the Queen Street property if they were able to purchase it from CREIT.

[27] By early November 1999, it was clear that the working relationship between Gordon and Dumbrell was not going to last. None of the projects that Dumbrell had worked on had produced any profit for Regional. Dumbrell had not received any remuneration in the year he had been at Regional. Gordon had refused Dumbrell's request for an advance on his commissions. Gordon was also systematically excluding Dumbrell from meetings and the decision-making process at Regional. On November 4, 1999, Dumbrell resigned effective November 22, 1999. He had decided to go into business for himself.

[28] On November 19, 1999, after Dumbrell had tendered his resignation from Regional, but while he was still employed there, Mr. Grosz told Gordon that Mr. Grosz and O. & Y. were considering making an offer on the Queen Street property. Mr. Grosz asked Gordon to determine the status of the property. He also told Gordon that because Gordon had brought the property to his attention, he was prepared to allow Gordon to participate with he and O. & Y. in the joint venture. Mr. Grosz indicated that Gordon could purchase one-half of Mr. Grosz's 50 per cent interest in the joint venture. This would mean that Gordon would have a 25 per [page624] cent interest in the Queen Street property if the joint venture could acquire it.

[29] Mr. Grosz and O. & Y. were respected and high profile participants in the Ottawa commercial real estate market. They did not need Regional's participation to complete the purchase. Gordon wanted to be involved in a joint venture with them. At Mr. Grosz's suggestion, Gordon prepared an offer to purchase the Queen Street property in the name of Regional. When he did so, he anticipated that Regional would purchase the property in trust for Mr. Grosz (25 per cent), Gordon or his corporate nominee (25 per cent), and O. & Y. (50 per cent).

[30] The offer to purchase the Queen Street property prepared by Gordon in November 1999 was very similar to the offer prepared by Dumbrell in July 1999. Both offers provided for a purchase price of $9.3 million with a commission of $300,000 payable to Regional. The only significant difference between the two offers was that the July offer identified Dumbrell as the contact person at Regional and the November offer identified Gordon as the contact person.

[31] The asking price for the Queen Street property had dropped by about $1 million since July when Regional had submitted its offer at $9.3 million. Unlike Dumbrell, Gordon was not familiar with the commercial real estate market in Ottawa and was unaware that the asking price for the property had gone down. Gordon did not speak to Dumbrell before preparing this offer. The offer prepared by Gordon was reviewed by his putative partners. Mr. Reichman of O. & Y. learned that

the offer prepared by Gordon was about 1 million more than the current asking price for the Queen Street property. He decided that he would take over any negotiations to purchase the Queen Street property. He submitted an offer in the name of O. & Y. at $8 million. That offer did not provide for any commissions payable to Regional.

[32] The offer submitted by O. & Y. was accepted by CREIT on or about November 25, 1999. The transaction was completed on December 2, 1999 and closed on January 24, 2000. The Queen Street property was purchased in trust by a numbered company. The numbered company was owned 50 per cent by O. & Y., and 50 per cent by a numbered company owned equally by Mr. Grosz and a company controlled by Gordon. Gordon's company held its 25 per cent interest in the property in trust for a syndicate assembled by Gordon. The syndicate consisted of Gordon, his wife and children, several cousins and his lawyer. Gordon, his wife and his children owned 73.33 per cent of the syndicate. In total, the syndicate advanced about [page625] $1,200,000 toward the project. Some of the payments went through Regional.

[33] Gordon acknowledged in cross-examination that this was not a typical syndication for which Regional would charge a fee for bringing the investors together. Regional did all of the work that had to be done for the syndicate on the project, but did not charge any fees until it submitted an invoice in late May 2002 after the interest in the property was sold. The trial judge was dubious as to the bona fides of that invoice.

[34] Early in 2000, Dumbrell learned through a contact at O. & Y., that O. & Y. had agreed to purchase the Queen Street property. Dumbrell spoke with Gordon and asked him about his or Regional's involvement in that purchase. Gordon lied to Dumbrell. He told him that he was unaware of the proposed purchase of the Queen Street property by O. & Y. and that neither Regional nor Gordon had anything to do with the purchase. Dumbrell subsequently learned of Gordon's involvement and commenced this lawsuit in October 2000. At that time, the syndicate put together by Gordon still held a 25 per cent interest in the Queen Street property.

[35] Under the terms of the agreement between O. & Y., Mr. Grosz and Gordon's syndicate, O. & Y. had an option to purchase the interests held by the other partners. In May 2002, O. & Y. exercised its option and bought out Gordon's syndicate. The syndicate's 25 per cent interest was sold at a profit of slightly more than $1 million. Dumbrell amended his statement of claim and alleged that he was entitled to 50 per cent of that profit.

III

Issue No. 1 -- Did the Trial Judge Err in Holding that Dumbrell Was Entitled to 50 per cent of the Profit under the Terms of the Employment Contract?

(a) The trial judge's analysis

[36] The trial judge found that the potential value of the Queen Street property as a development was made known to Gordon and Regional through Dumbrell's efforts. She further held that it was through those efforts that Regional established contacts with CREIT, assembled a file containing a great deal of information on the property, and was in a position to provide that information to Mr. Grosz when he expressed an interest in the property in October 1999. Mr. Grosz in turn offered Regional/Gordon a 25 per cent interest in the property because of the information he had received from Gordon. [page626]

[37] On the trial judge's findings, Dumbrell was directly responsible for the syndicate, under Gordon's direction and control, obtaining a 25 per cent interest in the Queen Street property. The syndicate ultimately made a $1 million profit from its involvement in the transaction.

[38] The trial judge rejected Gordon's evidence that he and Dumbrell had agreed that the Queen Street project would not be covered by the terms of Dumbrell's employment contract. She noted that it made no sense that Dumbrell would spend the vast majority of his time over several months trying to secure a property that was excluded from the terms of his employment contract. She then turned to the terms of that agreement.

[39] The contract was between Regional and Dumbrell. It described Dumbrell as "an employee". The services to be provided to Regional by Dumbrell were described in Schedule "A" to the agreement:

> The Corporation and the Employee agree that the Employee will be charged with the responsibility to provide the Corporation with Development, Acquisitions, Financing and Syndications and Consulting Services. Employee to research, investigate, report and recommend real property capital asset purchases suitable for development or syndication. Employee shall not bind the Corporation to any contract or legal commitment without the prior written authority of the Corporation.

(Emphasis added)

[40] The contract was for a term of six months with an expiry date of May 1, 1999, and provided for renewal for an additional term of six months on mutual agreement of the parties. Although the contract was not formally renewed, the parties agreed that it was renewed and was in effect when Dumbrell resigned in November 1999.

[41] The agreement provided for termination "at the end of the Term hereof", and further provided that neither party could commence an action under the contract more than one year after the expiration of the term of the contract. Dumbrell commenced this action in October 2000, less than one year after he quit. This initial claim eventually developed into one for commission on a profit realized more than two years after the contract was terminated.

[42] The provision of the contract governing Dumbrell's compensation is found under the heading "Employee Earnings":

> 1. EMPLOYEE EARNINGS
>
> The Corporation shall pay to the Employee the sum of [as per the commissions payable as set out in Schedule "B" attached]. The Corporation is responsible for making source deductions,

including payments on account of Canada Pension Plan and Employment Insurance. Employee shall be [page627] entitled to participate in Corporation's Health Benefit Package as exists as of the date hereof and as amended from time to time.

(Emphasis in original)

[43] Schedule "B" referred to in the above clause reads as follows:

SCHEDULE "B"

DESCRIPTION OF REMUNERATION PACKAGE TO EMPLOYEE

1(1) The remuneration package for the Employee will be based on performance of the Employee payable as follows: [See Note 2 below]

(a) For each project, profits to be split 50% to the Employee and 50% to the Corporation.

1(2) For purposes of this Agreement, "profit" shall include monies earned and actually received by the Corporation as completed Acquisition Fees, Development Fees and Syndication Fees earned as a result of the Employee's direct involvement for completed and closed projects in accordance with standard operating policy of the Corporation on the following business activities:

(a) Development projects;

(a) Syndication projects;

(a) Special consulting and brokerage fees payable to the Division.

1(3) "Profit" shall be defined as the Gross Revenues received for a particular Project less expenses directly related to the negotiation, acquisition, development and sale of the project. All such expenses shall be deducted from Gross Revenues as would a

prudent accountant applying generally accepted accounting principles. Expenses shall include, but not limited to:

(a) Acquisition cost of the property;

(a) Governmental and development fees;

(a) Professional advice (accountants, engineers, lawyers, third party consultants);

(a) Financing fees, brokers fees, interest and carrying charges;

(a) Fees paid to investors for the project;

(a) Costs and disbursements paid pursuant to any syndication agreement;

(a) Realtor's fees; and

(a) Construction costs and related site improvements.

(Emphasis added) [page628]

[44] The trial judge did not find that the contract of employment provided for payment of commission to Dumbrell on profits earned after the termination of the employment agreement. Rather, she equated the relationship between Regional and Dumbrell with a principal-agent relationship. Relying on Charles P. Rowen & Associates Inc. v. Ciba-Geigy Canada Inc. (1994), 19 O.R. (3d) 205, [1994] O.J. No. 1233 (C.A.), the trial judge held that since Regional accepted the benefit of the work done by Dumbrell regarding the Queen Street property, Regional was obligated to pay for that work in the absence of an agreement to the contrary. Next, she examined the language of the employment contract and concluded at para. 131:

The fact that crystallization of the deal [the sale of the syndicate's interest in the Queen Street property], and the

> culminating events occurred after the employee left his employment, is not, in my view, relevant. . . . The contract did not deal with this situation and therefore the entitlement is as set out in Charles P. Rowen & Associates Inc. et al. v. Ciba-Geigy Canada Inc., supra.

(Emphasis added)

[45] I agree with the trial judge's conclusion that Dumbrell was entitled to compensation for profits earned after the termination of the agreement, but my analysis is somewhat different than hers. I do not regard Charles P. Rowen, supra, as controlling. In Charles P. Rowen, the court was faced with a true principal-agent relationship, the terms of which had not been reduced to writing by the parties. The reasoning of the majority blends notions of quantum meruit and implied terms of a contract to resolve a problem that the parties had not addressed when establishing their relationship.

[46] In the present case, the parties did consider the nature of their working relationship. After considerable negotiation and legal assistance, they entered into an employment contract which described Dumbrell as an "employee" and addressed the nature of his compensation. In my view, the question of whether Dumbrell was entitled to commission on the profits earned on the Queen Street project depends on an interpretation of the language used in the contract. If he is entitled to commission on the profits from the Queen Street property, that entitlement must be found in the language of the agreement he entered into with Regional.

(b) Contractual interpretation

[47] Judges spend most of their working time deciphering the meaning of various kinds of legal documents, including written [page629] contracts: see e.g., Lord Justice Johan Steyn, "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25 Sydney L. Rev. 5; Sir Christopher Staughton, "How Do the Courts Interpret Commercial Contracts?" (1998) 58 Cambridge L.J. 303. Most Canadian judges faced with interpreting a written commercial contract, cite either or both

of Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133, at p. 901 S.C.R., and Eli Lilly & Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129, [1998] S.C.J. No. 59, at paras. 52-56. Professor Ruth Sullivan has observed that these two authorities can be read as advancing different notions of contractual intent. She observes that Consolidated-Bathurst, supra, arguably looks to the subjective intention of the contracting parties at the time the contract was made, while Eli Lilly, supra, looks to the intent as discerned from the words used in the written contract. Professor Sullivan refers to the former approach as the intentionalist approach, and the latter as the textualist approach: see Ruth Sullivan, "Contract Interpretation in Practice and Theory" (2000) 13 S.C.L.R. (2d) 369, at 375-86, 392.

[48] In Eli Lilly, supra, at paras. 52-54, Iacobucci J. refers to Consolidated-Bathurst, supra, with approval. He clarifies, at para. 54, what is meant in Consolidated-Bathurst by "the true intent of the parties" for contractual purposes:

> The trial judge appeared to take Consolidated-Bathurst to stand for the proposition that the ultimate goal of contractual interpretation should be to ascertain the true intent of the parties at the time of entry into the contract, and that, in undertaking this inquiry, it is open to the trier of fact to admit extrinsic evidence as to the subjective intentions of the parties at that time. In my view, this approach is not quite accurate. The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time.

[49] On the approach taken in Eli Lilly, supra, the focus is on the meaning of the words used in the contract. Evidence of the subjective intention of the parties has "no independent place" in the interpretative process: Eli Lilly, at para. 54; see also Staughton, "How Do the Courts Interpret Commercial Contracts?", supra, at 304-06; Investors Compensation Scheme Ltd. v. West Bromwich Building Society, [1998] 1 All E.R. 98,

[1998] 1 W.L.R. 896 (H.L.), at pp. 114-15 All E.R.

[50] In my view, when interpreting written contracts, at least in the context of commercial relationships, it is not helpful to frame the analysis in terms of the subjective intention of the parties at the time the contract was drawn. This is so for at least two reasons. First, emphasis on subjective intention denudes the [page630] contractual arrangement of the certainty that reducing an arrangement to writing was intended to achieve. This is particularly important where, as is often the case, strangers to the contract must rely on its terms. They have no way of discerning the actual intention of the parties, but must rely on the intent expressed in the written words. Second, many contractual disputes involve issues on which there is no common subjective intention between the parties. Quite simply, the answer to what the parties intended at the time they entered into the contract will often be that they never gave it a moment's thought until it became a problem: see Kim Lewison, The Interpretation of Contracts, 3rd ed. (London: Sweet & Maxwell, 2004) at 18-31.

[51] Eli Lilly, supra, instructs that the words of the contract drawn between the parties must be the focal point of the interpretative exercise. The inquiry must be into the meaning of the words and not the subjective intentions of the parties. In this sense, my approach is textualist. However, the meaning of the written agreement must be distinguished from the dictionary and syntactical meaning of the words used in the agreement. Lord Hoffmann observed in Investors Compensation Scheme Ltd., supra, at p. 115 All E.R.:

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

[52] No doubt, the dictionary and grammatical meaning of the words (sometimes called the "plain meaning") used by the parties will be important and often decisive in determining the

meaning of the document. However, the former cannot be equated with the latter. The meaning of a document is derived not just from the words used, but from the context or the circumstances in which the words were used. Professor John Swan puts it well in Canadian Contract Law (Markham, Ont.: Butterworths, 2006) at 493:

> There are a number of inherent features of language that need to be noted. Few, if any words, can be understood apart from their context and no contractual language can be understood without some knowledge of its context and the purpose of the contract. Words, taken individually, have an inherent vagueness that will often require courts to determine their meaning by looking at their context and the expectations that the parties may have had.

[53] The text of the written agreement must be read as a whole and in the context of the circumstances as they existed when the agreement was created. The circumstances include facts that were known or reasonably capable of being known by the parties when they entered into the written agreement: see [page631] BG Checo International Ltd. v. British Columbia Hydro and Power Authority, [1993] 1 S.C.R. 12, [1993] S.C.J. No. 1, at pp. 23-24 S.C.R.; H.W. Liebig & Co. v. Leading Investments Ltd., [1986] 1 S.C.R. 70, [1986] S.C.J. No. 6, at pp. 80-81 S.C.R., La Forest J.; Prenn v. Simmonds, [1971] 1 W.L.R. 1381, [1971] 3 All E.R. 237 (H.L.), at pp. 1383-84 W.L.R.; Staughton, "How Do the Courts Interpret Commercial Contracts?", supra, at 307-08.

[54] A consideration of the context in which the written agreement was made is an integral part of the interpretative process and is not something that is resorted to only where the words viewed in isolation suggest some ambiguity. To find ambiguity, one must come to certain conclusions as to the meaning of the words used. A conclusion as to the meaning of words used in a written contract can only be properly reached if the contract is considered in the context in which it was made: see McCamus, The Law of Contracts (Toronto: Irwin Law, 2005) at 710-11.

[55] There is some controversy as to how expansively context should be examined for the purposes of contractual interpretation: see Geoff R. Hall, "A Curious Incident in the Law of Contract: The Impact of 22 Words from the House of Lords" (2004) 40 Can. Bus. L.J. 20. Insofar as written agreements are concerned, the context, or as it is sometimes called the "factual matrix", clearly extends to the genesis of the agreement, its purpose, and the commercial context in which the agreement was made: Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc., [1998] O.J. No. 4368, 114 O.A.C. 357 (C.A.), at p. 363 O.A.C.

[56] I would adopt the description of the interpretative process provided by Lord Justice Steyn, "The Intracticable Problem of the Interpretation of Legal Texts", supra, at 8:

> In sharp contrast with civil legal systems the common law adopts a largely objective theory to the interpretation of contracts. The purpose of the interpretation of a contract is not to discover how the parties understood the language of the text, which they adopted. The aim is to determine the meaning of the contract against its objective contextual scene. By and large the objective approach to the question of construction serves the needs of commerce. [See Note 3 below]

(Emphasis added) [page632]

(c) The interpretation of this contract

[57] The context in which the written words used in this agreement must be understood begins with the parties who negotiated the agreement. Both were sophisticated, experienced, successful businessmen who could reasonably be expected to negotiate a commercially sensible and workable agreement. When they agreed to work together, it was anticipated that Dumbrell, whose expertise lay in finding commercial real estate projects, would investigate and, where appropriate, bring potentially profitable large-scale commercial developments to Regional. Regional had the ability to finance and develop these projects. It did so in various ways using whatever corporate vehicle

Gordon deemed appropriate.

[58] The agreement reached by the parties contemplated a relatively short working relationship of between six months and one year. It also contemplated that Dumbrell would receive nothing unless he brought projects to Regional which earned profits for Regional. If he did that, his compensation would be significant (50 per cent of the profits). In tying Dumbrell's compensation to profits as opposed to, for example, fees earned by Regional, the parties anticipated that Dumbrell's entitlement to commissions would not be known until a project was complete and Regional's net profit on the project could be determined.

[59] Given Regional's business history, it could reasonably be anticipated when the employment agreement was made that when projects were brought to it by Dumbrell, Regional would be involved in various ways and that its involvement could yield profits through a variety of methods at different stages of Regional's involvement in any given project. On the findings made by the trial judge, Dumbrell was not taking employment with a company whose sole source of profits came through various forms of fees, but was taking employment with a company whose profits could come through various kinds of involvement in different projects.

[60] I turn from the context in which the employment agreement was made to the words used in the agreement and in particular the words used in Schedule "B". Schedule "B" begins by stating that Dumbrell's remuneration will be based on his performance. He must produce to be paid. Schedule "B" then describes his remuneration as 50 per cent of "profits" for each project. "Profits" are described in paras. 1(2) and 1(3).

[61] Paragraph 1(2) makes it clear that profits must be earned as a result of Dumbrell's direct involvement in the project. In addition, the project must be "completed and closed ... in [page633] accordance with standard operating policy of the Corporation". The reference to "standard operating policy" is of no assistance as it is common ground that there was no such thing.

[62] Paragraph 1(2) sets out certain kinds of fees that are included in the meaning of profits, such as acquisition fees, development fees and syndication fees. The fees described in para. 1(2) are not an exhaustive list of the kinds of payments to Regional that can constitute profits. Lastly, para. 1(2) refers to business activities which constitute projects for the purpose of the calculation of profits, including "Syndication projects".

[63] Paragraph 1(3) sets out a formula by which profits are to be determined by deducting certain expenses from "Gross Revenues". The reference in para. 1(3) to "Gross Revenues" and the types of expenses identified in that paragraph indicates two things. First, the question of whether Regional earned any profit and, if so, the amount of that profit may well not be determined until the end of Regional's involvement in a particular project. Second, Regional's involvement in projects could take forms other than a fee for service basis. The reference to "Gross Revenues" and many of the expenses described in para. 1(3) are consistent with Regional taking equity positions in a project and realizing a profit upon a sale of that equity position.

[64] On my reading of Schedule "B", Dumbrell was entitled to a 50 per cent commission on profits if:

-- he was directly responsible for the project in that it was secured for Regional through his efforts;

-- Regional had earned and actually received moneys on the project;

-- the project was "completed and closed", that is Regional's involvement was completed; and

-- using the method described in para. 1(3), Regional had earned a profit.

[65] Nothing in the language of Schedule "B" limits Dumbrell's potential remuneration to projects that are

completed and closed as of the date of termination of his employment contract. The context in which the contract was made contraindicates imposing any such limitation on profits. Reasonable people in the position of Dumbrell and Gordon would have appreciated that Regional's involvement in the kind of complex large scale commercial projects that it was anticipated Dumbrell would bring to it may well not be completed within the relatively short time [page634] span contemplated by the employment contract. Similarly, the method used for calculating Dumbrell's compensation by reference to profit as calculated in para. 1(3) contemplates that the projects could well extend over a considerable period of time with the ultimate determination of whether any profit was made and, therefore, any remuneration owed to Dumbrell being based on events that occurred well after the relatively brief period of employment contemplated by the agreement. On my reading of Schedule "B", Dumbrell was entitled to 50 per cent of Regional's profits even if the profits were made after the employment contract was terminated.

[66] The appellants rely on the termination provision:

1.1 This contract shall terminate:

1.1.1 at the end of the Term hereof.

1.1 Upon termination or other expiration of this contract the Employee shall forthwith return to the Corporation all papers, materials, equipment and other properties of the Corporation held for the purpose of execution of the contract. In addition, each party will assist the other party in the orderly termination of the contract and the transfer of all aspects hereof, tangible and intangible, as may be necessary for the orderly, non-disrupted business continuation of the Corporation.

1.1 Neither party may commence an action under this contract more than one (1) year after the expiration of its term, or, in the event of default, more than one (1) year after the occurrence of said default.

(Emphasis added)

[67] The termination provision does not assist in defining profits for the purpose of calculating Dumbrell's compensation. The first part of the termination clause speaks to the point at which the contractual relationship ends. It does not purport to terminate obligations that existed under the contract when the contract came to an end. If, as I would hold, profits as defined in Schedule "B" include profits earned and calculated after the termination of the contract, the obligation to pay those profits, when and if they arise, is an obligation that exists under the contract as of the date of termination albeit in an inchoate form.

[68] The last paragraph in the termination clause is also a relevant consideration. That paragraph answers one of the arguments relied on by the appellants. They submitted that a definition of profits that included profits made after the termination date of the contract would create indefinite and potentially open-ended liability by Regional to Dumbrell for profits earned on projects many years down the road. The limitation provision in the termination clause excludes any claim by Dumbrell that is [page635] not advanced within one year of the termination of the contract. This provision effectively places limits on Regional's potential liability to Dumbrell. As it happens, the limitation clause does not assist Regional here because Dumbrell had commenced his action within the one-year period.

[69] In summary, like the trial judge, I conclude that Dumbrell was entitled to 50 per cent of the profits earned by Regional on the Queen Street project. I reach that conclusion through a reading of Schedule "B" of the agreement in the context of the circumstances in which the agreement was made. I do not read the termination clause as modifying the meaning of profits in the agreement.

IV

Issue No. 2 -- Was Dumbrell Entitled to 50 per cent of the Profits Earned by Entities Other than Regional/Gordon?

[70] As outlined above, through Dumbrell's efforts, and at Mr. Grosz's invitation, Regional/Gordon acquired a 25 per cent interest in the Queen Street property early in 2000.

[71] At Gordon's direction, the 25 per cent interest in the Queen Street property was held by one of his companies in trust for a syndicate of investors. Another Gordon company (LPH), his wife and his children held 73.33 per cent of the syndicate. Several of Gordon's cousins and his lawyer, who practised with one of the cousins, held the other 26.67 per cent of the syndicate.

[72] The accounting breakdown on the syndicate's investment in the Queen Street property, prepared at Gordon's request, but accepted by Dumbrell at trial, showed that the syndicate advanced about $1,200,000 on the Queen Street project and received about $2,200,000 on that project resulting in a profit of just over $1 million. The accounting records indicate that the funds were distributed in accordance with the percentage of ownership in the syndicate. Gordon and his immediate family received about $732,000 of the $1 million profit earned by the syndicate.

[73] In oral argument, Mr. Zarnett acknowledged that if Dumbrell was entitled to compensation on the Queen Street project under the terms of the employment contract, no distinction could be drawn between profits earned directly by Regional and profits earned by other corporate entities used by Gordon to generate the profit. I would extend the same reasoning to cover profits earned by Gordon's wife and children. On this approach, Dumbrell was entitled to 50 per cent of the profits earned by LPH, Gordon's wife and Gordon's children. [page636]

[74] Counsel submits, however, that profits earned by other investors in the syndicate cannot be treated as the same as Regional's profits. The accounting records demonstrate that profits were paid out to the other investors when the syndicate sold its 25 per cent interest in the Queen Street property to O. & Y.

[75] In her reasons, the trial judge accepted, at para. 158, that there were "third parties investing and risking money". I take this to mean that the trial judge accepted that Gordon's cousins and his lawyer were bona fides investors who helped finance the 25 per cent interest in the Queen Street property. She went on to hold, however, that Gordon's resort to other investors could not affect the compensation owed to Dumbrell. She said, at paras. 159-60:

> In calculating damages, there is no evidentiary foundation of any kind on which to assess legitimate costs which might have been set off against this profit.
>
> Without a scintilla of such evidence, the court is unable to do other than order damages of $500,000, pursuant to the first part of the paragraph in the employment contract dealing with employee remuneration.

[76] I cannot agree with this analysis. To the extent that the syndicate was owned by third parties who genuinely invested funds in the project, I do not see how profits payable to those investors can become the profits of Regional for the purposes of calculating Dumbrell's compensation. The accounting records do provide evidence that 26.67 per cent of the profit realized on the sale of the 25 per cent interest in the Queen Street project was paid to third party investors and not to Regional, Gordon, his companies, or his immediate family. The calculation of Dumbrell's compensation on the Queen Street project should not have extended to a percentage of the profits earned by third party investors. If my arithmetic is correct, Dumbrell should have received 50 per cent of the profits realized by a 73.33 per cent interest in the syndicate.

V

Issue No. 3 -- Did the Trial Judge Err in Holding Gordon Personally Liable for Breach of Contract?

[77] In his statement of claim, Dumbrell alleged several causes of action against Regional and Gordon. At trial, he

succeeded only on the breach of contract claim. In the statement of claim, Dumbrell alleged a breach of contract against only Regional. In her initial reasons for judgment, the trial judge [page637] found both Regional and Gordon liable for breaching the contract. She did not separately address Gordon's personal liability for breaching a contract to which he did not appear to be a party. Gordon's liability for breach of contract as distinct from Regional's liability was not addressed by counsel in closing argument.

[78] After the trial judge released her initial reasons, and at the request of counsel for Regional and Gordon, she heard further argument on Gordon's personal liability for breach of contract. The trial judge gave additional reasons in which she confirmed her initial finding that Regional and Gordon were both liable for the breach of contract.

[79] I have difficulty understanding the basis upon which the trial judge found Gordon liable for breach of contract. She spoke of "piercing the corporate veil" and described Regional as Gordon's agent for the purposes of the contract. However, she found both Regional and Gordon liable for breaching the contract. I agree with Mr. Zarnett's submission that if Regional acted as Gordon's agent for the purposes of the contract, only Gordon could be liable for breaching that contract. The trial judge's finding that Regional was liable along with Gordon for breaching the contract was also inconsistent with the trial judge's conclusion, at para. 187, that she should "pierce the corporate veil" and hold Gordon liable. Either Regional had a separate legal persona for the purposes of the contract or it did not.

[80] The concepts of piercing the corporate veil and holding that a corporation acts as an agent for the individual who controls that corporation achieve the same result in that they both impose personal liability for what appear to be corporate actions. They achieve that result, however, in different ways. The agency relationship assumes that the corporation and the controlling mind are distinct, but that on the relevant facts the former acted as agent for the latter. Piercing the corporate veil ignores the legal persona of the corporation:

Bruce L. Welling, Corporate Law in Canada: The Governing Principles, 2nd ed. (Markham, Ont.: Butterworths, 1991) at 122-36.

[81] There is no basis in this record for describing Regional as Gordon's agent for the purpose of entering into the employment contract with Dumbrell. Dumbrell did not plead that Regional acted as Gordon's agent. The terms of the contract offer no suggestion that Regional was acting in an agency capacity. Finally, Dumbrell's evidence does not suggest that he regarded Regional as Gordon's agent for the purposes of the contract. [page638]

[82] Nor is any case made out for ignoring Regional's separate legal persona. There can be no doubt that Dumbrell contracted with Regional and only Regional in November 1998. The employment contract clearly describes Dumbrell as Regional's employee. Dumbrell's pleadings and his evidence do not suggest otherwise. Gordon's total ownership and control of Regional and the fact that he made all decisions on behalf of Regional in respect of its dealings with Dumbrell does not detract from Regional's standing as a separate and distinct legal entity. Corporations must necessarily act at the instance and under the direction of those fixed with the responsibility and authority to direct the affairs of the corporation: see ScotiaMcLeod Inc. v. Peoples Jewellers Ltd. (1995), 26 O.R. (3d) 481, [1995] O.J. No. 3556 (C.A.), at p. 492 O.R.

[83] The separate identity of a corporation can be ignored where the corporation is inserted into a transaction for a fraudulent or dishonest purpose. Corporations used in that way often have no assets, no corporate history, and no reason for existence other than facilitating a particular transaction. None of those indicia apply to Regional. Regional cannot be described as a shell or corporation of convenience put in place by Gordon for the purpose of entering into the contract with Dumbrell. As of November 1998, Regional had been a thriving well-established corporate entity for many years. It participated in many different real estate transactions and employed many people. Dumbrell chose to become one of those employees. There is no suggestion in the evidence that the

creation of the employer/employee relationship between Regional and Dumbrell was tainted by fraud or dishonesty on the part of Gordon. There is simply nothing to suggest that Gordon set out to deceive or trick Dumbrell when he and Dumbrell negotiated the employment contract which created the contractual relationship between Dumbrell and Regional, and not between Dumbrell and Gordon. Dumbrell knew full well he was contracting with Regional. He could only reasonably expect to look to Regional for compensation in the event of a breach of the terms of the contract.

[84] The trial judge's reasons also suggest a second basis for holding Gordon liable. She referred to authorities that hold a directing mind of a company liable for inducing a breach of contract by that company: see e.g., Said v. Butt, [1920] 3 K.B. 497 (H.L.), at pp. 504-06 K.B.; Truckers Garage Inc. v. Krell, [1993] O.J. No. 3141, 68 O.A.C. 106 (C.A.), at pp. 114-15 O.A.C.; Kepic v. Tecumseh Road Builders, [1987] O.J. No. 890, 23 O.A.C. 72 (C.A.), at p. 74 O.A.C. [page639]

[85] Cases where an individual has been held liable for inducing a corporation's breach of contract have nothing to do with piercing the corporate veil or the concept of agency. These cases acknowledge the separate legal identity of the corporation and its directing mind. They hold the directing mind liable for the discrete tort of inducing the breach of contract and not for breach of contract itself. The measure of damages for inducing the breach of contract may or may not be the same as would apply to the breach of contract.

[86] Gordon cannot be liable for inducing a breach of the contract between Regional and Dumbrell. That cause of action was not pleaded. Nor do I understand counsel at trial or on appeal to have argued that Gordon's liability could be based on the separate tort of inducing a breach of contract. An allegation of inducing a breach of contract is very different from a claim that a person is liable for breaching the contract. In the absence of any pleading which expressly or impliedly alleges the tort of inducing a breach of contract, I do not think the principles underlying that tort can be relied on to render Gordon liable for the breached contract.

[87] The difficulties inherent in transforming an allegation of a breach of contract into a finding of inducing a breach of that contract are apparent in the trial judge's reasons. To establish the tort of inducing a breach of contract by the directing mind of the contracting party, it must be shown, among other things, that the conduct of the directing mind was not bona fides in the best interest of the corporation. In the addendum to her reasons, the trial judge indicates that Gordon's conduct caused Regional to lose certain fees on the Queen Street property. She states, at para. 173:

> His [Gordon's] secretive and misleading conduct eventually caused a serious loss to his company when the company became unable to make the offer which would have resulted in another $300,000.-$400,000. fee.

[88] I cannot agree that anything Gordon did caused Regional to act to its detriment in respect of the Queen Street property. The trial judge found that as a result of Dumbrell's efforts, Regional/Gordon acquired a 25 per cent interest in the Queen Street property. That is the only interest that was available to Gordon in the joint venture that ultimately purchased the property. As the trial judge found, the calculation of Regional's profits and, therefore, Dumbrell's commission, did not depend on what part of the profits Regional described as fees. Had Gordon chosen to describe some of the profits generated for the syndicate from the sale of its interests as fees payable to Regional, it [page640] would not have increased the overall profit earned by the syndicate and would have had no effect on the quantification of Dumbrell's compensation. There is no evidentiary basis to hold that Gordon's conduct in respect of the Queen Street property cost Regional anything. On my reading of Gordon's cross-examination, it was not suggested to him that his conduct had somehow deprived Regional of profits that it would otherwise have earned. A finding that Gordon acted against Regional's best interests in connection with the profit earned on the Queen Street property has no foundation in either the pleadings or the evidence.

VI

Conclusion

[89] I would allow Gordon's appeal, set aside the trial judge's finding regarding Gordon's personal liability, and dismiss the action against Gordon. I would allow Regional's appeal in part and vary the trial order to provide that Dumbrell is entitled to 50 per cent of the profit from the Queen Street project earned by LPH, Gordon's wife and Gordon's two daughters.

[90] Counsel should make written submissions (no more than ten pages each) as to costs both at the trial and on appeal.

Appeal allowed in part.

Notes

Note 1: In their factum, the appellants argued that under the terms of the employment contract, Dumbrell was entitled only to 50 per cent of Regional's profits and that none of the profit from the Queen Street project was earned by Regional. In oral argument, counsel accepted that the terms of the employment contract would reach profits earned by Regional or other entities controlled by Gordon.

Note 2: In the contract, all of the paragraphs in Schedule "B" are numbered "1". For ease of reference, I have added the numbers in parentheses.

Note 3: Lord Steyn has taken the same apporach in his judgements: see Pagnan SpA v. Tradax Ocean Transportation, SA, [1987] 1 All E.R. 81 (Q.B.), Steyn J., affd [1987] 3 All E.R. 565, [1987] 2 Lloyds Rep 342 (C.A.). See also Toronto-Dominion Bank c. Leigh Instruments Ltd. (Trustee of) (1999), 45 O.R. (3d) 417, [1987] O.J. No. 3290, 178 D.L.R. (4th) 634 (C.A.), at p. 639 D.L.R.; Lewison, The Interpretation of Contracts, supra, at 5, 22-24; Mount Joy Farms Ltd. v. Kiwi South Island Co-operative Dairies Ltd., [2001] NZCA 372, at para. 38.

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TAB 8

In the Court of Appeal of Alberta

Citation: IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing, 2017 ABCA 157

Date: 20170526
Docket: 1401-0235-AC
Registry: Calgary

Between:

IFP Technologies (Canada) Inc.

Appellant

- and -

**EnCana Midstream and Marketing,
PanCanadian Resources, EnCana Corporation,
EnCana Oil & Gas Developments Ltd.,
Canadian Forest Oil Ltd. and The Wiser Oil Company**

Respondents

**The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Patricia Rowbotham**

**Reasons for Judgment Reserved of The Honourable Chief Justice Fraser
Concurred in by The Honourable Madam Justice Rowbotham
Dissenting Reasons for Judgment of The Honourable Mr. Justice Watson**

Appeal from the Decision by
The Honourable Chief Justice Neil Wittmann,
acting in place of the Trial Judge,
Justice R.G. Stevens, pursuant to Rule 13.1
Dated the 30th day of July, 2014
Filed on the 8th day of September, 2014
(2014 ABQB 470, Docket: 0301-3520)

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Reasons for Judgment Reserved of
The Honourable Chief Justice Fraser

I. Introduction

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

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

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

[1] The parties sometimes refer to Eyehill Creek as the "North Bodo" property.

[2] All of the named respondents, except for The Wiser Oil Company and Canadian Forest Oil Ltd., were or are partners, or successors in interest, in PCR.

self-interest.

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

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

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

[7] This tangled contractual web raises issues of law fundamental to the effective operation of the oil and gas industry in this country. What is meant by a "working interest" in oil and gas leases? What does the transfer of a "working interest" in oil and gas leases convey to the recipient? And does an "entire agreement" clause preclude consideration of the factual matrix, including the commercial context of the contract? It also raises policy issues relating to the efficacy of the law on contractual interpretation and what this means for corporations seeking redress in the courts.

[8] In the end, the many legal, policy and factual issues raised come down to this. Did IFP contractually agree to give up a future stream of income valued at $14,800,000 in exchange for nothing more than the mere *possibility* of a thermal project at Eyehill Creek that was never guaranteed to proceed and that could be rendered economically impracticable through PCR's unilateral actions? The answer is no. IFP did not enter into any such contract. The relevant

contractual documentation here points to an inescapable truth. IFP owns, and has owned throughout the period of this dispute, a 20% working interest in *all of the oil and gas leases and other assets held by PCR* in Eyehill Creek.

[9] Therefore, I do not agree with the conclusion in the QB Reasons that IFP's interest in Eyehill Creek is limited to 20% of the oil and gas produced *only* from thermal and other enhanced recovery methods. For the reasons that follow, this appeal must be allowed.

[10] I begin by setting out certain background facts (Part II). I next identify certain key issues (Part III). I then discuss the standard of review with respect to contractual interpretation and explain why the standard of review, as it relates to both the meaning and application of the term "working interest", is correctness (Part IV). I next briefly review certain principles of contractual interpretation relevant to this appeal (Part V). This is followed by an analysis of the QB Reasons. I explain why the Trial Judge erred in concluding that IFP's interest is limited only to an interest in oil and gas derived from thermal and other enhanced recovery methods at Eyehill Creek and confirm that IFP is entitled to an accounting for its proportionate share of the net proceeds from primary production at Eyehill Creek. I also explain why IFP acted reasonably in refusing to consent to PCR's disposition to Wiser (Part VI). I then address the damages issue and outline why calculation of the net proceeds from primary production must be remitted to the Queen's Bench for determination (Part VII). The conclusion follows (Part VIII).

II. Factual Background

A. Setting the Scene

[11] The roots of the relationship between IFP and PCR pre-date the disputed contract.

[12] In the late 1980s and early 1990s, PCR's predecessor, CS Resources Limited (CS Resources) was a pioneer in exploiting heavy oil using horizontal wells. During this period, it had a business relationship with IFP's parent organization, IFP Energies Nouvelles, formerly known as the Institut Français du Pétrole (IFP France) which had technological expertise in petroleum research and development.

[13] In February, 1988, Société Nationale ELF Aquitaine Production (SNEAP), IFP France and CS Resources entered into a Technology Licensing Agreement (TLA) under which SNEAP and IFP France granted CS Resources a licence to use certain expertise and technical information relating to horizontal wells for the enhanced production of oil and gas (the "Technology") in return for a 3% gross overriding royalty on all lands held or acquired by CS Resources on which the Technology was used. CS Resources could terminate the TLA on 60 days written notice. SNEAP later assigned its rights to IFP France on April 3, 1990 and then on March 16, 1993, IFP France in turn assigned the rights to IFP.

[14] In addition, at the same time in 1993, IFP France and CS Resources entered into a Cooperation Agreement under which they agreed to extend their joint collaboration to other

technologies linked to the Technology. They agreed that any production of oil and gas by CS Resources using such other technologies would also be subject to the 3% gross overriding royalty in favour of IFP.

[15] By 1997, CS Resources was using the Technology and other technologies to produce oil and gas from certain properties and paying IFP the agreed upon 3% royalty. In July 1997, PCR acquired CS Resources and created the PCR Van Horne business unit to operate the merged heavy oil assets of PCR and CS Resources. At that time, PCR held a number of Crown oil and gas leases for Eyehill Creek. Two partners in PCR were EnCana Oil & Gas Developments Ltd. (formerly known as 592284 Alberta Ltd.) and PanCanadian Petroleum Limited (PCP). At the time the causes of action accrued, PCP was the managing partner of PCR. PCP was later succeeded by EnCana Corporation and the name of the PCR partnership was changed to EnCana Midstream and Marketing whose assets were later divided between EnCana Heritage Lands and EnCana Corporation. EnCana Heritage Lands was then itself wound up into EnCana Corporation which in 2009 was split into two companies, namely EnCana Corporation and Cenovus Energy. For convenience, I refer to PCR (the name of the original partnership) in these Reasons. This reference necessarily includes the relevant surviving partners.

[16] After taking control of CS Resources, PCR indicated to IFP a desire to terminate the TLA and redefine their relationship with the intention of jointly developing and implementing new technologies.

[17] One of PCR's heavy oil properties was Eyehill Creek (then sometimes referred to as the "North Bodo" property), located in Township 38, Range 1 W4M, Alberta. This lies just to the west of the border between Alberta and Saskatchewan. At one time, Eyehill Creek had been the site of primary production operations for extraction of oil. By the late 1990s, PCR no longer considered this conventional oil drilling economically viable and most of the 222 wells in the area had been shut-in. While PCR recognized that this was so, in January, 1998, its Van Horne business unit had identified a number of sections in Eyehill Creek as an attractive candidate for what was then a relatively new method of recovery for heavy oil. In particular, PCR believed that Eyehill Creek was well-suited for piloting an enhanced thermal recovery process known as steam-assisted gravity drainage (SAGD).

[18] SAGD is one of a number of thermal processes designed to achieve enhanced oil recovery (EOR). Its purpose is to recover oil which would otherwise not be recoverable through conventional methods such as primary production. In a traditional SAGD project, two horizontal wells are paired. One is drilled above the other. Steam is injected into the upper well. The steam makes the oil less viscous and the oil flows down towards the lower, producing well.

[19] In April, 1998, PCR proposed to IFP that it grant IFP a working interest in Eyehill Creek in consideration of IFP's terminating the royalty it received under the TLA.

[20] In May, 1998, at the joint request of PCR and IFP, Dobson Resource Management Ltd. (Dobson) carried out an independent economic evaluation of Eyehill Creek on which PCR and IFP

could rely in their forthcoming negotiations. Dobson's evaluation assumed that oil would be extracted from Eyehill Creek through a SAGD project.

B. Making the Deal

[21] Negotiations then took place between PCR and IFP. The evidence is incontrovertible that both parties came to the table with the desire to jointly pursue a SAGD project at Eyehill Creek. IFP's parent organization, IFP France, which has been in the oil and gas technology industry since 1944, brought a level of technological expertise and innovation that was matched by the level of PCR's expertise as an oil and gas site operator. IFP would have the opportunity to field test its thermal technologies, and PCR would be able to extract a far higher percentage of the oil from what PCR then considered a "dead" site. According to PCR's own senior reservoir and production engineer, Simon Gittins (Gittins), by that point PCR believed primary production was finished in Eyehill Creek and the field should be considered abandoned if production was limited to primary only: Appeal Record (AR) 1490/23-1491/8.

[22] The negotiations began with PCR's proposing that IFP be given a working interest in *thermal development only* at Eyehill Creek and ended with IFP's agreeing to a 20% working interest in *all development* at Eyehill Creek. By July 13, 1998, PCR and IFP had concluded a Memorandum of Understanding (MOU). As the Trial Judge found, the MOU redefined the relationship between PCR and IFP following termination of the TLA: QB Reasons at para 29. Under the MOU, PCR and IFP agreed to an asset swap. IFP would give up its 3% gross overriding royalty in exchange for PCR's granting IFP the "right" to "a 20% (twenty percent) working interest related to the development and production of oil and gas resources within all formations of the North Bodo area [Eyehill Creek], *whether such development and production is of a primary, assisted or enhanced nature*" [Emphasis added] (Extracts of Key Evidence (EKE), R45).

[23] Following conclusion of the MOU, the parties turned their attention to its implementation as they had agreed to do under Clause 4 of the MOU. That Clause provided that the parties would confirm the terms and conditions of the MOU in a "formal agreement" to be executed at October 31, 1998 at the latest "setting forth in detail the terms, provisions and conditions for the transactions" outlined in the MOU. This led to further negotiations to document in a formal agreement the terms and conditions in the MOU.

[24] In August, 1998, the month after execution of the MOU, PCR shared with IFP its preliminary plan for a thermal project at Eyehill Creek. It divided the project into two areas. An undepleted area was to be exploited first (south ½ of section 16, north ½ of section 9 and west ½ of section 20). The depleted area (referred to as depleted because this is where primary production had been undertaken) would be exploited later (north ½ of section 16, southwest 1/4 of section 21, southeast 1/4 of section 20 and northeast 1/4 of section 17). Sections 9, 17 and 21 were owned by PCR; sections 16 and 20 were Crown land. There were an estimated 29,000,000 barrels of original oil in place (OOIP) in the undepleted area and an estimated 32,000,000 barrels of OOIP in the depleted area (after roughly 3,000,000 barrels had been produced by primary production).

[25] PCR and IFP subsequently entered into a contract, effective as of October 26, 1998, implementing the terms of the MOU. IFP agreed to give up the 3% gross overriding royalty it held on a number of PCR-operated wells through the TLA. PCR and IFP agreed that, in exchange for IFP's giving up its gross overriding royalty – which IFP and PCR valued at $16,000,000, $14,800,000 of which IFP allocated to Eyehill Creek – IFP would be assigned, among other things, 20% of PCR's working interest in the petroleum and natural gas rights in Eyehill Creek.[3]

[26] The deal (Deal) made between PCR and IFP involves a number of agreements, four of which are critically significant. The first is the MOU.

[27] The second is a formal Asset Exchange Agreement (AEA), effective as of October 26, 1998. This master agreement sets out the business terms of the Deal under which IFP gave up its gross overriding royalty under the TLA in exchange for receiving a prescribed percentage of PCR's working interests in Eyehill Creek and another area called Pelican Lake, along with a royalty in one of the formations of Pelican Lake.

[28] Attached to the AEA as schedules are a number of agreements, one of which is the third agreement, a Joint Operating Agreement (JOA). The JOA, also effective as of October 26, 1998, is Schedule F to the AEA. The JOA details the operational rights and responsibilities of the parties with respect to the thermal project that PCR and IFP intended to pursue at Eyehill Creek. Two related terms of the JOA are important to highlight here. These are set out in the modified 1990 Canadian Association of Petroleum Landmen Operating Procedure (Operating Procedure) attached as Schedule B to the JOA.

[29] First, under Article 2401 of the Operating Procedure, if either PCR or IFP chose to sell their respective working interest to a third party, it was required to offer its co-owner a right of first refusal (ROFR) to buy out that interest before offering it to another potential buyer. Second, even if the co-owner to whom the interest was offered chose not to exercise its ROFR, the co-owner intent on disposing of its working interest to the third party could not do so without its co-owner's consent, which was not to be unreasonably withheld.

[30] The fourth agreement is a Technology Development Agreement (TDA), also effective as of October 26, 1998, under which the parties agreed to work together in the future to develop new oil and gas technologies.

[31] For convenience, I refer to the AEA, the JOA, the TDA and all other schedules to these agreements collectively as the "Contract".

C. PCR's Disposition of Its Working Interest in Eyehill Creek and Resulting Fallout

[3] Though nothing turns on this in terms of the dispute between PCR and IFP, another company, Enermark, held a working interest ranging from 3.625% to 7.25% on approximately two sections of land at Eyehill Creek.

[32] Within half a year of the Deal, heavy oil prices had fallen dramatically. Gas prices had risen. As time passed, the economics of a thermal recovery project at Eyehill Creek began to look poor to PCR. In addition, PCR was facing resource competition and leasing issues with a number of its other properties. This last point was unknown to IFP since PCR did not share this information with it.

[33] Also unknown to IFP was the fact that PCR had let a lease in Eyehill Creek lapse as of April 13, 2000. The Crown lease involved part of the lands in Eyehill Creek, the west half of section 20 (W20). This was one of the half sections in the undepleted area that PCR had identified as the first for a thermal project. A landman with PCR, Greg Sinclair (Sinclair), then attempted to salvage PCR's rights to W20 by filing a continuation application with Alberta Resource Development. But Alberta Resource Development advised on July 11, 2000 that the late application would not be accepted since the lease did not qualify for continuation under its late application rules. Had PCR applied prior to the lease having expired, there would have been less difficulty in having it renewed. Under the relevant regulation in force at the time, *Petroleum and Natural Gas Tenure Regulation*, Alta Reg 263/97, ss 14-17 (amended 11/2000), additional requirements apply where the application for continuation of a lease is not made until after the expiration of its term.

[34] As noted, PCR failed to notify IFP of its failure to renew the lease on a timely basis. PCR's failure to renew the lease triggered a chain of events that led to the Alberta Energy and Utilities Board's issuing abandonment notices to PCR for each of the 29 shut-in wells on the W20. Throughout this cascading series of events, PCR failed to comply with the requirement in the Operating Procedure to keep IFP informed of all matters relating to lease maintenance: see Article 309(b) of the Operating Procedure (EKE, A80). Thus, PCR did not give IFP copies of any of these notices. This was so despite the fact that PCR had previously complied with this obligation with respect to other more routine lease issues: see, for example, letter from Sinclair to IFP's general manager, Eric Delamaide (Delamaide), dated December 16, 1999 (EKE, A97). And it was so even though PCR was holding IFP's share of the Eyehill Creek Petroleum and Natural Gas Leases in trust: see JOA, clause 6 (EKE, A71).

[35] The abandonment notices required PCR to prove its right to produce from each well within 30 days, failing which PCR would have to abandon the wells. PCR did not prove any right to produce. This led in turn to the Crown's posting the W20 lease for sale. PCR bid only $1800. The Wiser Oil Company of Canada bid more than $1 million and it acquired the W20 lease in November, 2000. (A related company, The Wiser Oil Company, is a body corporate incorporated under the laws of Delaware and extra-provincially registered in Alberta. In these Reasons, I refer to The Wiser Oil Company of Canada and The Wiser Oil Company collectively as "Wiser"). IFP knew nothing about any of these developments either, including the Crown's posting of the W20 lease for sale or the fact that PCR intended to bid only $1800 for the W20 lease.

[36] In the meantime, on August 31, 2000, Alberta Resource Development had issued further notices to PCR that two of its Crown leases within Eyehill Creek were no longer eligible for continuation. The first lease related to part of section 16 and the second to part of section 20. These

notices informed PCR that it had one year from the date of the notices to provide evidence satisfying Alberta Resource Development that the lands in question were capable of producing petroleum or natural gas in paying quantities. Failing this, the rights subject to the notices would expire and the leases would be amended accordingly. These notices required PCR to have one economically producing well per spacing unit within the one year period. IFP was unaware that Alberta Resource Development had issued these notices because, yet again, PCR, in breach of its contractual obligations, failed to inform IFP of this development.

[37] By December, 2000, the month following the Crown's sale of the W20 lease to Wiser and just over two years following completion of the Deal, PCR had entered into talks to farmout its 80% working interest in Eyehill Creek to Wiser. This too was unknown to IFP. In fact, it was not until February, 2001 that IFP received informal notice that PCR was planning on entering into a farmout agreement with Wiser. This occurred when PCR gave IFP's Delamaide a draft copy of the proposed letter agreement between PCR and Wiser.

[38] In March, 2001, PCR and Wiser executed a letter agreement (Letter Agreement) setting out the terms under which Wiser would "earn" PCR's working interest in Eyehill Creek. Unlike most farmout agreements, Wiser was not required to drill wells to earn PCR's interest. Instead, it was to assume responsibility for the abandonment and reclamation costs of existing primary wells in Eyehill Creek. The Letter Agreement expressly stated that PCR was acting on behalf of all working interest owners, including IFP.

[39] Wiser planned to reactivate some existing wells and drill new ones on the site to exploit Eyehill Creek using primary production methods. It was particularly interested in targeting sections 9 and 16 – the very sections (the north ½ of 9 and the south ½ of 16) that PCR had identified as ideal for a SAGD thermal project. At this point, it is important to stress that primary production and SAGD cannot practically be physically undertaken on a site at the same time, a point which would have been well known to both PCR and IFP throughout.

[40] Finally, on April 19, 2001, in accordance with the JOA, PCR formally sent IFP a ROFR Notice confirming that PCR and Wiser had concluded the Letter Agreement and were in the process of finalizing a formal Abandonment Reclamation Option Agreement (ARO) to be effective as of January 1, 2001. The ARO was eventually entered into on May 18, 2001.

[41] On May 4, 2001, PCR (through Sinclair) sent a letter to the attention of Delamaide at IFP, purportedly on behalf of Wiser, seeking clarification of IFP's interest in Eyehill Creek. In the letter, Sinclair invited IFP to confirm that it owned nothing more than a 20% interest in "petroleum substances produced by means of thermal or enhanced recovery schemes or mechanisms and operations in relation thereto". In fact, Sinclair went so far as to request that IFP acknowledge that it would have "no right ... to receive information" about Wiser's operations: EKE, A127-128. Delamaide referred to this communication as the "ugly letter": AR 107/12-14.

[42] As a research and technology company, IFP was apparently in no position to take on the operations at Eyehill Creek on its own. Nor could it reasonably locate another thermal project

partner within the ROFR's 30 day deadline. More fundamentally, IFP was concerned that the primary production Wiser planned would render any future SAGD project on the lands economically impracticable. As the evidence at trial confirmed, conducting primary production on a site negatively impacts the practical and economic viability of thermal extraction for various reasons. Therefore, on May 9, 2001, IFP notified PCR that it waived the ROFR in favour of IFP and it also confirmed that it refused to consent to PCR's disposition to Wiser.

[43] Despite IFP's refusal to consent, PCR and Wiser entered into the formal ARO on May 18, 2001. As the Trial Judge found, under the terms of the ARO, PCR no longer purported to act on IFP's behalf. Since IFP had refused to consent to PCR's disposition to Wiser, PCR agreed in the ARO to indemnify Wiser from any liability of Wiser to IFP. This being so, PCR is responsible for any liability imposed on Wiser, whether to account for the net revenue Wiser has realized from primary production at Eyehill Creek or otherwise.

[44] Wiser completed its abandonment and reclamation program at the end of 2003. In the meantime, PCR formally assigned its petroleum and natural gas rights and surface rights to Wiser effective January 1, 2003.

[45] Wiser extracted petroleum and natural gas from Eyehill Creek using only primary production methods. Wiser did not keep IFP notified of any steps taken with respect to any of the leases at Eyehill Creek or otherwise. Wiser's stated excuse for not doing so: it was not asked to keep IFP informed of the steps taken at Eyehill Creek: see evidence of Wiser employee, Robert Pankiw (Pankiw), at AR 1789/23-41.

[46] On March 4, 2003, after IFP was unsuccessful in its attempts to resolve this matter with PCR, IFP filed a statement of claim for breach of contract. IFP sought $45 million in damages for breach of contract and lost opportunity, or alternatively, an accounting for 20% of the net revenue from primary production conducted at Eyehill Creek by Wiser and Wiser's successor, Canadian Forest Oil Ltd. (Canadian Forest).[4]

[47] Canadian Forest acquired Wiser's interests in November, 2004 and has continued to produce petroleum and natural gas from Eyehill Creek using only primary production methods. And like Wiser, Canadian Forest did not keep IFP informed of its operations, pending lease expiries or related matters. Canadian Forest's stated excuse: it understood that IFP was not a working interest owner in primary production operations: see evidence of Canadian Forest employee, Craig Seal, at AR 1726/8-11, 36-40; 1728/38-1729/5. Wiser employee Pankiw seemed to have the same understanding: AR 1765/39-1766/6; 1770/11-14.

D. The Trial Decision

[4] Canadian Forest Oil Ltd., a body corporate incorporated under the laws of Alberta, is a corporate successor to The Wiser Oil Company of Canada.

[48] The original trial judge, who heard the 33-day trial between January and June, 2011 passed away in the spring of 2014 before rendering judgment. Under Rule 13.1 of the Alberta *Rules of Court*, Alta Reg 124/2010, the Trial Judge took conduct of the case. The parties agreed that the matter could be decided based on the written record rather than proceeding with a new trial.

[49] In the QB Reasons, the Trial Judge provided a detailed analysis of the complex evidence in this case. The Trial Judge ultimately held that IFP's 20% working interest was limited to thermal and other enhanced recovery methods at Eyehill Creek. This was based on the conclusion that the AEA lacked a definition of working interest that the JOA and Operating Procedure provided.

[50] The reasoning path to this conclusion may be summarized as follows. The parties did not define in the AEA what was meant by "working interest". The preamble to the AEA referred to the parties' working interests being subject to the terms of the JOA, incorporated by reference into the AEA. The JOA's definition of working interest, taken from the Operating Procedure, is "... the percentage of undivided interest held by a party in a production facility on the joint lands, ... which percentage is as provided in the [JOA]..." The JOA set out at Clauses 4(c) and 5 that the parties' respective working interests (IFP - 20%; PCR - 80%) relate to thermal and enhanced recovery operations only. Thus, IFP's working interest in Eyehill Creek was limited to thermal and other enhanced recovery methods only. This being so, there was no inconsistency between the terms and conditions of the AEA and the JOA. As a consequence, IFP had no entitlement under the Contract to any of the proceeds of primary production at Eyehill Creek.

[51] The Trial Judge also determined that it was unreasonable for IFP to object to PCR's farmout agreement with Wiser. The proffered rationale – Wiser was proposing to do no more than PCR was already entitled to do under the Contract. That is because of the findings that neither the AEA nor the JOA imposed any obligations on PCR to (1) initiate a SAGD operation at Eyehill Creek; or (2) refrain from primary production at Eyehill Creek. Accordingly, on this reasoning, PCR's transfer to Wiser did not change the *status quo*. By restarting primary production, Wiser was doing no more than PCR already had a right to do under the Contract.

[52] The Trial Judge went on to find that even if there had been a contractual breach, IFP suffered no loss of opportunity because PCR's and Wiser's actions did not render a thermal or enhanced recovery operation "impossible" at Eyehill Creek. The Trial Judge acknowledged that the benefits of IFP's working interest may be more expensive to realize and that there was now less oil in the ground. However, improved technologies meant that the site's SAGD potential was not "destroyed". The Trial Judge then determined that a potential damages award could not be properly calculated due to what was viewed as limited evidence and a flawed damages model as to the incremental costs of any future thermal development. Therefore, no award was made.

[53] The Trial Judge also held that, even if a damages award were made, the amount should be discounted by 100%. He reasoned that after IFP received news of PCR's agreement with Wiser, IFP did not try to stop the sale. Nor did it undertake any internal processes to advance a thermal project, turn to its French parent for funding for a thermal project, or seek out another operational partner. All of this led to his finding that there was zero likelihood of a thermal development at

Eyehill Creek within the time frame considered determinative, that is "within a reasonable time" of the alleged breach of contract.

[54] The Trial Judge concluded that since IFP had unreasonably refused its consent to the Wiser disposition, PCR did not breach the consent requirement found in the JOA and Operating Procedure. Therefore, PCR was entitled to proceed with the farmout and Wiser was novated into the original agreements between IFP and PCR. As for IFP, it retained its 20% working interest only in thermal and other enhanced recovery operations at Eyehill Creek.

[55] In the result, the Trial Judge determined that the Contract was at odds with what he considered to be IFP's unilateral expectations with respect to (1) the nature of its working interest in Eyehill Creek; and (2) PCR's obligations not to engage in primary production. He declined to award any damages on the basis that this would be giving IFP "a better set of contracts conferring rights" than IFP had negotiated: QB Reasons at para 407. Therefore, IFP's claim was dismissed in its entirety.

III. Grounds of Appeal

[56] IFP advanced six broad grounds of appeal, which I would reduce to four. IFP contended that the Trial Judge erred in concluding that:

> 1. The Contract gave IFP a 20% working interest in oil and gas produced only from thermal and other enhanced recovery methods at Eyehill Creek;
>
> 2. IFP is not entitled to an accounting for the net revenue realized from primary production at Eyehill Creek;
>
> 3. IFP unreasonably refused to consent to PCR's disposition to Wiser; and
>
> 4. Even if it was reasonable for IFP to withhold its consent, IFP suffered no loss and even if it did, that loss should be discounted by 100%.

IV. Standard of Review

A. Governing Law

[57] At issue on this appeal is the Trial Judge's interpretation of the Contract between PCR and IFP. The current law on contractual interpretation requires that appellate courts accord a high degree of deference to a trial judge's particular interpretation of a contract. Because this usually involves findings of fact or mixed fact and law, the interpretation is reviewed for reasonableness: ***Sattva***, *supra* at paras 50-52; ***Heritage Capital Corp. v Equitable Trust Co.***, 2016 SCC 19 at paras

21, 24, [2016] 1 SCR 306 [***Heritage***]. However, if a contractual interpretation issue involves an extricable question of law, it will be reviewed for correctness: ***Sattva***, *supra* at para 53; ***Heritage***, *supra* at para 22.

[58] One error of law reviewed for correctness is where the trial judge fails to consider the "surrounding circumstances" or "factual matrix" of a contract. A trial judge must consider the factual matrix in interpreting a contract regardless of whether the contract is ambiguous. Therefore, it is an error for a trial judge to discount the factual matrix on the basis that the contract itself is not ambiguous: ***British Columbia (Minister of Technology Innovation and Citizens' Services) v Columbus Real Estate Inc.***, 2016 BCCA 283 at paras 40, 51, 402 DLR (4th) 117; ***Starrcoll Inc. v 2281927 Ontario Ltd.***, 2016 ONCA 275 at paras 16-17, 68 RPR (5th) 173.

[59] Providing that the trial judge has not erred in law in the approach to the factual matrix, whether a contract is ambiguous is reviewed for palpable and overriding error: ***Bighorn (Municipal District No. 8) v Bow Valley Waste Management Commission***, 2015 ABCA 127 at para 9, 599 AR 395 [***Bighorn***].

[60] Where a standard form contract is involved, the standard of review that applies to its interpretation is usually correctness: ***Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.***, 2016 SCC 37 at paras 4, 24, 46, 48, [2016] 2 SCR 23 [***Ledcor***]. As the Supreme Court noted, these are highly specialized contracts typically sold widely to customers without negotiation of their terms and their interpretation could affect a large number of people. As a result, it would be undesirable for courts to interpret identical standard form provisions inconsistently.

[61] By analogy, this reasoning applies with equal force to legal terms of art which have a common meaning to participants in a given industry. In such event, there is no identified need to define what such terms mean. Participants in the oil and gas industry rely on the commonly accepted usage of many terms: see, for example, the Glossary of Land Terms published by the Canadian Association of Petroleum Land Administration (CAPLA): CAPLA, "Glossary of Land Terms 2016", *NEXUS* (September 2016) 9 at 15.[5] "Working interest" is one of them. Since this term has an accepted meaning and usage in this sector, and its interpretation has precedential value, it must therefore be interpreted consistently. Thus, where the issue involves the meaning of a legal term of art – in this case, "working interest" as used in the oil and gas industry – the standard of review with respect to the meaning of that term is correctness.

[62] While a legal term of art may be modified by the parties to an agreement, that does not permit a trial judge to ignore the meaning attributable to it in the absence of such modification. To do so is tantamount to failing to take into account a key term of a contract or relevant factor or ignoring applicable principles and governing authorities. That, in turn, is a question of law reviewable for correctness: ***Sattva***, *supra* at para 53; ***Deslaurier Custom Cabinets Inc. v 1728106***

[5] See online: <http://caplacanada.org/wp-content/uploads/2016/09/2016_Sept_NEXUS.pdf>.

Ontario Inc., 2017 ONCA 293 at paras 65-68. Accordingly, a trial judge's failure to recognize that a legal term of art has a certain meaning is, by itself, an error of law reviewable for correctness. That is what happened here.

[63] Admittedly, not all errors of law are created equal. The legal error must relate to a material issue in the dispute which, if decided differently, would have affected the result of the case. However, there is no doubt that the error of law here – failing to recognize that the term "working interest" has a specific meaning in the oil and gas industry – adversely compromised the analysis of the nature and extent of the interest that IFP acquired from PCR in Eyehill Creek.

[64] Moreover, even where reasonableness is the standard of review, the law does not countenance a free-for-all in contractual interpretation where anything goes and everything slides easily under the deference bar. The objective application of established principles of contractual construction may well lead to a situation where there is, as with an administrative tribunal's interpretation of a statute, only one reasonable interpretation: ***McLean v British Columbia (Securities Commission)***, 2013 SCC 67 at para 38, [2013] 3 SCR 895.

[65] In deciding what the parties to a contract intended, a practical, common-sense approach is called for: ***Sattva***, *supra* at para 47. Courts should not sanction interpretations disconnected from economic reality, much less from a contracting party's obligation to act honestly and in good faith. Not only are these legitimate considerations in their own right, but if not followed, companies will be highly motivated to take their disputes out of the courts and into the private sector for resolution. Admittedly, this is already occurring in Canada. But the standard of review ought not be the catalyst for pushing more contractual disputes out of the public domain. When companies vote with their feet, this is ultimately hurtful to the evolution of the common law. And how ironic too were this to occur because of a standard of review designed to ensure that courts are not unduly overburdened.

B. Why Standard of Review Should Not Be Correctness for All Issues

[66] Despite the established law on standards of review, IFP has invited this Court to apply a correctness standard of review to *all* the issues on appeal. It has done so based on the unusual circumstances of the trial proceedings. In its view, the Trial Judge's decision was the result of a flawed process, exacerbated by delay. Thus, it argues that the three policy reasons justifying a "reasonableness" standard of review, as set out by the Supreme Court in ***Housen v Nikolaisen***, [2002] 2 SCR 235, 2002 SCC 33 [***Housen***], do not apply here.

[67] In particular, IFP submits that (1) there is no concern that applying the correctness standard will result in an increased number of appeals due to this case's unusual circumstances; (2) there is no need to preserve the integrity of the trial proceedings here as they have already been compromised by delay; indeed, the only way to preserve confidence in the judicial system is for a reconsideration of the issues; and (3) the Trial Judge enjoyed no advantageous position compared to this Court since his decision was made only on the basis of a written record.

[68] IFP's argument cannot succeed. I offer five reasons for this conclusion.

1. Recognizing the Purpose of Appellate Review

[69] By advocating a correctness standard of review, IFP is essentially asking for a re-trial, again on the record, but this time by this Court. However, appellate review is not meant to be a duplication of effort by judicial actors with little, if any, improvement in the quality of justice delivered: ***Housen***, *supra* at para 16; Roger P Kerans & Kim M Willey, *Standards of Review Employed by Appellate Courts*, 2nd ed (Edmonton: Juriliber, 2006) at 24 [Kerans & Willey].

[70] The trial itself was long and complex. It took approximately six weeks and included an information session at the Alberta Energy Research Core Laboratory. Twenty-five witnesses were called (including 12 experts), and over 600 exhibits were entered (including many highly technical reports). If a correctness standard of review were followed for all issues, this Court would be duplicating the Trial Judge's work entirely by re-examining the numerous volumes of transcribed testimony and documentary evidence. There is no basis to believe this would actually result in any net enhancement to the administration of justice.

2. Recognizing the Jurisdiction of Appellate Courts

[71] Restrictions on appellate review are not simply matters of polite deference but of jurisdiction. Deference to fact findings is a rule of law: ***Hodgkinson v Simms***, [1994] 3 SCR 377 at 426, 117 DLR (4th) 161. The role of appellate courts is to ensure the consistency of the law: ***Sattva***, *supra* at para 51. Not all issues in this appeal fall into this category.

3. Recognizing the Expertise of Trial Judges and Their Advantageous Position

[72] Trial judges are often better situated to make factual findings due to their extensive exposure to the evidence, their advantage of hearing testimony *viva voce*, and their overall familiarity with a case: ***Housen***, *supra* at para 18. IFP argues that this Court is in the same position to make findings as the Trial Judge since the decisions of both courts will be based on a written record. The implication is that the Trial Judge enjoyed no advantageous position with respect to fact-finding that justifies deference. However, deference is based on more than simply situational advantage. A trial judge's primary role is to weigh and assess the often-lengthy volumes of testimony and exhibits in a case. A trial judge's considerable expertise in the art of judicial gold-panning should be respected.

[73] Moreover, the process the parties all agreed to here is analogous to a summary proceeding. And deference applies in summary proceedings even where decisions may be based only on documentary evidence and the trial judge heard no evidence: ***Housen***, *supra* at paras 19, 24-25; ***Attila Dogan Construction and Installation Co. Inc. v AMEC Americas Limited***, 2015 ABCA 406 at para 9, 609 AR 313; ***1216808 Alberta Ltd. (Prairie Bailiff Services) v Devtex Ltd.***, 2014 ABCA 386 at para 24, 247 ACWS (3d) 348; ***FL Receivables Trust 2002-A v Cobrand Foods Ltd.***, 2007 ONCA 425 (CanLII) at paras 44-46, 85 OR (3d) 561. Therefore, the process followed does

not, by itself, justify a correctness standard of review for all issues.

4. Promoting the Autonomy and Integrity of Trial Proceedings

[74] A key presumption underlying our judicial system is that a just and fair outcome will result from the trial process: ***Housen***, *supra* at para 17. IFP argues that this presumption of fairness does not apply in this case. It contends that excessive delay and the original trial judge's inability to make a decision have compromised these proceedings to the point that a comprehensive hearing and reconsideration of the issues is required to preserve confidence in the judicial system.

[75] But this overlooks the fact that IFP, knowing what had transpired with the original trial judge, nevertheless made a calculated decision, along with the other parties, to let the Trial Judge take conduct of this case under Rule 13.1. The existence of Rule 13.1 is itself an acknowledgement that trial proceedings may not always go as planned, and that courts of first instance are still competent to decide the cases before them even if there is a change in judges. Otherwise, such situations would lead to an automatic appeal or retrial. As events unfolded in this case, the parties were provided with a process akin to a retrial but without having to repeat the considerable investment of time and resources already expended. It was their decision to make whether to opt for this process. All did, including IFP. This should not be taken as a criticism; it is perfectly understandable why all parties agreed to this process.

[76] Further, IFP's procedural objections about delay and a flawed process have not displaced the presumption that the Trial Judge followed and respected his obligation to decide issues independently and impartially. No one has alleged that the Trial Judge was anything but fair and impartial in the way he conducted the proceedings. Thus, while delay was a legitimate concern in this case, it did not render the Trial Judge's decision unjust. Nor did it void the integrity of the trial process.

5. Limiting the Number, Length and Cost of Appeals

[77] A key concern of our judicial system is to encourage the fair and just resolution of claims in a timely and cost-effective way. In many respects, standards of review are an effective "case-management device" that appellate courts use to regulate workloads and ensure the efficacy of the courts: Kerans & Willey, *supra* at 32. IFP argues that applying a correctness standard in this case is not likely to increase the overall number of appeals to this Court given the specific fact scenario involved. But this argument fails to recognize that inconsistent application of standards of review encourages parties to file more appeals questioning the appropriate standard. This frustrates the efficacy of the appeal process and diverts the focus from the merits of a case.

[78] Therefore, for all these reasons, despite the unexpected and undesirable course of these proceedings, there is no principled justification to apply a correctness standard of review to all issues before this Court. The existing law on standards of review governs.

V. Principles of Contractual Interpretation

A. Goal of Contractual Interpretation

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

1. Requirement to Consider Factual Matrix

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

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

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

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

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

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

2. Admissibility of Parol Evidence to Resolve Ambiguity

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

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

3. Interpreting Commercial Contracts

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

B. Conclusion

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

VI. Analysis

A. Overview of IFP's Interest in Eyehill Creek

[90] Following a careful and comprehensive review of the QB Reasons and all relevant documentation, I have concluded that the Trial Judge erred in concluding that the Contract gave IFP a 20% interest in thermal and enhanced recovery methods only at Eyehill Creek. In my view, the Contract reveals that PCR agreed to transfer, and did transfer, to IFP 20% of PCR's working interest in all the assets held by PCR in Eyehill Creek, including both Crown oil and gas leases and leases that PCR held freehold. I have further concluded that the JOA did not reduce or limit IFP's working interest. Accordingly, IFP is entitled to an accounting for 20% of the net revenue realized by Wiser through primary production at Eyehill Creek.

[91] The conclusions in the QB Reasons to the contrary stem from a number of errors of law and mixed fact and law which, individually and collectively, took the Trial Judge down an indefensible path never intended by the parties. Untangling these several errors is difficult in part because of the overlap amongst them and because one error then led to other errors, and eventually, the tangled thicket looks impenetrable.

B. Relationship Between AEA and Subsidiary Agreements

[92] Before explaining the various errors, a critical point must be stressed. While it is a given that a contract must be interpreted as a whole, the AEA is nevertheless the dominant agreement concluded between PCR and IFP. Article 1.5 of the AEA expressly provides:

> There are appended to this Agreement the following schedules .... [Schedule "F" is the JOA] Such schedules are incorporated herein by reference as though contained in the body hereof. Wherever any term or condition of such schedules *conflicts or is at variance with*

> *any term or condition* in the body of this Agreement, such term or condition in the body of this Agreement *shall prevail*. [Emphasis added]

[93] It is easy to understand why there was a felt need by the parties to include this mandatory requirement in the Contract. The complexity of the Contract was such that it would have been obvious to all that, in proceeding to implement the MOU, a number of subsidiary agreements would be required in addition to a master agreement, some of which would be standard form contracts of general application only.

[94] In the end, the Contract included the AEA and five subsidiary agreements attached as Schedules. In addition, a number of the Schedules themselves had more agreements attached, making for a total of 17 agreements in the Contract.[6] All this being so, it is self-evident why the parties took steps to ensure that the AEA as the master agreement contained an express provision that if there was any conflict or variance between the AEA and subsidiary agreements, the AEA would prevail. Prudence dictated the inclusion of this provision in the AEA – and for good reason.

[95] Against this backdrop, I now turn to the errors in the QB Reasons.

C. Reviewable Errors in the QB Reasons

1. Failure to Take into Account Relevant Terms in the AEA

(a) Failure to Recognize the Legal Meaning of "Working Interest"

[96] The problems with the contractual analysis began right from the start. If the starting point is wrong, it is easy to understand why the end point likely will be too. The AEA refers to PCR's conveying to IFP 20% of PCR's "working interest" in the PCR Eyehill Creek Assets. "Working interest", as that term is used in the AEA, has a specific legal meaning. Unfortunately, the Trial Judge failed to recognize this. By itself, this constitutes a reviewable error of law. The Trial Judge then compounded this error by wrongly using the fact that the parties had not expressly defined the meaning of "working interest" in the AEA to disregard, in their entirety, the textually explicit conveyance articles in the AEA.

[97] Article 1.1(t) of the AEA defines the "PCR Eyehill Creek Assets" that PCR transferred to IFP as "an undivided interest equal to 20% of the working interest of PCR... in and to: (i) the PCR Eyehill Creek Petroleum and Natural Gas Rights; and (ii) the PCR Eyehill Creek Miscellaneous Interests." Yet the Trial Judge went on to conclude as follows at para 97 of the QB Reasons:

> I find that IFP's working interest pursuant to these

[6] Some were duplicates. Excluding the duplicates which still required attention paid to relevant details, the total number was 11.

> agreements has always been limited to thermal and other enhanced recovery methods. I find the AEA did not grant broad rights that were subsequently reduced or modified by the JOA, as assumed by both the Plaintiff and the Defendants. *The AEA does not define the term working interest*. [Emphasis added]

[98] It is true that the AEA does not expressly define the term "working interest". But that is unnecessary, indeed irrelevant, in the circumstances here since "working interest" is a legal term of art. On this point, the law is clear that a "working interest" in relation to mineral substances *in situ* is a particular kind of property right or interest in land. When the owner of minerals *in situ* (the Crown in this case) leases the right to extract these minerals (here to PCR), the right to extract is known as a "working interest": see ***Bank of Montreal v Dynex Petroleum Ltd.***, [2002] 1 SCR 146, 2002 SCC 7 at para 2 [***Dynex***]. This particular kind of interest in land is also commonly called a "*profit à prendre*", which allows a party to enter land and take a resource for profit: ***Dynex***, *supra* at para 9; ***Alberta Energy Company Ltd. v Goodwell Petroleum Corporation Ltd.***, 2003 ABCA 277 at para 63, 339 AR 201; John Ballem, *The Oil and Gas Lease in Canada*, 4th ed (Toronto: University of Toronto Press, 2008) at 15; see also ***Orphan Well Association v Grant Thornton Limited***, 2017 ABCA 124 at paras 32, 131. Therefore, simply stated, "working interest" constitutes the *percentage of ownership* that an owner has to explore, drill and produce minerals from the lands in question.

[99] This meaning also happens to be consistent with the American definition of "working interest" as "the exclusive right to exploit the minerals on the land": see Howard Williams & Charles Meyers, *Manual of Oil and Gas Terms*, 8th ed (New York: Matthew Bender & Company, 1991) at 1377.

[100] When PCR signed leases with the Crown to extract petroleum substances from the lands included in Eyehill Creek, it obtained a 100% working interest in those oil and gas leases with the sole right to extract the resources therein.[7] Therefore, when PCR in turn agreed to dispose of 20% *of its working interest* in Eyehill Creek to IFP, that "working interest" constituted a proportionate share of PCR's right to extract the minerals under the oil and gas leases, whether Crown or freehold, that it held in Eyehill Creek, irrespective of the method of extraction.

[101] While a working interest may be limited to a specific zone or mineral, a "working interest" in minerals does not contemplate the right to profit from resource extraction being limited to, or dependent upon, a specific method of extraction. Accordingly, where contracting parties limit recovery of minerals conveyed *to a particular method of extraction only*, the party receiving that truncated right would not receive a true "working interest" in the minerals.

[7] This would of course be subject to the proviso that PCR was not a joint lessee of the subject leases. It must also be noted that PCR did dispose of a small part of its working interest to Enermark.

[102] It takes but a moment of reflection to realize the difficulties a contrary view would entail. It is important to understand these difficulties because they explain and underscore why a true working interest in oil and gas cannot be limited to a specific method of extraction. If a working interest were contingent on the method of extraction, that would mean that where one party had the right to extract oil on certain lands through thermal production and another through primary production, two *different parties* would then be claiming rights to the *same barrels of oil*. This makes no sense practically or economically.

[103] While more oil can be extracted through thermal production, the reality is that both methods involve extracting some of the same barrels of oil. Therefore, were two parties to be given rights to oil in the same property based on the method of extraction, the level of complexity this would necessarily engender, including how to handle competing claims to the same barrels of oil, would all need to be addressed. Many issues would require resolution, beginning with the most obvious. Who gets to extract the oil first – the party using primary production or the one using thermal production? After all, the answer cannot be based on who wins a footrace to the lands. If it were, the party doing primary production would invariably win given the lesser costs that this entails. Moreover, it is unclear how a right limited to receiving proceeds from a certain method of extraction only could possibly qualify as a property right in minerals when there is no "property" to which the right to share in proceeds of production might ever attach.

[104] Nevertheless, even assuming for the sake of argument that contracting parties could in theory restrict a "working interest" in minerals to a particular method of extraction, PCR and IFP did not do so in the AEA. While parties to a contract are free to deviate from a legal term of art, there is nothing in the AEA that indicates any intention by the parties to depart from the legal meaning of a "working interest". To the contrary. To be absolutely precise, the AEA does not purport to limit the working interest that PCR conveys to IFP to oil and gas produced from thermal and other enhanced recovery methods. The word "thermal" is not even mentioned in the AEA, not once, not ever. Nor are the words "enhanced recovery methods". Finally, and tellingly, the working interest conveyed to IFP is defined as "20% of the working interest *of PCR*". No one has ever suggested that PCR's working interest in Eyehill Creek was limited to oil and gas produced only through thermal and other enhanced recovery methods.

[105] Thus, when PCR and IFP concluded the AEA, both would have understood – and intended – that the term "working interest" means what that term is understood to mean at law when they agreed that PCR would convey to IFP *20% of PCR's working interest* in Eyehill Creek. In failing to recognize the legal meaning of "working interest", the Trial Judge erred in law.

(b) Disregarding the Substantive Provisions in the AEA

[106] The Trial Judge also disregarded the clear, compelling textual wording of the substantive provisions in the AEA. That textual wording explicitly confirms the parties' understanding and intention – and in no uncertain terms. It expressly provides that PCR transferred to IFP 20% of PCR's working interest in all the assets defined therein. The key Article, Article 2.1 of the AEA, provides as follows:

> PCR hereby agrees to sell, assign, transfer, convey and set over to IFP, and IFP hereby agrees to purchase from PCR, *all of the right, title, estate and interest of PCR* (whether absolute or contingent, legal or beneficial) *in and to the PCR Assets* ..., all subject to and in accordance with the terms of this Agreement. [Emphasis added]

[107] "PCR Assets" are defined in turn under Article 1.1(s) of the AEA, as meaning, amongst other things, the "PCR Eyehill Creek Assets". Article 1.1(t) defines "PCR Eyehill Creek Assets" as follows:

> "PCR Eyehill Creek Assets" means an *undivided interest equal to 20% of the working interest of PCR*, as and at the date hereof as more particularly described in [a land schedule], in and to:
>
> (i) the PCR Eyehill Creek Petroleum and Natural Gas Rights; and
>
> (ii) the PCR Eyehill Creek Miscellaneous Interests." [Emphasis added]

[108] Following these definitions through to the end, "PCR Eyehill Creek Petroleum and Natural Gas Rights" is defined in Article 1.1(x) to mean: "the interests set out in Exhibit 2 to Schedule "B-4" under the heading "Petroleum and Natural Gas Rights." Exhibit 2 attached to Schedule "B-4" lists title documents, including both petroleum and natural gas rights, and the joint lands to which they pertain. Hence, PCR's intention to convey to IFP 20% of PCR's working interest in all of these oil and gas rights is straightforward and explicit. The same holds true for the PCR Eyehill Creek Miscellaneous Interests. These Interests are defined in Article 1.1(w) to mean "all property, assets, interests and rights pertaining to the PCR Eyehill Creek Petroleum and Natural Gas Rights". This includes contracts and agreements relating to those rights, such as "gas purchase contracts" or "processing agreements".

[109] The wording and meaning of these comprehensive and unequivocal provisions could not be more clear-cut. PCR sold and transferred to IFP a recognizable interest under property law – an undivided interest as a tenant in common equal to *20% of PCR's working interest* in the PCR Eyehill Creek Petroleum and Natural Gas Rights (which included Crown leases) and in the PCR Eyehill Creek Miscellaneous Interests (which included other assets that PCR held in Eyehill Creek), as both terms are defined in the AEA. In other words, when PCR conveyed to IFP 20% of PCR's working interest in the PCR Eyehill Creek Assets, PCR transferred the right to recover 20% of PCR's *entire interest* in the PCR Eyehill Creek Petroleum and Natural Gas Rights, *irrespective of the method of extraction used for recovery*. This is a case in which the textual wording of the AEA admits of no other reasonable conclusion. And yet, the Trial Judge disregarded the key conveyance provisions in the AEA. This too was a fatal error.

(c) Improper Reliance on Preamble Clause in the AEA

[110] Nor does anything in the preamble clauses in the AEA change the meaning of "working interest" in the AEA. But the Trial Judge relied on the second preamble to the AEA in deciding that the meaning of the "working interest" is defined only in the JOA. That preamble reads as follows:

> AND WHEREAS following Closing IFP and PCR shall each own working interests in and to the PCR Lands, *which shall be operated by PCR* for and on behalf of PCR and IFP, all subject to and in accordance with the terms and conditions of the Joint Operating Agreements described in section 2.9 hereof; [Emphasis added]

[111] To rely on this provision to justify looking only to the JOA for a definition of "working interest" also constitutes reviewable error. The subject preamble has nothing to do with the respective ownership interests of PCR and IFP. It addresses the fact the parties agreed that the *operation* of the PCR Lands, not their *ownership*, was to be "subject to and in accordance with" the JOA (and two other joint operating agreements attached as schedules to the AEA). Moreover, in any event, for reasons detailed below, the JOA does not modify or vary the meaning of "working interest" in the AEA.

[112] In summary, the Trial Judge erred in law in (1) failing to recognize that "working interest" is a legal term of art with a specific meaning in the oil and gas industry; (2) disregarding in their entirety the clear, compelling substantive provisions in the AEA relating to the 20% of PCR's working interest that PCR conveyed to IFP; and (3) wrongly relying on a preamble provision in the AEA to trump its substantive textual provisions. This led the Trial Judge into further errors discussed below and in the end, it led him to an interpretation of the Contract that would give IFP not only an interest incompatible with the parties' objective intentions but one incompatible with the law on working interests in the oil and gas industry.

2. Failure to Consider Factual Matrix

[113] The Trial Judge found that the JOA, and in particular Clause 4(c), was determinative of the nature and extent of IFP's working interest in Eyehill Creek. In so finding, however, the Trial Judge failed to consider surrounding circumstances on the basis the Contract was not ambiguous. This interpretive approach constitutes a reviewable error of law. Regardless of whether any such ambiguity existed, the surrounding circumstances ought to have been taken into account. Had they been, it would have been apparent that the JOA was not intended to – and did not – limit IFP's working interest in Eyehill Creek.

(a) Admissible Facts Relating to Surrounding Circumstances

[114] Evidence of the negotiations between the parties and the MOU leading up to the conclusion of the AEA and related documentation are critical to understanding *the genesis and aim* of the

Contract, including the JOA in particular. But the Trial Judge failed to put these on the interpretive scale. Indeed, the MOU was expressly taken off it.

[115] The incontrovertible facts, as revealed in the supporting documentary evidence, confirm that PCR and IFP agreed, following negotiations between the parties, that IFP would receive 20% of PCR's working interest in all development in Eyehill Creek. That agreement, documented in the MOU, did not limit IFP's interest in Eyehill Creek to thermal or enhanced production only. Indeed, the exact opposite is so. This is patently clear from the MOU.

[116] The unchallenged background facts are these.

April, 1998	PCR proposed Eyehill Creek to IFP as a property in which IFP might be granted a working interest in exchange for its gross overriding royalty.
May 29, 1998	An internal PCR memo recommended assigning IFP a 6% working interest in Eyehill Creek "thermal development". The memo added: "The intent would not be to burden IFP with any of the ongoing liability or production due to primary operations."[8]
June 15, 1998	PCR sent a fax to IFP offering to convey to IFP as of July 1, 1998 a "15% working interest in all thermal development" at Eyehill Creek. Of particular note, it added that IFP will have "[n]o abandonment obligation of existing infrastructure".[9] The fax also referenced a June 4, 1998 meeting in which PCR had proposed to IFP a range of working interest for IFP from 6% to 25% in Eyehill Creek.[10]
June 16, 1998	IFP replied proposing that it receive a 20% working interest in Eyehill Creek on "*all* development (including thermal development)" with no abandonment obligations for existing infrastructure.[11]

[8] Mark Montemurro, "IFP Heavy Oil Royalty Recommendation" (May 29, 1998), Agreed Exhibit 84 at 2.

[9] Montemurro, "IFP Royalty" (June 15, 1998), Agreed Exhibit 93 at 1. This fax also included a proposal that IFP receive a gross overriding royalty for other lands called Pelican Lake.

[10] Subsequent to June 4th, PCR evaluated the May 26, 1998 analysis entitled "Reserves and Economic Evaluation of Certain Interests of Institut Français du Pétrole as of January 1, 1998" by third party engineering consultant, Dobson.

[11] Séverin Saden, "No title" (June 16, 1998), Agreed Exhibit 95 at 1. The fax also included a proposal with respect to the gross overriding royalty for Pelican Lake.

June 18, 1998	Mark Montemurro (Montemurro), head of the Van Horne business unit at PCR, sent a fax to IFP confirming that Montemurro was prepared to recommend that PCR agree to IFP's proposal dated June 16, 1998 and inviting IFP to forward to him a memorandum of understanding.
June 19, 1998	Séverin Saden (Saden), head of the legal department of IFP France, faxed Montemurro confirming that IFP would send a draft memorandum of understanding the following week and attaching a chart that confirmed that *IFP would receive 20% of PCR's 100% working interest in Eyehill Creek*.[12]
June 23, 1998	IFP faxed PCR and enclosed the draft memorandum of understanding, with Saden adding: "The document has been prepared by Erik Verbraeken who is working with me on this project; he has tried to keep the text as simple as possible."[13]
June 30, 1998	An internal PCR memo stressed that Eyehill Creek is the "BEST SAGD (technically and economically) opportunity that PanCanadian has and we believe that the project should be advanced." (EKE, A62)

[117] These negotiations culminated in the MOU which PCR signed July 13, 1998. The MOU (at page 2, paragraph 2) expressly granted IFP

> a 20% (twenty percent) working interest related to the development and production of oil and gas resources within all formations of the North Bodo [Eyehill Creek] area, *whether such development and production is of a primary, assisted or enhanced nature*. [Emphasis added]

[118] In addition, the MOU contained another noteworthy provision which speaks directly – and in compelling terms – to the purpose of the Contract and, especially, the JOA. Article 3 of the MOU provides:

> IFP and Pancanadian will define and carry out joint technology development programmes that will contribute to the optimised

[12] Saden, "No title" (June 19, 1998), Agreed Exhibit 101 at 2.

[13] Saden, "No title" (June 23, 1998), Agreed Exhibit 103 at 1.

development of the abovementioned formations [in Eyehill Creek]; .... *[I]n particular, IFP and Pancanadian will define a joint technology development programme related to the application of thermal recovery technologies on the formations.* [Emphasis added]

(b) Significance of Surrounding Circumstances

[119] Four aspects of these surrounding circumstances warrant special mention. First, evidence of the negotiations prior to conclusion of the MOU establishes that the parties understood very well the difference between conveying to IFP a working interest in all the oil and gas rights in Eyehill Creek irrespective of the method of extraction versus conveying to IFP some lesser interest.

[120] Second, there is no doubt that as part of the Deal, PCR and IFP intended, and agreed, as documented in the MOU, that PCR would convey to IFP 20% of PCR's working interest in all oil and gas formations within Eyehill Creek, *regardless of whether the development was of a primary, assisted or enhanced nature*. And equally, there is no doubt that this agreement in the MOU is entirely consistent with the AEA and PCR's unqualified conveyance thereunder to IFP of 20% of PCR's working interest in Eyehill Creek.

[121] Third, Article 3 of the MOU reflects the joint intention of PCR and IFP to pursue a thermal project at Eyehill Creek. The surrounding circumstances make clear that both parties, not just IFP, entered the Contract, and in particular the JOA, with the intention of doing so.

[122] Fourth, it is equally clear that it was the common understanding and agreement between PCR and IFP from the very beginning of the negotiations that IFP would have no abandonment obligations whatever with respect to existing infrastructure at Eyehill Creek. This was never in dispute. PCR proposed this term and IFP accepted it. Abandonment costs for existing infrastructure (including the 222 existing wells) were to be for PCR's account.

(c) Consequential Reviewable Errors

[123] As noted, all of these surrounding circumstances ought to have been put on the scale in interpreting the Contract and, especially, the JOA. But they were not. In ignoring this factual matrix, the Trial Judge also relied on Article 7.3 of the AEA, an entire agreement clause. It provided, as many contracts documenting commercial transactions typically do, that the AEA "supercedes all other agreements, documents, writings, and verbal understandings among the Parties relating to the subject matter hereof and expresses the entire understanding of the Parties with respect to the subject matter hereof." On this basis, the Trial Judge effectively dismissed the MOU and other surrounding circumstances as irrelevant to the interpretive exercise. In so doing, he erred.

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

[125] There was, and is, a serious dispute about the parties' objective intentions with respect to the nature and extent of the interest in the oil and gas leases that PCR conveyed to IFP under the Contract. As the Trial Judge himself put it, "... there is uncertainty whether the 'right, title, estate and interest' purchased by IFP from PCR was limited to thermal and other enhanced recovery working interests or whether IFP received something more": QB Reasons at para 68. Therefore, given this dispute, it was incumbent on the Trial Judge to put on the scale as an interpretive aid the relevant factual matrix in assessing the parties' objective intentions. That included the historical relationship between the parties, the background facts leading up to the MOU and the MOU.

[126] This documentary evidence, which is unchallenged, points in one direction and one direction only – PCR was to convey to IFP 20% of PCR's working interest in Eyehill Creek. Of particular import is the uncontradicted documentary evidence that IFP negotiated for, and secured, PCR's agreement to transfer to IFP 20% of PCR's working interest in all of the oil and gas assets held by PCR, without limitation. And to be clear, IFP was to have no contingent liability for the abandonment costs associated with the existing 222 wells at Eyehill Creek.

[127] The Trial Judge did take into account oral evidence given by a number of witnesses, including PCR's Sinclair, Wayne Sampson (Sampson) and Montemurro as to PCR's and IFP's respective *subjective* intentions at the time the Contract was concluded. These witnesses sought to explain and justify why certain terms and conditions were included in the JOA. It is evident that the Trial Judge treated this parol evidence as providing a persuasive context and explanation as to why certain terms were included in the JOA. This is ironic since he concluded there was no ambiguity in the Contract. In fact, even if the Trial Judge had found an ambiguity in the Contract, none of this parol evidence on subjective intention was admissible in the circumstances here. Not only did the evidence of PCR's witnesses go to PCR's subjective intentions, but worse yet, those PCR witnesses purported to explain what IFP's subjective intentions were. That included the claim by certain PCR witnesses that IFP supposedly gave up its right to 20% interest in all development in exchange for being relieved of any liability for abandonment costs of existing wells. The Trial Judge relied on this evidence in interpreting the JOA. As stated at QB Reasons, para 33: "The JOA relieves IFP of any liability for abandonment obligations related to primary operations. The evidence at trial indicated that it was important to IFP to limit its liability in this regard."

[128] Leaving aside the fact that (1) evidence about subjective intentions was inadmissible in the circumstances here; and (2) PCR and IFP had agreed from the start that IFP would have no liability for abandonment costs, the critical error the Trial Judge made was in failing to consider admissible evidence about the factual matrix. As a consequence, the way in which the evidence was handled was the reverse of how the subject evidence should have been handled. In the result, while the evidence that could properly have been considered absent ambiguity – namely the MOU and relevant background factual information – was ignored as irrelevant, parol evidence about subjective intentions that did not qualify as relevant background information or as an exception to the parol evidence rule was nevertheless admitted and placed on the interpretive scale.

[129] In short, the MOU and related background information were admissible in their own right

as part of the factual matrix regardless of whether an ambiguity was found in the Contract. Hence, that uncontradicted background documentary evidence, including the MOU, ought to have been taken into account in the interpretive exercise. That did not happen. To adopt an interpretation of the Contract without placing this relevant factual background on the interpretive scale is not only erroneous in law, it is also disconnected from commercial reality.

3. Misinterpreting the JOA

[130] I now turn to why the Trial Judge erred in his essential conclusion that the JOA limited IFP's interest in Eyehill Creek to oil and gas produced only through thermal and enhanced recovery methods. Understanding the factual matrix relating to the conclusion of the JOA, including its purpose, is key to unpacking the errors in this mixed up, muddled morass.

(a) Failure to Consider the Purpose of the JOA

[131] As noted, the primary purpose of contractual interpretation is to give effect to the parties' objective intentions in concluding the subject contract. In this interpretive exercise, the purpose sought to be achieved by the contract is a relevant and useful analytical tool. Why? As explained by Sébastien Grammond in "Reasonable Expectations and the Interpretation of Contracts Across Legal Traditions" (2009) 48:3 Can Bus LJ 345 at 354-355, citing F. Gendron, *L'interprétation des contrats* (Montreal: Wilson & Lafleur, 2002):

> To paraphrase Gendron, what the parties wanted to do helps us understand what they wanted to say. In terms of intent, purposive interpretation mandates an inquiry into the parties' "meta-intention," or intention concerning the transaction as a whole, and then uses that general purpose as a tool to deduce a "micro-intention," an intention regarding specific clauses. In many cases, the process of purposive interpretation can be reframed on the basis of reasonable expectations. Thus, a party to a contract reasonably expects that the interpretation of the contract will advance his or her "purpose" in entering into the contract. Parties also reasonably expect that the contract will not be given a meaning that "defeats its purpose."

[132] Accordingly, to understand the rationale for the inclusion of certain clauses in the JOA, it is first necessary to understand its purpose. Unfortunately, the Trial Judge never turned his attention to this critical issue. As a consequence, he failed to recognize that the AEA and the JOA serve fundamentally different objectives. The AEA dealt with the transfer of assets in the asset swap, in other words, *ownership* of the assets. The JOA (and the other joint operating agreements which were part of the Contract) outlined the terms under which the parties would *operate* to exploit those assets; hence the name joint *operating* agreements. The preamble to the JOA makes this clear:

> AND WHEREAS the parties wish to provide for the *exploration, operation, maintenance and development* of the Joint Lands and Title Documents ... [Emphasis added]

[133] This preamble says nothing about *ownership* of assets. As a document based on a standard form *operating* contract, the JOA was not intended to define the nature of the parties' respective *ownership* interests in Eyehill Creek. What, then, was its primary purpose? Just this – to set out the terms and conditions under which PCR and IFP would pursue a thermal project at Eyehill Creek.

[134] There is, on this record, an overwhelming sea of evidence that PCR and IFP entered into the JOA for this purpose. The following incontrovertible facts on this point speak for themselves.

1. It was PCR, not IFP, that initially proposed a thermal project at Eyehill Creek as part of the asset swap and shared those plans with IFP. Indeed, it was PCR, not IFP, that identified Eyehill Creek as the best candidate for a thermal project: see paras 23-24 of QB Reasons.

2. It was PCR, not IFP, that *confirmed to both IFP and the Alberta government* that primary production was finished at Eyehill Creek.

3. It was PCR, not IFP, that identified the number of barrels of oil that could be recovered at Eyehill Creek through a thermal project: EKE, A64.

4. It was PCR, not IFP, that sought approval from the Alberta government to change the royalty regime for Eyehill Creek to the generic oil sands royalty regime for EOR: EKE, R43.

5. It was PCR, not IFP, that issued Authorization for Expenditures for what PCR itself referred to as the "Eyehill Creek Thermal Project": EKE, A88.

[135] All of this is highly relevant to the genesis, aim and purpose of the JOA. But again, none of this was put on the interpretive scale in determining the parties' objective intentions under the JOA. It all should have been. This factual matrix convincingly establishes that when the Contract, including the JOA, was concluded, *both* PCR and IFP intended to pursue a thermal project at Eyehill Creek to exploit the minerals at that location. In other words, a thermal project at Eyehill Creek was not merely a glimmer in IFP's eyes; that glimmer was shared by PCR. Indeed, PCR was instrumental in conceiving and advancing the pursuit of a thermal project at Eyehill Creek.

[136] However, rather than consider the purpose of the JOA, the Trial Judge focussed – wrongly – on whether PCR was *required* to initiate a thermal project under the agreement between the parties. It was not. Given commercial realities, there was no written commitment by either PCR or IFP that a thermal project would ultimately be implemented at Eyehill Creek. Both parties would have recognized that this was so. That undoubtedly is one of the reasons why IFP was unwilling to give up its 3% gross overriding royalty for an interest in oil and gas produced only from a thermal

project. But this does not alter the fact that when the JOA was concluded, the fundamental purpose of the JOA was to outline the terms and conditions under which PCR and IFP would proceed with their shared intention to pursue a thermal project at Eyehill Creek.

[137] This purpose informs not only the reasons for the parties including various terms and conditions in the JOA but also what they intended by their inclusion. Consequently, by not considering this purpose when analyzing the various Clauses in the JOA, the Trial Judge erred in law.

(b) Ignoring Factual Matrix Relating to Primary Production

[138] In interpreting the JOA, the Trial Judge also erred in his approach to the issue of primary production at Eyehill Creek. Unfortunately, here too, he asked himself the wrong question, that is whether the JOA *prohibited* primary production. It is an improper leap for a court to conclude that because something has not been expressly forbidden under a contract, it follows that it is permitted. That is not necessarily so. There are many things parties to a contract cannot do even if they are not expressly prohibited. As the Supreme Court noted in ***BCE Inc. v 1976 Debentureholders***, 2008 SCC 69 at para 71, [2008] 3 SCR 560, reasonable expectations "looks beyond legality to what is fair, given all of the interests at play" to address conduct that is "wrongful, even if it is not actually unlawful." The mere fact the JOA did not explicitly prohibit PCR from undertaking primary production does not mean that the JOA was intended to address, or addressed, the terms under which PCR, as operator, could engage in new primary production, and still less unconstrained primary production.

[139] On the issue of primary production at Eyehill Creek, again the evidentiary record of the surrounding circumstances is compelling and unchallenged. When the Contract was concluded, both PCR and IFP were operating on the shared assumption that primary production at Eyehill Creek was finished and all that remained was to phase out existing production. This shared assumption was a foundational basis on which the JOA was concluded. And it underscores why the purpose of the JOA was to pursue a thermal project. It also helps place the purpose of Clauses 4(c) and 5(c) in context, speaking as it does to the intended limited scope of both Clauses. And what it says is that these Clauses were not directed to the possibility of new primary production at Eyehill Creek, whether through reactivating old wells or drilling new ones.

[140] This record is replete with evidence that both PCR and IFP considered primary production to be finished at Eyehill Creek. All of it falls within the scope of admissible objective evidence of background facts that were within the knowledge of both parties before conclusion of the JOA. What then was that evidence?

[141] Dealing first with PCR's understanding, in an internal memo dated July 22, 1998 from Montemurro to fellow employees, Richard Ameli and Gittins, instructing them on how to respond to inquiries from the Alberta government, Montemurro stated: "I think any discussion around primary should be in the direction of "primary is finished", the field is depleted on primary. If EOR is not implemented, the field is abandoned, period" (EKE, A63).

[142] PCR certainly represented to the Alberta government that primary production was done at Eyehill Creek as evidenced by its memo to Alberta Energy dated August 5, 1998. The subject was the "Proposed Eyehill Creek Thermal Project (Bodo)." In its memo, PCR answered a question posed by Alberta Energy this way: "Our response to your question as to what proportion of the costs (operating and capital) are incremental to primary production, is that *none are* as the fields have already been exploited conventionally.... *Primary recovery cannot economically recover any more oil beyond the roughly 4,000,000 bbl already recovered*" [Emphasis added] (EKE, A64).

[143] When Gittins was examined on PCR's position in its dealings with the Alberta government, he was asked how PCR was hoping to convince the Alberta government to grant PCR, as Gittins put it, a "more favourable royalty regime": AR 1423/10. His answer: "Well, essentially, the field was shut in on primary production. So the only project that we had going forward was the thermal development for Eyehill Creek, and so that was the case being made to the government": AR 1423/13-15. Pressed on whether this was merely a "tactical position" with the government or whether it was a real position, that primary was finished, he answered: "And – and that's my understanding, is we had no intention of moving ahead with any primary development": AR 1491/2-3. To be clear, the point here is not just that PCR had no intention of proceeding with primary development. It is that PCR had no intention of doing so because, in its view, primary production was finished since it was no longer considered economically viable.

[144] IFP was well aware that all this was so. Erik Verbraeken (Verbraeken), legal counsel for IFP France, testified that Sampson, a senior landman at PCR intimately involved in negotiating the JOA for PCR, had said that "primary was dead": AR 302/1-7. And Verbraeken confirmed in cross-examination that IFP understood that PCR "would only phase out existing primary production, and that's it": AR 302/35-36.

[145] In fact, Sampson admitted as much in his testimony. When pressed on whether he had represented to Verbraeken and Delamaide that there would be no more primary production, he said he would not have presumed to speak for PCR before adding that PCR would have followed Montemurro's recommendation: AR 1583/34-1584/3. As noted, Montemurro's view was that "primary was finished". Sampson was then asked whether, had he made a representation, it would have been in the agreement. In his answer, he makes it clear that it was the view of PCR management that there would be no more primary production other than what was being phased out. Why? As he admitted:

> ... the consensus view was that other than whatever was petering out, there would be no more primary production. *It was going to be a thermal project* : AR 1584/9-11, Emphasis added.

[146] Indeed, when IFP's counsel pressed Sampson about what he meant by stating that primary was "petering out", Sampson answered:

> Yeah. I believe that the production was minimal, and we may even

> have shut in what was left. I don't specifically recall that. But it was [minimal] if it existed: AR 1592/3-4.

[147] This evidentiary record of the surrounding circumstances establishes the *shared* state of mind of both PCR and IFP when they concluded the JOA: primary production at Eyehill Creek was finished; all that remained was for PCR to phase out existing primary production.

[148] Therefore, the JOA did not address the terms and conditions under which primary production could be restarted or initiated without IFP's agreement. Consequently, the Trial Judge erred in concluding that because primary production was not expressly prohibited, it followed that reactivating primary production (including through new wells) was permitted without limitation and in further concluding that Wiser did no more than PCR was entitled to do when it reactivated primary production at Eyehill Creek.

(c) Misconstruing Clauses 4 and 5 of the JOA

[149] This then takes me to the terms of the JOA. The Trial Judge essentially concluded that Clauses 4(c) and 5 in the JOA were determinative of IFP's *ownership* interest in Eyehill Creek. I have already explained why the Trial Judge erred in disregarding entirely the articles in the AEA under which PCR transferred to IFP 20% of PCR's working interest in the PCR Eyehill Creek Assets. The Trial Judge then compounded this error by zeroing in on these two Clauses in the JOA and determining that they, and they alone, were decisive in prescribing the scope of IFP's "working interest" and limiting IFP's working interest in Eyehill Creek to oil and gas produced through thermal and enhanced production methods.

[150] Two further critical errors are imbedded in this conclusion. First, the JOA and Clauses 4(c) and 5 in particular do not limit IFP's working interest to thermal methods and enhanced production methods only. And second, even if they did, they would not, in any event, be decisive on this point given the express conflict provision in the AEA.

[151] These Clauses provide as follows. Clause 4(a) is included as it helps place Clause 4(c) in context:

> 4. Operations
>
> (a) All operations conducted by the parties pursuant to this Agreement shall be at each party 's sole risk and expense unless the contrary is specifically stated *and always in accordance with Clause 5 hereof*.
>
> ....
>
> (c) It is specifically agreed and understood by the parties that the working interests of the parties *as described in Clause 5*

of this Agreement relate exclusively to thermal or other enhanced recovery schemes and projects which may be applicable in respect of the petroleum substances found within or under the Joint Lands and the Title Documents. Unless specifically agreed to in writing, IFP will have no interest and will bear no cost and will derive no benefit from the recovery of petroleum substances by primary recovery methods from any of the rights otherwise described as part of the Joint Lands or the Title Documents.

5. *Participating Interests*

Except as otherwise provided in this Agreement, as and from the Effective Date hereof, the parties hereto shall bear all royalties, costs, risks and expenses paid or incurred under this Agreement and the Operating Procedure and shall own the Title Documents, the Joint Lands, the petroleum substances and the operations to be carried out pursuant to this Agreement as follows:

(a) That portion of the Joint Lands described in Schedule "A1":

PCR – an undivided 80% working interest
IFP – an undivided 20% working interest

(b) That portion of the Joint Lands described in Schedule "A2":

PCR – as described in Schedule "A2"
IFP – as described in Schedule "A2"

(i) In any event and at all times, unless otherwise specifically agreed in writing, the working interests of the parties will be in the proportions PCR 80%, IFP 20%; ...

(c) For greater clarity, there exist, in conjunction with the Joint Lands, numerous wells, flowlines, processing facilities and other similar and related surface and underground installations which have been or are being used in the primary production of petroleum substances and which are owned, at least partially, by PCR. The parties do not intend that IFP will, pursuant to this Agreement, acquire any interest in such wells, flowlines, facilities or installations. Unless otherwise specifically agreed in writing, the only circumstance in which IFP will come into possession of a

> proportionate 20% working interest share in any of the aforementioned wells, flowlines, facilities or installations is in the event such wells, flowlines, facilities, or installations are included within the definition of a thermal or other enhanced recovery project. At such time as the parties agree to the inclusion of any such well, flowline, facility or installation in a thermal or other enhanced recovery scheme or project, IFP will forthwith become the owner of a proportionate 20% working interest in any such well, flowline, facility or installation without further consideration paid by IFP to PCR. In such circumstance, IFP will assume its proportionate share of all future costs, liabilities and benefits derived from or associated with its ownership of such well, flowline, facility or installation. Any interest so acquired will become subject to the Operating Procedure without further action by the parties. [Emphasis added]

[152] Before explaining the reviewable errors in the analysis of these Clauses, I recognize that the JOA contains some careless wording which confuses "participating interests" with "working interests". The term "participating interest" is defined in the Operating Procedure as follows: "the percentage share of the costs of an operation conducted hereunder (or any respective segment thereof) which a party has agreed to pay or is required to pay pursuant to this Operating Procedure". The heading of Clause 5 is "Participating Interests", not "Working Interests". And Clause 1(e) also defines "participating interest", this time as meaning "the percentage of undivided interest of each party as set forth in *Clause 5 of this Agreement*". Finally, Clause 6 of the JOA states:

> PCR has agreed to hold the *participating interest stated in Clause 5*, covering the Joint Lands ... in trust, for IFP subject always to the terms and conditions of the Agreement. [Emphasis added]

But in my view, nothing turns on the use of this mixed up terminology for purposes of this appeal and so no more will be said about it.

[153] The Trial Judge relied on Clause 4(c) to limit IFP's working interest in Eyehill Creek to thermal and enhanced production only. As he put it, "[t]he JOA then provides at Clause 4(c) that the parties' 80% and 20% working interests relate to thermal and enhanced recovery operations only": para 98 of QB Reasons.

[154] This interpretation of Clause 4¡c) cannot stand. The first sentence of Clause 4(c) refers to the "working interests of the *parties as described in Clause 5* being limited to thermal or other enhanced recovery schemes and projects". Clauses 5(a) and (b) in turn refer to PCR having an undivided 80% working interest and IFP having a 20% working interest in the Joint Lands referred

to in Schedules "A1" and "A2" respectively. There is no reference whatever in Clauses 5(a) or (b) to the working interest of PCR or IFP being limited to thermal or enhanced recovery operations. The key point is this. If Clause 4(c) were interpreted as limiting IFP's 20% working interest in Eyehill Creek to thermal or enhanced production only, it would necessarily have the same limiting effect on PCR's working interest too. This interpretation is unreasonable. The parties did not agree under the JOA to limit their own *ownership* interests to thermal or enhanced production only. This would lead to the absurd result that neither IFP nor PCR had any interest in Eyehill Creek beyond oil and gas produced through thermal or enhanced recovery methods. This cannot be.

[155] This interpretation is rooted in the failure to understand that Clause 4 is directed not to "ownership" but to a different purpose, "operations". That is why Clause 4 is entitled "Operations". Its purpose is to address PCR's and IFP's intended joint operations in pursuit of a thermal project at Eyehill Creek. In other words, Clause 4 speaks of each of their working interests as described in Clause 5 being limited to an 80%-20% split in thermal or other enhanced recovery schemes and projects because that is what they intended to pursue – a thermal project. Clause 4 must be interpreted having regard to the purpose of the JOA and the relevant surrounding circumstances.

[156] Similarly, if Clause 5 were interpreted to mean that it limited IFP's rights to thermal production only, then it would also mean that PCR's rights at Eyehill Creek were equally limited to the same extent. Again, this makes no sense. The parties did not agree that the JOA would somehow constrain or limit their respective working interests in Eyehill Creek. An interpretation that would have this effect highlights the unreasonableness of using this wording, designed for an entirely different purpose, to limit the *ownership* rights of either PCR or IFP at Eyehill Creek.

[157] I now turn to the last sentence in Clause 4(c), which the Trial Judge also relied on to strip IFP of the full interest in the oil and gas rights in Eyehill Creek conveyed to it under the AEA. I repeat it for ease of reference:

> Unless specifically agreed to in writing, *IFP will have no interest and will bear no cost and will derive no benefit from the recovery of petroleum substances by primary recovery methods* from any of the rights otherwise described as part of the Joint Lands or the Title Documents. [Emphasis added]

[158] What was intended by this provision? To properly interpret this sentence, its wording must be placed in the context of the JOA as a whole and, equally important, the surrounding circumstances of the Contract. Four points warrant mention, all of which are relevant to what was objectively intended by this last sentence in Clause 4.

[159] First, the purpose of the JOA was to set out the terms and conditions under which the parties would pursue a thermal project at Eyehill Creek. Sampson did not propose the inclusion of Clause 4(c) in a vacuum. When he did so, he understood that Eyehill Creek was going to be a thermal project: AR 1584/9-11. He acknowledged this at least twice more in his evidence: AR

1584/35-37; AR 1590/27-31.

[160] Second, both PCR and IFP considered primary production to be finished except for phasing out of existing wells. This was the commercial context in which the JOA was concluded.

[161] Third, the last sentence of Clause 4(c) cannot be separated from the rest of the Clause of which it forms a part. The first sentence in Clause 4 reveals that this Clause describes the parties' *working interests only* in the thermal project they intended to pursue, not their *working interests* in all the Eyehill Creek Assets.

[162] Fourth, the surrounding circumstances confirm that, in keeping with what had been understood and agreed between the parties from the time PCR first proposed an asset swap, IFP would not be responsible for any of the abandonment costs associated with the then *existing infrastructure*, which included 222 wells at Eyehill Creek, most of which had been shut in. PCR recognized that it would be unfair to burden IFP with those costs. After all, when IFP agreed to transfer to PCR assets valued at $14,800,000, it was buying assets, not liabilities. The corollary of this is that IFP was prepared to accept that with respect to *existing infrastructure*, it would have no interest in that infrastructure unless and until it agreed to pay its 20% share of costs associated therewith.

[163] As for the argument that the MOU did not contain an express provision to this effect, this is so. But the MOU was intended to outline the key contentious terms agreed to by the parties following negotiations. Abandonment costs of existing infrastructure was not one of them. Both parties had agreed from the start that IFP would have no liability for these costs. Thus, the fact the MOU did not expressly address this non-contentious agreement is unsurprising. The crucial point is this. There is not a shred of evidence on this record that following conclusion of the MOU, PCR and IFP ever agreed to vary, much less reverse, the agreement in place from the start – IFP would not be responsible for abandonment costs of existing infrastructure. Therefore, I do not accept the argument that IFP bargained away the rights it had under the MOU to a working interest in all development at Eyehill Creek in exchange for no liability for abandonment costs for existing infrastructure.

[164] What does all this add up to? Just this. The purpose of Clause 4(c) was to implement the agreement made from the start and protect IFP from liability for abandonment costs of existing infrastructure. This was part of the Deal; IFP did not give up rights to primary production or limit its working interest in Eyehill Creek in exchange for this protection. The parties provided for two exceptions, one in Clause 4(c) and the other in Clause 5(c).

[165] Under Clause 4(c), IFP would not be required to assume its proportionate share of costs associated with the existing infrastructure *unless and until IFP agreed otherwise*. That included costs associated with the existing primary production facilities (and their phasing out). However, IFP was given the right, at its option, to opt in to the existing infrastructure in which event IFP would be entitled, under the JOA, to the full benefits of primary production flowing from its proportionate interest.

[166] That this was to be at IFP's option is clear from Clause 4(c). It provides that "Unless specifically agreed to in writing, IFP will have no interest and will bear no cost" for primary production. Notably, Clause 4 does *not* require the agreement of both parties. Thus, the decision whether to exercise IFP's participation right under Clause 4(c) was intended to be IFP's and IFP's alone. And understandably so. After all, this Clause was intended to protect IFP, not benefit PCR. Therefore, whether to exercise the option to participate in the phasing out of primary production in existing infrastructure was at IFP's option, not PCR's. Of course, unless IFP agreed to assume responsibility for costs relating to existing infrastructure, it was only fair that IFP would likewise have no interest in and derive no benefit from it or primary production derived therefrom. It is this, and only this, which the last sentence in Clause 4(c) seeks to convey.

[167] Similarly, under Clause 5(c), if any of the existing infrastructure was incorporated into a thermal or other enhanced recovery project, IFP would be required to pay its 20% share of costs, but in this case, future costs only. Clause 5(c) recognizes this and is intended to address this very point.

[168] Moreover, in any event, neither Clause 4 nor Clause 5 of the JOA says anything at all about *new wells* for primary production or the minerals produced therefrom. Nowhere in the JOA did IFP ever agree to give up its rights to primary production from new wells.

[169] Finally, it is noteworthy that the Operating Procedure, a standard form contract, was not amended to address the obvious problems that would arise if two parties had competing claims to the same barrels of oil. The fact the parties did not amend the Operating Procedure to address the myriad of issues that would need to be addressed and resolved in that case belies any claim that the parties intended to limit IFP's working interest at Eyehill Creek to thermal and other enhanced recovery methods only.

[170] This is quite apart from the obligations that the Operating Procedure imposed on PCR as Operator. Under Clause 9(a) of the JOA, the Operating Procedure applied to *all operations conducted in respect of the exploration, development and maintenance of the Joint Lands for the production of petroleum substances*. In turn, the Operating Procedure made it clear that PCR, as Operator, did not have *carte blanche* to do whatever it wished in exploiting the minerals at Eyehill Creek. In this regard, Article 301(a) imposed on PCR an obligation to "consult with [IFP] from time to time with respect to decisions to be made for the exploration, development and operation of the joint lands and the construction, installation and operation of any production facilities...." Again, there is nothing in the Operating Procedure that relieved PCR of any of its obligations thereunder on the basis that IFP's interest in Eyehill Creek was limited to thermal and other enhanced recovery methods only. Nor is there anything in the Operating Procedure that restricted IFP's working interest in Eyehill Creek.

[171] A Clause intended to protect IFP cannot now be turned on its head and used for another purpose entirely. And yet, that is what PCR is trying to do. It is attempting to use Clause 4(c), designed to protect IFP from liability for abandonment costs of existing infrastructure unless and

until IFP agreed otherwise, to support its claimed rights to (1) engage in unrestricted new primary production at Eyehill Creek, rather than simply phasing out primary production; and (2) cut IFP out of any benefits from primary production. This unreasonable interpretation, which is inconsistent with both the commercial context and factual matrix, is without merit. A Clause designed as a shield to protect IFP cannot be used as a sword to benefit PCR.

[172] For these reasons, the Trial Judge's conclusion that the JOA restricted IFP's working interest in Eyehill Creek to oil and gas produced only through thermal or other enhanced recovery methods cannot be sustained.

4. Failure to Recognize the Conflict Between the AEA and the JOA

[173] Finally, in the end, it comes down to this. Even if I were wrong and the JOA limited IFP's working interest in Eyehill Creek to oil and gas produced only through thermal or other enhanced recovery methods as concluded by the Trial Judge, the unequivocal wording of the AEA would nevertheless trump any provisions to this effect in the JOA. As noted, the AEA is the dominant agreement concluded between PCR and IFP. To repeat, Article 1.5 of the AEA expressly provides:

> There are appended to this Agreement the following schedules .... [Schedule "F" is the JOA] Such schedules are incorporated herein by reference as though contained in the body hereof. Wherever any term or condition of such schedules *conflicts or is at variance with any term or condition* in the body of this Agreement, such term or condition in the body of this Agreement *shall prevail*. [Emphasis added]

[174] The Trial Judge justified not applying this Article on the basis there was no conflict between the AEA and the JOA. His reasoning on this point is summarized at para 99 of the QB Reasons:

> The AEA and JOA are contemporaneous documents. Article 1.5 of the AEA incorporates the Schedules and makes them part of the body of the AEA. This is not a case of inconsistency between the terms and conditions of the AEA and the JOA; rather, the AEA lacks a definition that the JOA and Operating Procedure provide. I conclude IFP's working interests under these Agreements is in respect of thermal and other enhanced recovery operations only.

[175] This reasoning suffers from two pivotal flaws.

[176] First, I have already explained why the Trial Judge erred in concluding that the AEA lacked a definition of "working interest" and in thereby failing to recognize that the AEA

conveyed to IFP 20% of PCR's working interest in Eyehill Creek.

[177] Second, while Article 1.5 of the AEA incorporated the schedules (including the JOA) into the AEA, the AEA was nonetheless granted predominance in the event of a conflict between it and any terms or conditions in the schedules. Consequently, any interpretation of the JOA that limited IFP's working interest in Eyehill Creek to less than what was conveyed to IFP under the AEA would necessarily constitute a "conflict" or "variance" from the text in the AEA. In that event, there can be no debate about the interpretation of Article 1.5 of the AEA. The AEA would trump any limitation on IFP's working interest in the JOA. Therefore, even if I were wrong in concluding that the Trial Judge erred in his interpretation of the JOA, the provisions in the AEA conveying to IFP 20% of PCR's working interest in Eyehill Creek would nevertheless govern.

[178] For these reasons, IFP's working interest in Eyehill Creek is, and remains, an undivided interest as a tenant in common equal to 20% of PCR's working interest in the PCR Eyehill Creek Petroleum and Natural Gas Rights (which included Crown leases) and in the PCR Eyehill Creek Miscellaneous Interests, as both terms are defined in the AEA.

[179] Accordingly, IFP is entitled to an accounting for its proportionate share of the *net revenue* realized from primary production at Eyehill Creek.

5. Misinterpretation of Article 2401 of the Operating Procedure

[180] I have also concluded that the Trial Judge erred in finding that IFP acted unreasonably in withholding its consent to the farmout to Wiser. IFP's withholding of consent was reasonable in the circumstances of this case. Accordingly, PCR breached the Contract by proceeding as it did. While the Trial Judge erred in failing to find that IFP's withholding of consent was reasonable, my conclusion would apply with added force were IFP's interest in Eyehill Creek limited, as found by the Trial Judge, to oil and gas produced only through thermal and enhanced recovery production methods. I now turn to my reasons for these conclusions.

[181] When PCR decided to farm out its interest to Wiser, Article 2401 of the Operating Procedure required that PCR give IFP a ROFR. Even though IFP waived that right, under the Contract PCR could not dispose of its working interest to Wiser without IFP's consent. In this regard, Article 2401B(e) of the Operating Procedure provided that:

> Such consent shall not be unreasonably withheld, and it shall be reasonable for an offeree to withhold its consent to the disposition *if it reasonably believes that the disposition would be likely to have a material adverse effect on it, its working interest or operations to be conducted hereunder* ....[Emphasis added] (EKE, A82)

[182] IFP was an "offeree" under this provision, and as noted, on May 9, 2001 it sent a letter to PCR declining to consent to the disposition of PCR's interest to Wiser: EKE, A129-130. In doing so, IFP determined that the disposition would "have a material adverse effect on IFP's working

interests and operations" given that Wiser's intent to develop the Eyehill Creek lands through primary methods of production only would "effectively prevent or severely affect future thermal or enhanced recovery schemes".

[183] The Trial Judge found that it was not objectively reasonable for IFP to believe the disposition would have a material adverse effect on its working interest or future operations. For this, he relied on the concept of the *status quo*. In his view, Wiser would not be doing anything that PCR was itself not allowed to do under the Contract. As the Trial Judge put it, "[t]he agreement neither prohibited PCR from undertaking primary production, nor obliged it to carry out thermal operations": para 194 of QB Reasons. He added that while "IFP had the unilateral expectation that PCR would initiate a SAGD operation and would refrain from primary production", the agreements provided "no basis for this expectation" and so it was unreasonable to object "on the grounds Wiser would undertake something [primary production] PCR was entitled to do": para 198 of QB Reasons. He then went on to find that "the reasonable expectations of the parties" did not assist IFP since there was no reasonable expectation that PCR would not pursue primary production at Eyehill Creek: para 211 of QB Reasons.

[184] In reaching these conclusions, the Trial Judge rejected the applicability of this Court's decision in ***Mesa Operating Limited Partnership v Amoco Canada Resources Ltd.*** (1994), 149 AR 187 (CA) [***Mesa***]. In ***Mesa***, this Court held that a "contract should be performed in accordance with the reasonable expectations created by it": para 19. The Trial Judge noted that a reasonable expectation must be held by both parties and that "[o]ne party's expectation cannot create an obligation on another party if that obligation is not shared": para 208 of QB Reasons. He then concluded that while IFP may have had an expectation that PCR would only engage in thermal production, that expectation was not shared by PCR.

[185] I have already explained why the JOA was premised on the shared assumption that there would be no new primary production but only a phasing out of existing primary production. However, even if I were wrong on this point too, the Trial Judge's approach to Article 2401 would still be erroneous. This is so even accepting for the sake of argument his conclusion that there was no reasonable expectation that PCR would not pursue primary production at Eyehill Creek.

[186] I agree that the JOA did not obligate PCR to *implement* a thermal project. After all, an "intention" to pursue a thermal project is just that – an intention. Nothing is ever certain in any industry, and especially not in oil and gas. Corporate priorities change; financial circumstances change; the economy changes; and intentions change. But that does not end the analysis. What the Trial Judge failed to consider is whether there was nevertheless, at a minimum, a reasonable expectation that PCR would not engage in primary production *in a manner which substantially nullified the contractual objectives or caused significant harm*: ***Mesa***, *supra* at para 22. Having regard to the entirety of the Contract and the factual matrix, I conclude that such an expectation was a reasonable one.

[187] In ***Mesa***, this Court dealt with a discretionary decision under an oil and gas contract relating to the type of pooling to be used for a shared area of land. The trial judge found that

Amoco had breached its contractual relationship by choosing to use areal pooling rather than reserves pooling. While a discretion existed under the contract, the trial judge determined that it had to be exercised in "good faith", which the trial judge said was breached when a party acts in a manner which "substantially nullifies the contractual objectives or causes significant harm to the other contrary to the original purposes or expectations of the parties": (1992), 129 AR 177 (QB) at 218. This Court upheld the trial decision but on the basis that Amoco had breached a term implied in fact based on the reasonable expectations of the parties. Rejecting the idea that the law itself imposed a general obligation of good faith, this Court instead grounded the rule in the agreement of the parties, concluding in ***Mesa***, *supra* at para 22 as follows:

> The rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith. As the trial judge said, a party cannot exercise a power granted in a contract in a way that "substantially nullifies the contractual objectives or causes significant harm to the other contrary to the original purposes or expectations of the parties".

[188] Since ***Mesa***, the concept of the duty of good faith in contract law has evolved. Most recently, in ***Bhasin***, the Supreme Court recognized good faith contractual performance as a "general organizing principle" which underlies the existing case law. Rather than being a separate rule, the organizing principle "manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance": para 66.

[189] What is this organizing principle? It is exemplified in "the notion that, in carrying out his or her own performance of the contract, a contracting party should have *appropriate regard to the legitimate contractual interests of the contracting partner"*: para 65, Emphasis added. Accordingly, parties to a contract have a common law duty to act honestly in the performance of contractual obligations: ***Bhasin***, *supra* at para 33. This duty requires that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract": para 73.

[190] One situation where this principle applies is "where one party exercises a discretionary power under the contract": ***Bhasin***, *supra* at para 47; McCamus, *supra* at 839, 844-849. In such cases of contractual discretion (and McCamus includes ***Mesa*** in this category), limitations are implied on the exercise of discretion in order to give effect to the reasonable expectations of the parties: McCamus, *supra* at 865-866; ***Bhasin***, *supra* at para 48. ***Mesa*** falls under the organizing principle of good faith contractual performance, it being an implied term that contractual discretion should be exercised according to certain parameters: Joseph T Robertson, "Good Faith as an Organizing Principle in Contract Law: *Bhasin v Hrynew* – Two Steps Forward and One Look Back" (2015) 93 Can Bar Rev 809 [Robertson] at 835. Decisions like ***Mesa***, notes Robertson, *supra* at 839:

> ... support the understanding that the implied obligation of good faith contractual performance has a gap-filling role. The implied obligation does not create new obligations outside the scope of the contract. Like any implied term, the obligation aims to implement the parties' unstated intentions thereby protecting their reasonable expectations.

[191] This organizing principle of good faith contractual performance requires that, in carrying out the performance of a contract, "appropriate regard" is given to the other party. This does not compel a party to put the interests of others above its own, but it does require "that a party not seek

to *undermine* those interests": ***Bhasin***, *supra* at para 65, Emphasis added. That is something that both parties to a contract would reasonably expect.

[192] Whether expectations are reasonable can be informed by the commercial context of a contract: ***Mesa***, *supra* at para 20. Reasonable expectations of contracting parties are to be found in the contract itself rather than the court's abstract perception of what is "fair". While "reasonable expectations" does not operate as a stand-alone principle divorced from the contract actually agreed to between the parties, this does not diminish its role in informing the duty of "good faith" in contractual performance. In doing so, the reasonable expectations of the parties operate so as to imply a term limiting one party's ability to perform a contact in a manner which undermines the interests of the other party.

[193] As detailed earlier in these Reasons, the purpose of the Contract between IFP and PCR was to pursue a thermal project. In other words, whatever the ultimate result may have been, the primary *objective* of the Contract, and in particular, the JOA, was to exploit the minerals at Eyehill Creek using thermal production. Given that reality, neither IFP nor PCR would reasonably expect the other to operate in such a manner so as to substantially nullify the ability to pursue that objective.

[194] All this being so, in keeping with ***Mesa*** and ***Bhasin***, PCR was, at a minimum, under a duty of good faith not to engage in primary production in a manner which would undermine or substantially nullify IFP's ability to pursue a thermal project. This obligation necessarily precluded farming out its interest to a third party who would do the same. This good faith requirement is not inconsistent with the Contract. While there was no guarantee in the Contract that a thermal project would ever proceed at Eyehill Creek, even if PCR had the "right" to engage in new primary production using existing or new wells – which I have rejected for reasons explained earlier – it did not in any event have the right to engage in unconstrained primary production. The contrary is so. In keeping with the parties' reasonable expectations, PCR had a minimum good faith obligation under the Contract not to engage in primary production at Eyehill Creek in a manner which would substantially harm IFP's interests in pursuing a thermal project contrary to the original objective of the Contract.

[195] It follows as a corollary that the Trial Judge erred in concluding that Wiser was simply acting as PCR was entitled to act under the Contract. The duty to perform a contract in good faith placed limits on how PCR could affect IFP's interests in Eyehill Creek. And those limits in turn informed why it was reasonable for IFP to believe that the disposition of PCR's interest to Wiser would have a material adverse effect on IFP's interests.

[196] This reality is particularly striking if, as the Trial Judge determined, IFP's working interest were in fact limited to proceeds from thermal and other enhanced production methods at Eyehill Creek. I have concluded the converse, namely that IFP retained an unqualified 20% working interest in PCR Eyehill Creek Assets regardless of whether production was thermal or primary in nature. Even in that case, IFP's interest would be substantially harmed by primary production since it intended, as did PCR when it concluded the Contract, to pursue a thermal project at Eyehill

Creek. However, if IFP's working interest were limited to thermal or enhanced recovery methods only, then any action to conduct primary production in a manner which significantly undermined the ability to pursue a thermal project would be destructive of IFP's interest in Eyehill Creek. Not only would the objective behind the Contract be thwarted, IFP's very ability to receive any real benefit from the gross overriding royalty it gave up as part of the asset swap would be negated as well.

[197] Had PCR desired the right, if it should decide it no longer wished to pursue a thermal project at Eyehill Creek, to engage in primary production in a manner which substantially compromised a future thermal project without securing IFP's agreement, then it should have bargained for that. It did not.

[198] A good faith contractual performance obligation precludes a co-owner of oil and gas rights from acting unilaterally without consulting another co-owner when the objective of a joint operating agreement comes to an end. And properly so.

[199] This does not mean that once PCR (or for that matter, IFP) decided it no longer wished to pursue a thermal project at Eyehill Creek, the parties would have been at an impasse. Co-owners of mineral rights intent on pursuing a specific objective – to pursue a particular project – do change their minds. This is not unusual in the oil and gas sector. But when that happens, it is then incumbent on the co-owners to decide what they wish to do to exploit the minerals. And when they do, that may well lead, in turn, to amendment of an existing joint operating agreement and operating procedure or the conclusion of a new joint operating agreement and operating procedure to reflect the new reality. Or if the existing agreements are comprehensive enough to address this possibility, that would then call for agreement as to how to proceed. And if nothing were resolved, then the parties would be left with their respective rights at common law as co-owners.[14]

[14] Even if a co-tenant at common law is allowed to unilaterally extract petroleum substances without the consent of the other tenant in common, and there remains some uncertainty whether this is so, there is nonetheless a duty to account to the co-owner for that co-owner's proportionate share: see Nigel Bankes, "Pooling Agreements in Canadian Oil and Gas Law" (1995) 33 Alta L Rev 493 at 502; Rob Desbarats, Jay Todesco & Kate Royer, "Sole Risk Provisions in Joint Operating Agreements For Unconventional Oil and Gas Development" (2016) 54:2 Alta L Rev 417 at 431; Jan Bagh, Dan McAffee & Edie Gillespie, "Recent Judicial Developments of Interest to Oil and Gas Lawyers" (2008) 45:3 Alta L Rev 817 at 857; and J. Jay Park, "Marketing Production from Joint Property: The Past, The Present and the Future" (1990) 28:1 Alta L Rev 34 at 36.

[200] Against this background, I return to why it was reasonable for IFP to refuse to consent to PCR's disposition to Wiser. IFP was rightly concerned that the manner in which Wiser would exploit the lands at Eyehill Creek through primary production would severely affect IFP's ability to pursue a thermal project from a practical and economic perspective. From what IFP knew at the time, Wiser was a company uninterested in thermal production and whose extraction methods consisted solely of primary production. What is more, because Wiser had no interest in thermal potential, IFP was understandably concerned that Wiser would not use any precautions or mitigation techniques in recovering petroleum through primary means.

[201] It was common knowledge at the time of conclusion of the Contract that primary production ran the likelihood of compromising the viability of thermal projects. PCR certainly knew this, as evidenced by internal emails. For example, PCR's Gittins noted in an e-mail from February 2000 that any re-commissioning of primary production at Eyehill Creek had to be wary of sand being produced, which would create wormholes and in turn make thermal drilling very difficult:

> *... The problems arise if sand is produced along with the oil, to the extent that wormholes are propagated over a significant area of the reservoir. This makes precision drilling (as required to drill the injection well of a SAGD project) in the future a very difficult proposition.* Hence I do not have a problem with the primary production of the oil from these wells but if sand production is required to accomplish this then it could prevent future SAGD production and we could wind up with a 10,000,000 bbl oil reserve write down in the future for the sake of a few hundred bbl/day of production. *IFP also have a 20% WI in this area and my understanding is that they are only interested in thermal development* [Emphasis added] (EKE, A98).

[202] Moreover, it is beyond question that PCR had shared this information about wormholes with IFP prior to its decision to deny consent: para 173 of QB Reasons; see also Delamaide testimony at 21/13-26; 39/31-40/35. Accordingly, IFP was well aware when it refused its consent that Wiser's activities at Eyehill Creek were sure to adversely affect its ability to pursue a thermal project. On top of this, IFP had good reason to believe that Wiser, unlike PCR, was not concerned about developing the lands at Eyehill Creek in a manner compatible with their pursuit of a thermal project. For example, PCR had in the past made certain recommendations to IFP in order to avoid actions which would "have too large an impact on any thermal operation": EKE, A97.

[203] The Trial Judge attempted to skirt these realities by falling back on the idea that, whatever the past history between the parties, PCR was nonetheless allowed under the Contract to engage in the kind of unbridled primary production which Wiser sought to practice and ultimately did practice. I have explained why I reject this "*status quo*" reasoning. PCR did not have the right to engage in new primary production and certainly not in any manner it saw fit. At a minimum, PCR was under a duty of good faith not to engage in primary production in a manner which would

undermine or substantially nullify IFP's ability to pursue a thermal project. Moreover, such a duty also extended to not farming out its interest to a third party who would likely do the same. Accordingly, IFP acted reasonably in refusing to consent to PCR's disposition to Wiser.

[204] Thus, for these reasons, the Trial Judge erred in concluding that IFP had acted unreasonably in withholding its consent to PCR's disposition of its interest to Wiser. As a further consequence, Wiser was not novated into the JOA.

VII. Damages

[205] Based on my finding that it was reasonable for IFP to refuse to consent to the disposition to Wiser, PCR breached the Contract in proceeding as it did. Unfortunately, the Trial Judge's analysis of what the damages might be were he wrong in concluding that IFP had acted unreasonably in refusing to consent to PCR's disposition to Wiser contains reviewable errors.

[206] First, the Trial Judge's assessment of damages was premised on an improper starting point, namely his finding that PCR had the right to engage in unrestricted primary production at Eyehill Creek. This was not so.

[207] Second, his assessment of damages was also premised on the assumption that despite the nature and extent of primary production by Wiser, IFP's pursuit of a thermal project at Eyehill Creek had not been rendered "impossible" or "destroyed": QB Reasons at paras 240, 409. Neither is the appropriate test for breach of contract. It is enough that a thermal project would be rendered practically uneconomical.

[208] Third, the Trial Judge also concluded that the damages would need to be established with "reasonable certainty": QB Reasons at para 356. This is not the standard used for assessing damages for breach of contract. Proof of damages is based on probability, not reasonable certainty. Moreover, difficulty in determining damages is not a justification for awarding no damages at all: ***Penvidic v International Nickel*** (1975), [1976] 1 SCR 267 at 279-80; ***Webb & Knapp (Canada) Ltd. v Edmonton (City)***, [1970] SCR 588 at 599-601; ***Dallin v Montgomery***, 2011 ABCA 189 at para 47, 513 AR 87.

[209] Nevertheless, I have concluded that there are no grounds for interfering with certain conclusions the Trial Judge reached on damages, not because the reasons offered are free from error, but because the conclusions are justified on other grounds.

[210] To explain why requires a consideration of the implications of PCR having breached the Contract in the manner it did. What damages properly flow from that breach? On this initial point, while considerable time was spent on quantum of damages in the factums and in oral argument, I do not find it necessary to explore and resolve alleged errors by the Trial Judge in calculating the amount of damages based on the premise of a thermal project actually proceeding at Eyehill Creek. Why? Because no matter which permutation and combination is considered, the Trial Judge did not err in his ultimate conclusion that whatever the amount of the damages, there was zero chance

that a thermal project would have proceeded at Eyehill Creek. Thus, there is no reviewable error in his conclusion that any damages attributable to the loss of a thermal project should be discounted "by 100% to reflect the 'chance of non-occurrence'": QB Reasons at para 383.

[211] Despite the breach of Contract, what exactly did IFP lose when PCR transferred its interest to Wiser? IFP lost an opportunity to convince PCR – or any successor in interest likewise interested in pursuing a thermal project – that a thermal project should be a "go". It also lost an opportunity to agree with PCR on other methods to exploit the minerals at Eyehill Creek whether under the JOA and Operating Procedure or otherwise. But realistically, having regard to all relevant considerations and factors, what chance would there be that a thermal project would have been implemented? In my view, the Trial Judge's conclusion that there was none is not only reasonable, it is correct.

[212] Once PCR signalled its intention to transfer its working interest to Wiser, IFP had two opportunities to proceed with a thermal project. One was when it received the ROFR. But IFP declined to exercise its rights under the ROFR, buy PCR out, and take over PCR's remaining working interest in Eyehill Creek. The second opportunity was after PCR disposed of its interest to Wiser. I am not discounting the obvious practical hurdles that arose as Wiser proceeded to initiate new primary production at Eyehill Creek. But as the Trial Judge found, at no time after Wiser acquired PCR's working interest in Eyehill Creek did IFP make any move to stop the primary production,[15] convince Wiser to proceed with a thermal project, or initiate one on its own, whether by bringing in a new co-owner or otherwise.[16]

[213] As for the lost opportunity as a co-owner to agree on new methods to exploit the minerals at Eyehill Creek once the *purpose* of the JOA had ended, that too would inevitably have led to the same result. Some time after concluding the Contract, PCR abandoned the idea of a thermal project at Eyehill Creek. I realize that this was in part because it chose to proceed with a thermal project elsewhere at its own property at Christina Lake. And I also realize that PCR was not forthcoming in discussing its change of plans with IFP. But that does not diminish the reality that there would have been only five options available to PCR and IFP as co-owners to exploit the minerals at Eyehill Creek: (1) proceed with a thermal project jointly; (2) proceed with a thermal project individually under the independent operations option in Article X of the Operating Procedure; (3)

[15] There is no evidence on this record that IFP sought any optimal recovery inquiry from what was then the Energy Resources Conservation Board under s 21 of the *Energy Resources Conservation Act*, RSA 2000, c E-10. Such inquiries were held from time to time since at least 1971. Nor is there any evidence that IFP took any steps to seek a review of any existing order or well license or otherwise oppose the recommissioning of any old wells. Nor is there any evidence on this record that it took any steps to oppose the granting of well licenses for any new wells.

[16] IFP had the right to propose and conduct an independent operation under Article X of the Operating Procedure. Whether this right existed after the disposition to Wiser remains an open issue. That would turn on the implications of Wiser not being novated into the JOA. Nevertheless, even if IFP could no longer propose an independent operation contractually, it retained its rights as co-owner to exploit the minerals at Eyehill Creek with all the consequences flowing from that. Given the Trial Judge's finding that IFP took no steps to move forward independently with a thermal project, all of this is academic.

proceed with primary production; (4) wait to see what the future held; or (5) a combination of one or more of these options given the extent of, and area covered by, the Eyehill Creek Assets.

[214] On this record, there was no realistic chance that PCR would ever have agreed to proceed with the first option, a thermal project at Eyehill Creek. Nor was IFP in a position to proceed with the second option, an independent operation, as the Trial Judge himself concluded: see QB Reasons at para 197. And IFP never did. With respect to the fourth option, the Trial Judge found that PCR would have had to engage in primary production "to preserve its leases": QB Reasons at para 381. Despite my reservations about the extent to which some of this reasoning borders on speculative – since it is in Alberta's interest to permit leases to be extended where doing so would result in the maximum benefit being realized by Albertans from extracting oil and gas – nevertheless, this record is lacking as to likely options on this front. Accordingly, there is no basis to interfere with this finding by the Trial Judge. This necessarily affects the fifth option too. That effectively left only the second option: proceed with primary production.

[215] Thus, for these reasons, the Trial Judge made no reviewable error in concluding that any award of damages should be discounted by 100% to reflect the chance of non-occurrence of a thermal project.

[216] Therefore, in the result, IFP is entitled to an accounting for its proportionate share of all net revenue realized to date from primary production at Eyehill Creek on both existing and new wells.

[217] However, two issues remain unresolved which this Court is not in a position to settle. The first relates to the effect of the contractual limitation on liability contained in Article 7.9 of the AEA. The Trial Judge found that any damages award would have been limited, in any event, to $16,000,000 based on this Article. However, he did not consider the potential application of this limitation, if any, in the context of IFP's continued ownership of a working interest in the Eyehill Creek Assets. Consequently, whether that Article limits in some way IFP's ownership interests or its ability to require Wiser to account to IFP for IFP's proportionate share of the net proceeds of primary production to date remains an open issue. In other words, does the $16,000,000 limitation apply to restrict either IFP's ownership interest or the amount of net revenue it is entitled to receive from primary production to date at Eyehill Creek? We received no argument on this point.

[218] The second issue relates to how to calculate the net revenue. In addition to the obvious, there is a question of whether and to what extent, if any, IFP should be responsible for abandonment costs of existing infrastructure. To take a few examples only, there may be wells that were not reactivated at all and have now been formally abandoned. Whether IFP is responsible for what would otherwise be its proportionate share of those costs remains another open issue. Also, there might be certain abandonment costs that were already required to be paid when existing wells were reactivated. In other words, those costs might have been baked in, with or without reactivating them for primary production. Again, is IFP responsible for those costs or only the incremental costs of abandoning the wells associated with their reactivation for primary production? And is it, in any event, open to IFP to opt in to existing wells on an individual basis? Again, we heard no argument on these or related points dealing with how to determine the "net

revenue" realized from primary production at Eyehill Creek.

[219] Since this Court is unable to address and resolve these issues, they must be remitted to the Queen's Bench for determination and I so order. If, in the course of dealing with these issues, the parties raise other related issues which need to be resolved in order to properly dispose of this matter, the Queen's Bench will be able to adjudicate these as well as it sees fit.

VIII. Conclusion

[220] For these reasons, I allow the appeal. As noted, IFP's working interest in Eyehill Creek is, and remains, an undivided interest as a tenant in common equal to 20% of PCR's working interest in the PCR Eyehill Creek Petroleum and Natural Gas Rights and in the PCR Eyehill Creek Miscellaneous Interests, as both terms are defined in the AEA.

[221] Accordingly, IFP is entitled to an accounting for its proportionate share of the *net revenue* realized from primary production at Eyehill Creek.

[222] The outstanding issues relating to the disputed cap on liability and calculation of net revenue of primary production at Eyehill Creek are remitted to the Queen's Bench for determination.

Appeal heard on October 16 and November 10, 2015

Reasons filed at Calgary, Alberta
this 26th day of May, 2017

Fraser C.J.A.

I concur:

Rowbotham J.A.

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Dissenting Reasons for Judgment Reserved of
The Honourable Mr. Justice Watson

I. Summary

[223] IFP Technologies (Canada) Inc ("IFP") and PanCanadian Resources Ltd ("PanCanadian" or "PCR") entered into four agreements in 1998: a Memorandum of Understanding, an Asset Exchange Agreement, a Joint Operating Agreement, and a Technology Development Agreement. For simplicity we refer to them as the "Deal", although acknowledging that the parties were not entirely *ad idem* on appeal as to whether the four agreements can be taken as a harmonious whole.

[224] Pursuant to the Deal, IFP exchanged a 3% gross overriding royalty that it already held on a number of PanCanadian-operated wells for a 20% working interest in resource development in the Eyehill Creek area where there had been, in the 1990s, primary oil production. This was a heavy oil area in the Mannville formation.

[225] By 1998, primary production had become uneconomical in the Eyehill Creek area and around two hundred wells were shut in. PanCanadian lost several leases and was receiving Crown notices to move on other shut-in wells.

[226] PanCanadian became EnCana Corporation as this dispute unfolded (collectively, PanCanadian). Wiser Oil Company, later Canadian Forest Oil Ltd ("Wiser") came into the picture when it acquired PanCanadian's interests via a farm-out agreement, and later, the Abandonment Reclamation and Option Agreement or ARO (collectively, "farm-out agreement").

[227] IFP contended at the 33-day complex trial that, after having worked harmoniously and profitably with PanCanadian on other projects, it was deprived of the interests it acquired in the Deal; in short, PanCanadian was in breach of contract.

[228] The Deal was interpreted by Wittmann CJ in *IFP Technologies (Canada) v Encana Midstream and Marketing*, 2014 ABQB 470, 591 AR 202 ("QB Reasons"). The QB Reasons carefully surveyed the Deal and the relevant circumstances, and the appellant largely accepts the recital of evidence. The QB Reasons essentially found that IFP got what it bargained for even though that bargain did not give IFP what it hoped for. As is often the case in the economic-shock-sensitive resource industry, the Deal was not a guaranteed endeavour.

[229] This Court has closely examined the record and the QB Reasons and we are not unanimous. In dissent, I respectfully am not persuaded to to interfere. Even if I might be inclined to a somewhat different view on some matters from the view of the QB Reasons, I am not persuaded that there are material errors of fact or law about the conclusion that there had been no breach of contract.

[230] The appeal should therefore, in my view, be dismissed. My reasons follow.

II. Overview of the Dispute

[231] In light of the clear and comprehensive QB Reasons, an aerial view of the circumstances is sufficient. We do not discuss every point raised.

[232] The QB Reasons found that the scope and nature of IFP's interest as reflected by the July 1998 Memorandum of Understanding (MOU in the QB Reasons) was significantly revised by the October 1998 Joint Operating Agreement and Asset Exchange Agreement. More specifically, the QB Reasons explained:

> 33 A key issue in this dispute is the nature of IFP's working interest. While the [Memorandum of Understanding] set out the intention that IFP's 20% working interest would relate to all development and production, whether primary, assisted or enhanced, the [Joint Operating Agreement] purports to limit the parties' working interests to thermal and other enhanced recovery. The [Joint Operating Agreement] relieves IFP of any liability for abandonment obligations related to primary operations. The evidence at trial indicated that it was important to IFP to limit its liability in this regard. ....

[233] The QB Reasons concluded that the text of the Joint Operating Agreement (JOA in the QB Reasons) and Asset Exchange Agreement (AEA in the QB Reasons), corresponding to evidence about negotiations, reflected that IFP did not want to be linked to existing primary production by PanCanadian at Eyehill Creek, then shut in. During negotiations and later in the text of the Deal, IFP was concerned with liability for the significant cost of abandonment of those wells, among other things. The Deal reflected that.

[234] The QB Reasons also concluded that IFP effectively traded away its interest in *primary* production at Eyehill Creek to avoid potential liability related to *primary* production. They found IFP focused its aspirations only on production by thermal methods (subject to limitations in the Deal) and at the start, PanCanadian shared the thermal production vision. The Chief Justice held that any right by IFP to refuse to consent to PanCanadian's farm-out agreement with Wiser depended on the extent of its working interest under the Joint Operating Agreement and Asset Exchange Agreement. Those agreements did not make IFP's refusal to consent to the farm-out reasonable. As a result, the farm-out agreement was not a breach of the Deal, and PanCanadian and Wiser did not owe IFP anything, even if that left IFP with only a conceptual residual interest in the Deal.

[235] The Chief Justice was satisfied that this outcome was not unfair to IFP as it had received no guarantee under the Deal that there would ever be thermal production at Eyehill Creek. We observe, in passing, that the principal witness for IFP, Delamaide, conceded that PanCanadian was

not required to proceed with thermal production (Transcript 226/35-36). But Delamaide also asserted that "[w]e didn't give up our royalty for hope [of a thermal project]. We gave it for something far stronger than that." (Transcript 206/4-5). Of course, parol evidence cannot supplant, or even explain, the wording of the Deal in a manner that is inconsistent with its interpretation in the QB Reasons.

[236] IFP's position is that it retained a broader property interest in the resources at Eyehill Creek regardless of any agreement to focus the Joint Operating Agreement on thermal production to avoid liability on the existing primary production facilities and abandonment (referred to by Delamaide as ring-fencing). On closer examination, it is more like a veto.

[237] IFP contended that even if PanCanadian was not required to carry on thermal production at Eyehill Creek, a proper reading of the Deal was that PanCanadian could not prejudice thermal production on it, let alone permit Wiser to do so. Despite the suggestion that PanCanadian had a trust obligation to IFP, the trial and appeal do not turn on the concept of a trust.

[238] IFP distinguishes the specific working interest under the Joint Operating Agreement from what it characterizes as a property right in production recognized under the Asset Exchange Agreement. Put another way, IFP contended that the Deal gave them two forms of interest, not only the Joint Operating Agreement structured working interest which the QB Reasons characterized as their only remaining interest. Although IFP's position is complex, the spine of its submission appears to be IFP's residual interest to veto resource development of the Eyehill Creek property until PanCanadian either commenced thermal production as per the Joint Operating Agreement (with IFP's right to participate) or, presumably, until PanCanadian acquired IFP's working interest.

[239] Significantly, however, the veto did not prevent PanCanadian from any primary production, since the Deal and events thereafter had PanCanadian doing so without attack by IFP. The veto appears to have been against large-scale primary production which, in IFP's view, would leave it with nothing to make thermal production viable. As argued, this is a unique form of right or interest and since it does not bear clear definition, it is not surprising that IFP should apply the term "reasonable expectations" to identify it. The "reasonable expectations" veto asserted draws breath from Article 2401B(e), which refers to withholding consent from efforts "likely to have a material effect" on IFP's interest.

[240] IFP contends that its reasonable expectations as to the meaning of the Deal were known to and accepted by PanCanadian. Those reasonable expectations and its residual property interest (as a matter of interpretation of the Deal) justified IFP's refusal to consent to PanCanadian's farm-out agreement with Wiser especially when coupled with the scale of primary production Wiser intended (and did). The actions of PanCanadian and Wiser in that regard were said to be a breach of the Deal for which IFP was entitled to damages.

III. Summary of the Events Leading to the Dispute

[241] Between January and June, 1998, PanCanadian appears to have concluded that some or all of the Eyehill Creek property would be well-suited for piloting an enhanced thermal recovery process known as steam-assisted gravity drainage. It concluded that IFP's parent organization, the Institut Français du Pétrole could bring technological expertise about thermal production that would complement PanCanadian's experience as an oil and gas site operator. The Memorandum of Understanding dated June 23, 1998, was the outcome of discussions between representatives of IFP and PanCanadian in June 1998.

[242] The QB Reasons held that by the terms of the Deal, their interests were separate. "Nothing contained herein shall be construed as creating a partnership, joint venture or association of any kind or as imposing upon any party, any partnership duty, obligation or liability to any other party.": Article 1501 of the Operating Procedure being Schedule B to the Joint Operating Agreement. While the Joint Operating Agreement superseded the Operating Procedure in the event of discrepancy, this acknowledgment was considered significant.

[243] The 1990 Operating Procedure is a standard form agreement that is a product of the Canadian Association of Petroleum Landmen. We can assume that this document embodied industry consensus on various typical contract terms – at least when this version was in use.

[244] The QB Reasons found that the Memorandum of Understanding contemplated a 20% working interest in all forms of production, albeit that the parties were focused on thermal production. However, the QB Reasons concluded that, after detailed negotiations by the sophisticated corporate parties with legal advice, IFP agreed to give up its share in primary production (for which it did not want to share risk and costs).

[245] The effective date of the Joint Operating Agreement was the same as the asset swap Asset Exchange Agreement. On appeal, IFP asserts that the definitions of "PCR Assets" in Clause 1.1 of the Asset Exchange Agreement, including "PCR Eyehill Creek Assets" under Clause 1.1(t), should be linked to "PCR Eyehill Creek Petroleum and Natural Gas Rights" and "PCR Eyehill Creek Miscellaneous Rights" which, when combined, give IFP a 20% property interest in the PanCanadian Eyehill Creek Petroleum and Natural Gas Rights. But Clause 2.9(d) of the Asset Exchange Agreement provided:

> Upon the execution of the [Joint Operating Agreements] referred to in subclause 2.9(A) ..... subclause 2.9(c) ..... shall be terminated ..... and the **relationship** of the parties with respect to the PCR Lands shall be governed solely by the terms and provisions of said [Joint Operating Agreements]. [Emphasis added]

[246] IFP effectively contends that the new "relationship" is to be distinguished from any property right it had under the Asset Exchange Agreement, and all this meant was that the operational aspects of IFP's working interest was governed by the Joint Operating Agreement. The QB Reasons at para 80 appear to accept that the word "relationship" had limited effect.

[247] Nonetheless, the QB Reasons read the Asset Exchange Agreement together with the relevant Joint Operating Agreement as giving IFP a 20% share of any thermal production only. The Joint Operating Agreement contains several features in Clause 4 as described by the QB Reasons thus:

> [91] Clauses 4(a) and 4(b) of the [Joint Operating Agreement] set out the structure of the parties' joint operations:
>
> > 4(a) All *operations* conducted by the parties pursuant to this Agreement shall be *at each party's sole risk and expense* unless the contrary is specifically stated and always *in accordance with Clause 5 hereof*.
> >
> > (b) All operations conducted by the parties pursuant to this Agreement shall be conducted in a lawful manner and in accordance with good oilfield practice.
>
> 92 Clause 4(c) limits the working interests of the parties to thermal or other enhanced recovery schemes and projects:
>
> > 4(c) It is specifically agreed and understood by the parties that the working interests of the parties as described in Clause 5 of this Agreement relate exclusively to thermal or other enhanced recovery schemes and projects which may be applicable in respect of the petroleum substances found within or under the Joint Lands and the Title Documents. Unless specifically agreed to in writing, IFP will have no interest and will bear no cost and will derive no benefit from the recovery of petroleum substances by primary recovery methods from any of the rights otherwise described as part of the Joint Lands or the Title Documents.
>
> 93 The Defendants argue this is a very significant clause. They rely on it to argue that IFP's working interest was reduced from the provisions of the AEA which conveyed a percentage of all of PCR's interest in the Title Documents and the Joint Lands to a working interest relating exclusively to thermal or other enhanced recovery schemes. They submit IFP has no interest in any other production from the lands and the JOA applies only to production from thermal or other enhanced recovery methods. [Emphasis added in QB Reasons]

[248] The QB Reasons went on to note that Clause 5(c) of the Joint Operating Agreement was also directed to what sort of production work would be subject to the 80:20 split:

> 5(c) For greater clarity, there exist, in conjunction with the Joint Lands, numerous wells, flowlines, processing facilities and other similar and related surface and underground installations which have been or are being used in the primary production of petroleum substances and which are owned, at least partially, by PCR. *The parties do not intend that IFP will, pursuant to this Agreement, acquire any interest in such wells, flowlines, facilities or installations*. Unless otherwise specifically agreed in writing, the only circumstance in which IFP will come into possession of a proportionate 20% working interest share in any of the aforementioned wells, flowlines, facilities or installations is in the event such wells, flowlines, facilities, or installations are included within the definition of a thermal or other enhanced recovery project. *At such time as the parties agree to the inclusion of any such well, flowline, facility or installation in a thermal or other enhanced recovery scheme or project, IFP will forthwith become the owner of a proportionate 20% working interest in any such well, flowline, facility or installation without further consideration paid by IFP to PCR. In such circumstance, IFP will assume its proportionate share of all future costs, liabilities and benefits derived from or associated with its ownership of such well, flowline, facility or installation. Any interest so acquired will become subject to the Operating Procedure without further action by the parties.* [Emphasis added]

[249] In effect, the QB Reasons find that, even if individuals negotiating on behalf of IFP may not have been inclined to surrender the working interest in other potential forms of production at Eyehill Creek under the Memorandum of Understanding, the objective meaning of the Deal as reflected in the Joint Operating Agreement and Asset Exchange Agreement, resulted in that trade-off. The QB Reasons supported this reading of the Joint Operating Agreement by reference to the contemporaneous Asset Exchange Agreement which contained acknowledgments and an entire agreement clause described in the QB Reasons as follows:

> 81 Article 3 of the AEA sets out representations and warranties. In Articles 3.1 and 3.2, IFP and PCR each acknowledge they are purchasing one another's interests and assets on an "as is, where is" basis, without representation and warranty and without reliance on any information provided to or on behalf of IFP by PCR or vice versa or by any third party. The Defendants note there are no representations or warranties with respect to any promise to commence a thermal project or to refrain from primary production.
>
> 82 Articles 4 and 5 relate to Indemnities and Article 6 to Operating Adjustments. Article 7 contains some general provisions, including "Further Assurances" by each party.

> 83 Article 7.3 contains an entire agreement clause:
>
> > The provisions contained in any and all documents and agreements collateral hereto shall at all times be read subject to the provisions of this Agreement and, in the event of conflict, the provisions of this Agreement shall prevail. No amendments shall be made to this Agreement unless in writing, executed by the Parties. This Agreement supersedes all other agreements, documents, writings, and verbal understandings among the Parties relating to the subject matter hereof and expresses the entire agreement of the Parties with respect to the subject matter hereof.
>
> 84 This article makes clear the parties intended to have the AEA and attached schedules govern their relationship, without reference to any prior agreement or verbal understandings. The AEA takes precedence over any collateral agreements in the event of conflict. This includes the MOU signed by the parties prior to the AEA that, as discussed above, contained slightly different language on key terms. [Emphasis in QB Reasons]

[250] Based on this analysis, the QB Reasons found that IFP got what it bargained for and had no reasonable expectations of any more than what the Deal said in October, 1998, as interpreted by the QB Reasons. In this respect, another crucial fact finding of the QB Reasons should also be noted here:

> 198 I can appreciate why IFP believed the disposition to Wiser would be likely to have a material adverse effect on its working interest or future operations. The problem is that such belief must be objectively reasonable. IFP had the unilateral expectation that PCR would initiate a [steam-assisted gravity drainage] operation and would refrain from primary production, but the agreements provide no basis for this expectation. Furthermore, in the context of an industry mandating development rather than sitting on rights, an agreement in which each party could make decisions based on its own interests, and tenants-in-common ownership, I find it was unreasonable for IFP to object to the disposition to Wiser on the grounds Wiser would undertake something PCR was entitled to do and in fact was doing. It is not objectively reasonable to withhold consent and prohibit the alienation of PCR's interests on that basis.

[251] No one suggests on appeal that there was any sort of collateral agreement entitling IFP to anything more than what the Deal actually gave IFP. The ‘whole agreement clause” (Article 7.3) has also been noted. On this topic see ***Lindley v Lacey***, (1864) 17 CB (NS) 578, 144 ER 232;

Erskine v Adeane, (1873) 8 Ch App 756; ***Hawrish v Bank of Montreal***, [1969] SCR 515 at 520-51, 2 DLR (3d) 600; ***Carman Construction v Canadian Pacific Railway Co***, [1982] 1 SCR 958; ***Heilbut, Symons & Co v Buckleton***, [1913] AC 30 at p 47 (UKHL); G.H.L. Fridman, *The Law of Contract in Canada* 6th ed, (Thomson Professional Publishing 2011) at pp. 440-51.

[252] Rather, IFP largely presses its case on what it calls 'reasonable expectations' reflected within the Deal and not extrinsic to it. Those expectations are said to support IFP's decision to refuse to consent to the farm-out agreement, and made PanCanadian's decision to farm-out to Wiser a breach of the Deal. At risk of repetition: the basis of those reasonable expectations proposed by IFP was a form of residual interest in the Eyehill Creek property's leased resources; the effect of those reasonable expectations was an ability to veto primary production by Wiser (and logically by PanCanadian) because that would undermine the viability of thermal production.

[253] Seen in that light, the judicial task at trial was still to objectively interpret the Deal as it was written and signed, while making its parts work as harmoniously as possible.

[254] The QB Reasons inter-related the Asset Exchange Agreement and the Joint Operating Agreement according to the language of each, and effectively found that they operated harmoniously and did not need to 'amend' each other in the sense argued at trial:

> 97 I find that IFP's working interest pursuant to these agreements has always been limited to thermal and other enhanced recovery methods. I find the AEA did not grant broad rights that were subsequently reduced or modified by the JOA, as assumed by both the Plaintiff and the Defendants. The AEA does not define the term working interest. The Preamble to the AEA states, however, that the ownership of working interests is subject to and in accordance with the terms and conditions of the JOA. Furthermore, the JOA is incorporated by reference into the AEA as though it were contained in the body of the AEA. As such, the definition of working interest in the JOA is incorporated by reference into the AEA.
>
> 98 Turning to the JOA, it adopts the definition of working interest set out in the Operating Procedure: "... the percentage of undivided interest held by a party in a production facility on the joint lands, ... which percentage is as provided in the Agreement..." The JOA then provides at Clause 4(c) that the parties' 80% and 20% working interests relate to thermal and enhanced recovery operations only.
>
> 99 The AEA and JOA are contemporaneous documents. Article 1.5 of the AEA incorporates the Schedules and makes them part of the body of the AEA. This is not a case of inconsistency between the terms and conditions of the AEA and the JOA; rather, the AEA lacks a definition that the JOA and Operating Procedure provide. I

> conclude IFP's working interests under these Agreements is in respect of thermal and other enhanced recovery operations only.

[255] Therefore, the context of the Memorandum of Understanding was that IFP would have the opportunity to field test its thermal technologies and PanCanadian would be able to extract a significantly higher percentage of oil than traditional primary production could achieve. We must defer to specific fact findings in the QB Reasons as to the history of events absent palpable and overriding error of fact or clear unreasonableness in the reasoning.

[256] The Joint Operating Agreement, Schedule B Operating Procedure, had two separate clauses which gave IFP two different rights in response to PanCanadian seeking to dispose of its interest: a right of first refusal (Article 2401B(d)) and a right to withhold consent to any dealings by PanCanadian that IFP could reasonably believe would negatively affect its interest in the property (Article 2401B(e)). The two rights clauses would arise if IFP was given a "disposition notice" by PanCanadian. These clauses also applied to the farm-out agreement.

[257] The right of first refusal clause in Article 2401B(d) referred to an election by the party receiving the disposition notice to itself give notice of "acceptance to purchase, for the applicable price, all of the working interest included in such disposition notice on the terms and conditions set forth in the disposition notice". As elaborated below, IFP did not exercise this clause.

[258] The QB Reasons at para 112 concluded that the consent clause, Article 2401B(e), was at the "core of this case" because IFP did purport to exercise it (and, as noted below, to rely on it for a considerable time) after an Abandonment, Reclamation and Option Letter Agreement and an Extension and Interim Operation Agreement was reached between PanCanadian and Wiser in March, 2001. Article 2401B(e) of the Operating Procedure provides as follows (emphasis in QB Reasons):

> In the event that the working interest described in the disposition notice is not disposed of to one or more of the offerees pursuant to the preceding Subclause, *the disposition to the proposed assignee shall be subject to the consent of the offerees. Such consent shall not be unreasonably withheld, and it shall be reasonable for an offeree to withhold its consent to the disposition if it reasonably believes that the disposition would be likely to have a material adverse effect on it, its working interest or operations to be conducted* hereunder, including, without limiting the generality of all or any part of the foregoing, a reasonable belief that the proposed assignee does not have the financial capability to meet prospective obligations arising out of this Operating Procedure. ...

[259] Further context and detail are needed at this point.

[260] Although the Deal was concluded in October 1998, it was clear by July 27, 1999 (if not by late 1998) that economic problems led to a virtual standstill at the Eyehill Creek property. There

was evidence that by December 15, 1998, PanCanadian already knew that thermal production would not be economical. There was also evidence that in February and March 1999 PanCanadian was not optimistic about Eyehill Creek production.

[261] An internal PanCanadian memo dated July 27, 1999, following a site visit to Eyehill Creek proposed three options for thermal production: construct a new facility; move an existing facility from Senlac to Eyehill Creek; or abandon the idea of thermal operations. Already by November, 1998, increases in the price of gas made the thermal project at Eyehill Creek uneconomical. By comparison, PanCanadian's Senlac facility appears to have been available as a steam-assisted gravity drainage testing ground even if profitability there might have been marginal.

[262] It appears that PanCanadian lost interest in thermal production at Eyehill Creek in or before August 2000. Internal documents of October 5, 1999 and October 8, 1999, suggest that IFP was also aware that low prices for oil and elevated prices for gas were affecting any start-up of thermal production at Eyehill Creek. On December 2, 1999, PanCanadian was informed that PNG Lease No 0485010072 had expired.

[263] Wiser had picked up the PNG Lease No 0495040095 when it outbid PanCanadian. The Crown had also been pressing PanCanadian about the other wells in the area. The window was closing with Notices to Prove the Right to Produce issued to PanCanadian on June 23, 2000 for some 25 wells. PanCanadian appears to have faced abandonment liabilities.

[264] IFP contended to this Court that it was not told about these events, and particularly not told of the expiry of the PNG Lease No 0495040095 and the pressure by the Crown. IFP characterizes the PanCanadian's silence as lacking good faith. IFP was found to have learned about Wiser in February, 2001. PanCanadian's staff evidently did not think some of this information concerned IFP since IFP's interest, in the staff member's understanding, was in thermal production only.

[265] In December, 2000, PanCanadian and Wiser entered into discussions for a farm-out. The QB Reasons found that PanCanadian gave IFP informal notice of the draft letter agreement with Wiser in February, 2001, and that IFP did not react to that informal notification.

[266] By March 7, 2001, Wiser and PanCanadian had entered into the farm-out agreement and, by March 31, 2001, an Extension and Interim Operation Agreement. By April 9, 2001, PanCanadian and Wiser were seeking extensions of time from the Crown as to threatened abandonments for 27 wells. PanCanadian gave IFP notice of the farm-out agreement on April 19, 2001 with the comment that the notice "does not constitute any acknowledgment of your interest to the transactions contemplated by" the farm-out agreement.

[267] PanCanadian followed up with a proposed letter agreement on May 4, 2001. On May 9, 2001, IFP replied that it chose not to exercise the right of first refusal, but refused consent of the disposition to Wiser. IFP explained that in its view, the 20% interest it possessed included all forms of development, not just thermal production. The IFP letter included this:

> We remind you that Pan Canadian's commitment to the initiation and subsequent implementation of such technology development programs was a major reason that IFP agreed, pursuant to the terms of [the Memorandum of Understanding] and [the Asset Exchange Agreement] to exchange its royalty interests in the former CS Resources lands for working interests in the lands covered by the [Asset Exchange Agreement]. *It was also one of the reasons that IFP agreed, in derogation of the terms of the [Memorandum of Understanding] and the [Asset Exchange Agreement] to limit the scope of the [Joint Operating Agreement] to thermal or other enhanced recovery schemes and projects on Eyehill Creek*."
>
> [Emphasis added]

[268] PanCanadian and Wiser proceeded with the farm-out agreement. PanCanadian was of the view that IFP's objection was unreasonable and the farm-out agreement was a legally effective novation consistent with the Deal. Nonetheless, IFP and PanCanadian continued to be in contact under the Deal. IFP was told by a July 18, 2001 letter from PanCanadian that under the farm-out agreement Wiser had until December 31, 2003 to "earn PanCanadian's working interest in the captioned lands".

[269] By December, 2001, Wiser had done 105 abandonments, 42 reactivations and 23 new wells, of 220 wells on the suspended list for Eyehill Creek. By June 13, 2002, IFP was objecting in writing to Wiser's drilling operations. That letter included these statements:

> Recently it came to our attention that Wiser has commenced drilling operations on the lands utilizing primary methods only. These operations undermine and potentially render impossible the agreed intention to develop the area using enhanced recovery techniques. Consequences, these agreements ... will have the effect of defeating the reasonable expectation that IFP ... had at the time of contract the [AEA]. Wiser clearly has neither the intention nor even the technological ability to fulfill the undertakings of PCR ...
>
> [Emphasis added]

[270] By letter of July 31, 2002, PanCanadian replied to IFP, denying that IFP had any covenant to develop the Eyehill Creek lands and asserting that IFP's refusal to consent was not legally valid.

[271] On March 4, 2003, IFP filed its Statement of Claim suing PanCanadian (and its successor, EnCana) on a variety of bases, largely centred on breach of contract. IFP also sued Wiser as a party to the breach and alternatively as a form of trespasser against IFP's interests in the Deal.

IV. Reasons Under Appeal

[272] The Chief Justice dismissed IFP's claim for breach of contract. He found that IFP unreasonably withheld consent to the farm-out agreement. These findings also defeated IFP's claim that Wiser was a party to PanCanadian's breach and a trespasser on property in which IFP had a legally enforceable interest.

[273] The QB Reasons ended with a synopsis on the breach of contract claim as follows:

> 407 The contractual matrix entered into is at odds with the unilateral expectations of IFP. Were it to be granted the remedy asked for, the Court would, of necessity, acknowledge a better set of contracts conferring rights on IFP that IFP did not negotiate in the first instance. IFP cannot attain a remedy which it could not have obtained from PCR. IFP did not bargain for a joint venture, notwithstanding its unilateral expectations in this regard. It provided technology in exchange for a working interest. IFP's working interest was restricted to EOR. It had no interest in primary production. Yet, primary production was contemplated in the contractual matrix.

[274] In his view, the Deal did not justify IFP's contention as to its reasonable expectations under the Deal or withholding of consent to the farm-out agreement. The QB Reasons summarized: "I find IFP was unreasonable in withholding its consent to the farm-out agreement between PCR and Wiser. Wiser was novated into the JOA and IFP retains its 20% working interest in thermal and other enhanced recovery at Eyehill Creek": para 408.

[275] The Chief Justice found, in the alternative, that if he was in error as to the breach of contract claim, IFP had not made out a proven loss of opportunity. In light of our reasons on liability, we do not need to burrow into the topic of damages.

[276] As elaborated below, I agree that unilateral subjective hopes of the persons who acted on behalf of IFP could not change the meaning of the Deal. Its terms must be read objectively in light of the commercial context by an informed and impartial observer; the objective interpretation of the Deal is crucial.

[277] The issue as to whether it was reasonable for IFP to withhold consent to the farm-out agreement depended in part on what reasonable expectations IFP was entitled to have (on an objective interpretation of the Deal) and the circumstances in which the question of consent was called for by PanCanadian's notice of disposition.

[278] The QB Reasons reveal that whether the farm-out agreement effectively deprived IFP of its interest in the original Deal was considered. They also considered whether deprivation, if any, was inconsistent with the Deal. We are not persuaded that IFP's decision to not exercise the buyout clause in the Joint Operating Agreement's Operating Procedure Article 2401B(d) would automatically deprive IFP of the right to exercise the consent clause under Article 2401B(e). However, nothing turns on that subsidiary topic.

[279] I am not persuaded that there was fundamental error in the QB Reasons that the reality was that IFP was not in a position to cross-develop the Eyehill Creek property using thermal production when Wiser was doing primary production on scores of wells, nor was it otherwise viable.

[280] Turning to standard of review and hereafter to the analysis of the live issues, the procedural history of the litigation at the Court of Queen's Bench is relevant.

V. Queen's Bench Procedural History

[281] The Chief Justice of the Court of Queen's Bench replaced the deceased judge who had heard the complex 33-day trial. The Chief Justice replaced him pursuant to rule 13.1 of the *Alberta Rules of Court*, AR 124/2010.

[282] As reported in the QB Reasons, he "contacted counsel for the parties and they confirmed that this matter could be fairly decided on the record. I agreed to proceed accordingly": para 5.

[283] As a result, the Chief Justice's findings were necessarily based upon a close review of the testimonial and documentary evidence. The respondents contended that a standard of correctness is warranted because of the action's unusual procedural history.

VI. Grounds of Appeal

[284] The issues on appeal, somewhat restated, are whether:

i. IFP unreasonably refused to consent to the farm-out agreement;

ii. IFP reasonably believed that the farm-out agreement would have a material adverse effect on it and its working interest;

iii. PanCanadian acted contrary to the reasonable expectations of the parties to the Asset Exchange Agreement pursuant to which IFP had acquired its interest;

iv. PanCanadian owed a duty of good faith to IFP and, if so, did it breach that duty;

v. IFP is entitled to an accounting from Wiser; and

vi. IFP is entitled to damages

[285] Given my conclusions on Grounds one through four it would be unnecessary for me to comment on Grounds five and six. To clarify, however, I might say that I largely would accept the analysis of the majority about damages were I to commence from the tipping point which the majority has found.

[286] IFP also generalizes its criticism of the QB Reasons as reflecting error of this sort: "the court repeatedly referred to and rejected arguments which IFP did not make, and failed to consider arguments that IFP did in fact make".

[287] Speaking generally, it is hard to discern what harm would be done if a trial judge discussed arguments the party might have made but which would not have succeeded. So covering issues that IFP did not formulate does not seem a reversible error. That said, the grounds raised by IFP can be construed as saying only that the QB Reasons misconceived IFP's submissions and failed to accurately consider and address arguments that IFP did make.

VII. Standard of Review

[288] Despite the unusual fact that the Chief Justice was, in essence, sitting in a record review situation analogous to the position ordinarily occupied by this Court, we are satisfied that the customary standards of review apply.

Standard of Review for Findings Based Solely on the Record

[289] All factual determinations, whether related to credibility, primary and inferred facts, or the global assessments of the evidence, are measured on a reasonableness standard: ***HL v Canada (Attorney General)***, 2005 SCC 25, [2005] 1 SCR 401 at paras 53-54. An appellate court may not interfere absent a palpable and overriding error that renders a finding unreasonable: ***Housen*** at para 24.

[290] The Honourable Roger P Kerans & Kim M Willey in *Standards of Review Employed by Appellate Courts*, 2nd ed (Edmonton: Juriliber, 2006) at 50-52 point to the functional justifications for deference that exist regardless of the form that the evidence at trial takes. These include the rationale arising from the appropriate division of labour between trial and appeal courts. A *de novo* appeal is no more beneficial to the autonomy, integrity and expertise of a trial process, whatever form the trial process takes.

[291] The justifications for deference exist beyond the usual advantages possessed by triers of fact, and many trials involve testimonial exhibits like audio and video interviews, recordings, charts, expert reports, photographs and other documents. The increase in summary trials is also a movement towards adjudication based less on *viva voce* evidence and more on what might be characterized as a composite record: see generally ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87, the *Alberta Rules of Court* and many judgments of this Court.

[292] This does not change the level of deference. ***Attila Dogan Construction and Installation Co v AMEC Americas Ltd***, 2015 ABCA 406 at para 9, 609 AR 313, held "[t]he standard of review for findings of fact and of inferences drawn from the facts is the same, even when the judge heard no oral evidence". "Nor is deference to factual findings reduced simply because they are based entirely on a written record": ***FL Receivables Trust 2002-A v Cobrand Foods Ltd***, 2007 ONCA 425 at para 46, 85 OR (3d) 561.

Standard of Review Governing the Issues in this Appeal

[293] ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53 at paras 51 and 53, [2014] 2 SCR 633 notes that judicial decisions in contract disputes are not likely to have much value beyond the specific litigation. As explained in ***Sattva***, there is little to be gained and much to be lost by re-litigating such questions at an appellate level.

[294] An exception to the reasonableness approach arises when the terms of the contract at issue being interpreted are standard terms of a standard-form contract and where consistency and predictability of interpretation are important: ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37, [2016] 2 SCR 23. Different clauses in the same overall agreement may be either standard form clauses, and correctness applies, or they may be homespun, in which instance reasonableness applies. Either way, however, the test remains an objective one and, to my mind, should be a rather a clinical exercise. That is so even though, as the majority correctly observes, context is still important: see *eg* ***Wood v Capita Insurance Services Ltd*** [2017] UKSC 24 at paras 10 to 15 where Lord Hodge contended that "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation."

[295] Objective interpretation of standardized terms adapted to the contractual arrangements between these parties may give rise to extricable issues of law. If so they are reviewable for correctness: ***Ledcor***. The Operating Procedure document arguably is a standardized document for which a multiplicity of reasonable interpretations of the same terms would not be helpful. However, while some aspects of the contract terms are drawn from industry, the decisive parts of the agreements were drafted for or adapted to the Deal by the parties. We note as well that this standardized agreement usually applies in very different circumstances, the actual production of the oil and gas, not the mode of production. So once again deference will apply to the question of what the contract actually consists of. In my view, interference with the ultimate conclusion would be justified only if the factual aspects of the interpretation of the Deal in the QB Reasons were unreasonable or afflicted with palpable and overriding error. The majority finds such.

[296] The approach of the QB Reasons was to apply general principles of contractual interpretation to the words of the written contract, considered in light of the factual matrix: see ***Sattva*** at para 50.

[297] The Supreme Court has also made the following observation in ***Heritage Capital Corp v Equitable Trust Co***, 2016 SCC 19 at para 22, [2016] 1 SCR 306: "where an extricable question of law can be identified, the standard of correctness applies. Extricable questions of law include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'".

[298] Significant principles of contractual interpretation (such as referred to in the passage from ***Heritage Capital***) are engaged here. So "a practical, common-sense approach not dominated by technical rules of construction" applies: ***Sattva*** at para 47. The approach should be objective, and

should not isolate and focus on a specific aspect of a collection of agreements, or fix on the language of that aspect and call the result on that basis. An examination of surrounding circumstances does no more than "deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read *in light of the entire contract*: ***Sattva*** at para 57 (with emphasis added).

[299] Prof. Fridman, in *The Law of Contract in Canada*, 6th ed (Toronto: Thomson Canada Limited, 2011) wrote: "The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood...": at 15 with footnotes omitted. Prof. Fridman quotes from ***Ron Ghitter Property Consultants Ltd v Beaver Lumber Co***, 2003 ABCA 221 at para 9, 17 Alta LR 4th 243 at para 9 which reads in part (with emphasis added):

> The common thread ... is that the parties will be found to have reached a meeting of the minds, in other words be *ad idem*, where it is clear to the objective reasonable bystander, in light of all the material facts, *that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty* ....This requires the court to decide whether "a sensible third party would take the agreement *to mean what a understood it to mean or what B understood it to mean, or whether indeed any meaning can be attributed to it at all*.... Otherwise, ... "the consensus *ad idem* would be a matter of mere conjecture."

[300] To move beyond the determination of objective intent potentially involves the insinuation into the contract of court-inspired implied terms thought to make the contract more like the parties should have intended. This is not the role of the court.

[301] The distinction between implying a term and interpreting what is there already has a blurry boundary despite that crucial distinction: see ***Ontario Electricity Financial Corporation v Iroquois Falls Power Corporation et al***, 2016 ONCA 271 at paras 111-13, 398 D.L.R. (4th) 652 leave denied (January 19, 2017) [2016] SCCA No 279 (QL) (SCC No 37083).

[302] In sum, the specific findings of fact and the inferences of fact or mixed fact and law in the QB Reasons deserve deference and are assessed for reasonableness. Extricable questions of law are assessed for correctness. In the end, even on a reasonableness standard of review, the required application of objectivity to the question of interpretation and the necessity of consistent application of established principles of contractual construction, can lead to a situation where there is, on the crucial issues, only a single interpretation that fits the Deal and the entire context. This brings me to the submissions on appeal.

VIII. Analysis

[303] To set the stage for the various arguments made by IFP, it is useful to look at what IFP invested in the Deal and what it hoped to receive under it. Plainly, what IFP traded in the Asset

Exchange Agreement (its 3% gross overriding royalty) had significant value. The QB Reasons found that the parties agreed to a valuation figure of $16 million; IFP internally allocated $14.8 million of this amount to Eyehill Creek: para 32.

[304] This figure of $16 million is significant to another aspect of the Deal as noted in the QB Reasons:

> 85 Article 7.9 purports to limit liability of either party with respect to claims arising out of or in connection with the AEA to the value of assets set out in Article 2.7, namely $16 million:
>
> > In no event shall the liability of PCR to IFP in respect of claims of IFP arising out of or in connection with this Agreement exceed, in the aggregate, the value for the PCR Assets as set out in section 2.7, taking into account any and all increases or decreases to such value that occur by virtue of the terms of this Agreement. In no event shall the liability of IFP to PCR in respect of claims of PCR arising out of or in connection with this Agreement exceed, in the aggregate, the value for the IFP Assets as set out in section 2.7, taking into account any and all increases or decreases to such value that occur by virtue of the terms of this Agreement. [Emphasis added in QB Reasons]

[305] The QB Reasons found that IFP knowingly traded assets of significant value to PanCanadian in return for the Joint Operating Agreement. That agreement gave PanCanadian discretion as to whether and how to commence thermal production. It does appear that IFP was relatively deferential to PanCanadian about commencement of thermal production and also patient with PanCanadian's limited primary production work. IFP does not dispute that PanCanadian was not required to do thermal production at a particular time.

[306] Steam-assisted gravity drainage was contemplated to be a substitute for unprofitable primary well production under the Memorandum of Understanding. But soon after the Deal, thermal production was not looking propitious either. That change was not a result of PanCanadian acting unilaterally, even if it did act rather unilaterally as a consequence of those developments. There is no dispute that costs and resource prices can change over time, even greatly. Further, while the 3% gross overriding royalty had value, it was not traded for a 20% gross overriding royalty on the Eyehill Creek property. The 20% working interest was an interest of a different sort, and had a different potential profit and risk.

[307] Further, while IFP suggests that the Deal created almost a perverse incentive for PanCanadian to not turn to thermal production, the QB Reasons were aware of this, calling the Deal unusual since elements of it "create competing working interests": para 194. As much as it might seem, *ex post facto*, to have been improvident for IFP to have agreed to a Deal containing

those terms, there is no suggestion of IFP being vulnerable or being taken advantage of, let alone cheated. I turn to the first two grounds of appeal.

Grounds 1 and 2 - Did IFP Act Reasonably in Refusing Consent to the Farm-out Agreement?

[308] I combine IFP's first two grounds of appeal.

[309] IFP emphasizes the language in Article 2401B(e) of the Operating Procedure whereby it says that consent could be refused if it "reasonably believes that the disposition would be likely to have a material effect on it, its working interest or operations to be conducted thereunder". IFP suggests that the QB Reasons at para 198 paraphrased this language although it was quoted in full at para 111.

[310] The QB Reasons properly accepted that the onus was on PanCanadian to prove consent was unreasonably withheld: ***Sundance Investment Corporation Ltd v Richfield Properties Ltd*** (1983), 41 AR 231 at para 23, 24 Alta LR (2d) 1. The party refusing consent is entitled to base its refusal on self-interest: QB Reasons at paras 153-58.

[311] The QB Reasons rejected a contention by PanCanadian that all elements of IFP's rationale for refusing to consent had to exist and be known to IFP at the time of the refusal of consent, and after-the-fact justification could not supplement the reasonableness of refusal to consent. The QB Reasons did not say that the grounds for refusal always had to exist before the refusal. The QB Reasons stated that there were not "new grounds for withholding consent": paras 183-87. They also held that the basis of IFP's refusal remained the same throughout: it had concluded that Wiser was going to deplete the resources at Eyehill Creek making thermal production unviable. This was part of the original rationale even though further information became available.

[312] IFP also refers to ***Community Drug Marts P & S Inc Estate v William Schwartz Construction Co Ltd*** (1980), 31 AR 466, 116 DLR (3d) 450, affirmed [1981] AJ No 537 (QL) for the proposition that it was entitled to serve its own interests by refusing to consent. Although the QB Reasons acknowledge this (see paras 154 and 155), they also say that the circumstances of whether the refusal to consent is reasonable include "the commercial realities of the marketplace and the economic impact of an assignment": para 162. The latter is crucial because the QB Reasons accepted the respondents' submission that "if a party to an agreement will receive as much under the proposed disposition as it would have had under the original agreement then a refusal to consent must be unreasonable. [The respondents] submit Wiser was doing no more than what PCR was entitled to do; the status quo was unchanged and IFP's justification for withholding consent was plainly untenable and unreasonable": para 192.

[313] The identity and character of a party proposed to substitute for an existing party (here Wiser for PanCanadian) might be a factor in refusing consent if an undertaking is personal or there is a distinct difference between the substitute and the original party: see e.g. ***Ford Motor Company of Canada, Limited v Welcome Ford Sales Ltd,*** 2011 ABCA 158 at paras 46, 54 to 59, 505 AR

146. Indeed, wording in Article 2401B(e) mentions "financial capability" as a potential difference between the substitute party and original party. That is not an issue here.

[314] IFP's concern over the lack of *competence* of Wiser in thermal production was offered as a basis to differentiate PanCanadian. But PanCanadian would also have needed IFP's help. So the change of identity on competence grounds does not appear to be a dispositive consideration on the reasonableness of consent. Indeed, IFP emphasizes *attitude* not competence: para 21 of its factum.

[315] IFP urges that an important identity differential arises from the difference between "an operator who is experienced in thermal production and *who cares about preserving the field's thermal potential* [as] entirely different from primary production by an operator with no knowledge of thermal and no reason to care about the impact of what it is doing on future thermal operations." (emphasis added). Although IFP asserts that the QB Reasons overlooked important evidence (which IFP described at paras 22 to 34 of its factum), those submissions come down to a dispute about the ultimate fact findings.

[316] A trial judge does not have to itemize every element of the facts in the reasons: compare ***Pivotal Capital Advisory Group Ltd v NorAmera BioEnergy Corp***, 2010 ABCA 199 at para 22, 487 AR 313. A swathe of the evidence which IFP says was ignored related to the previous reliability of PanCanadian generally and its research about whether steam-assisted gravity drainage development of Eyehill Creek would be profitable. Arguably, that evidence tends to support the inference that PanCanadian made its decision to remove itself from the Deal on the basis of informed economic practicality which would have presumably governed PanCanadian had Wiser not stepped in.

[317] There is no suggestion that Wiser called on IFP to contribute to expenses necessary to rehabilitate or abandon primary production wells. It stuck with that part of the Deal. PanCanadian also monitored what Wiser was doing and told IFP about it. In the end, we are not persuaded that the QB Reasons fall short of reasonable because they did not find the change of identity from PanCanadian to Wiser provided IFP with grounds to refuse consent.

[318] Identity aside, IFP emphasizes that the anticipated work by Wiser would adversely affect IFP's working interest in the Eyehill Creek area. This returns to the point discussed above about the circular position of IFP: it had a reasonable expectation-based form of veto to prevent primary production that could materially and adversely affect its interest.

[319] IFP says that the QB Reasons wrongly re-cast the question that IFP posed in relation to consent and therefore missed the essence of its submission. We disagree. The QB Reasons simply noted that, even if the Wiser work would deplete the resource, it would only be in a manner that PanCanadian could have done. As noted, the QB Reasons point out that the Deal was unusual in the sense that it created competing interests as well as terms of how the parties might be able to work together.

[320] That said, the QB Reasons pointed out: "[i]t is equally clear that IFP was in no position to undertake [steam-assisted gravity drainage] operation on its own. It had neither the operational

know-how nor the financial backing to do so. It could not take advantage of the ROFR clause or initiate independent operations": para 197 with emphasis. The reference to financial backing refers to the fact that the Deal contemplated that IFP might be required to turn to others for financing, and to grant rights under those circumstances: QB Reasons at para 75. IFP's part of the Deal acknowledged limitations on IFP's obligations, capacity and rights in the Joint Operating Agreement. The respondents' position is that IFP retained a residual ability to commence thermal operations on its own. I am not persuaded by the respondents' argument that IFP's decision not to exercise the right of first refusal clause defeated IFP's ability to withhold consent. A party with two contractual rights is entitled to exercise either of them.

[321] I have also concluded that it was not a palpable error for the QB Reasons to find that IFP's rationale for refusing consent was unreasonable because it had the effect of overriding legitimate rights of another party to the same Deal. Said another way, IFP contended that PanCanadian could not injure its contractual rights but the converse is also true. That said, I concede that the majority view that IFP, seeing things from its point of view, is that IFP could reasonably refuse to consent. The consent related to alienation, and the key problem for IFP was more to do with how to utilize the lands.

[322] The QB Reasons in effect related IFP's refusal to consent to the fact that IFP was dissatisfied because the respondents could proceed without its consent with primary (not thermal) production. But the negative effect on IFP is the same no matter which of them did it.

[323] As quoted above, "it was unreasonable for IFP to object to the disposition to Wiser on the grounds Wiser would undertake something PCR was entitled to do and in fact was doing. It is not objectively reasonable to withhold consent and prohibit the alienation of PCR's interests on that basis.": para 198 of the QB Reasons. Against this factual background, that was a reasonable finding and cannot be disturbed.

[324] In the end, I agree with the QB Reasons that there was no reasonable refusal under the terms of the Deal. As a matter of law IFP was in no worse position after the farm-out to Wiser than it was before. PanCanadian was under no obligation to develop the thermal and enhanced recovery potential of Eyehill. IFP did not contract for that obligation. Absent some other legally effective reason to impugn the farm-out agreement, these first two grounds of appeal must fail.

[325] A premise of IFP on related grounds is that IFP had a right under the Deal to prevent both PanCanadian and Wiser from primary production without compensating IFP. That leads to the third ground of appeal as to reasonable expectations and substantially to the fourth ground of appeal, which relates to good faith.

Grounds 3 and 4 - Good Faith Dealings and Reasonable Expectations

[326] The scope on appeal of the topic of good faith execution of the Deal by PanCanadian must be clarified. Although there was a pleading about misrepresentation in the original statement of claim, misrepresentation was not pursued at trial or on appeal. To the extent that IFP makes

submission about good faith on appeal, it is only in the context of PanCanadian entering into the farm-out agreement as against what it should be taken to know about the reasonable expectations of IFP. IFP's arguments about good faith are linked to whether the farm-out agreement effectively eliminated IFP's entitlements under the Deal. As the bad faith submission is related to the reasonable expectations submission, we analyze them together.

[327] IFP's position commences with the contention that both PanCanadian and IFP were of the opinion in 1998 that primary production at Eyehill Creek was uneconomical and thermal production was the only way to proceed. Thermal production would use the special skills of IFP and the practical knowhow and capacity of PanCanadian. IFP said that PanCanadian represented this aspiration internally, to IFP and to the Alberta government. IFP also invokes the Memorandum of Understanding.

[328] It is important to emphasize that the rest of the Deal (the Joint Operating Agreement, Asset Exchange Agreement and Technology Development Agreement) came months later and reflected IFP's position after considerable discussion (especially concerning primary production liabilities).

Good Faith in Contractual Dealings

[329] I start the analysis of the third and fourth grounds of appeal with the principle that a party can reasonably expect that the other party will not act dishonestly. "At a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid, and forthright: ***Bhasin v Hrynew***, 2014 SCC 71, at para 66": ***Potter v New Brunswick Legal Aid Services Commission***, 2015 SCC 10 at para 99, [2015] 1 SCR 500 (with emphasis). In my view, the word "reasonable" in that package is part of a cumulative concept of executory 'good faith', and it is not a free standing entitlement of reasonableness of the part of the other party when it exercises rights it possesses under the contract.

[330] IFP's submissions on Ground four center on whether PanCanadian wrongly, that is, in bad faith, farmed-out the leased property to Wiser. It contends that it did so secretively, within months of the Deal and in a manner that rendered IFP's residual interest in the Deal worthless. The QB Reasons did not find that PanCanadian's conduct wrongly overrode any reasonable expectations of IFP: paras 205-207.

[331] There is nothing that I see in ***Bhasin*** to suggest that IFP's expectations — however reasonable and even if considered together with principles relating to implying terms in a contextual way for business good sense — that make it reversible error for the QB Reasons not to find justification for "repairing" the Deal so as to enforce an obligation of good faith performance by PanCanadian.

[332] The law will not amend this sort of a contract merely because the interests of IFP did not turn out to be beneficial, advantageous or profitable, let alone because the Deal turned out to be improvident: compare ***Jedfro Investments (USA) Ltd v Jacyk***, [2007] 3 SCR 679, 2007 SCC 55 at para 34 citing ***Pacific National Investments Ltd v Victoria (City)***, [2004] 3 SCR 575, 2004 SCC

75, para 31. As discussed more fully below, one-sided expectations about what contracts promise are not what the law means by reasonable expectations. Reasonable expectations in a contract are only those which the manifested intentions in the contract, properly interpreted, reveal.

[333] In light of the record, I am not persuaded that the "organizing principle of good faith" discussed in ***Bhasin*** should be treated as creating a specific term of the Deal or as influencing the meaning of any terms of the Deal. To be fair, my colleagues place emphasis on that organizing principle in relation to the *execution* rather than the interpretation of the contract saying at para 188 that PanCanadian was obliged to have "appropriate regard to the legitimate contractual interests of the contracting power". The distinction is important so I do not wish to be thought of side-swiping the majority reasoning in this respect on the way by. I merely differ with the majority on what IFP was entitled by the terms of the agreement to claim as legitimate contractual interests.

[334] IFP contended that actions by Sinclair for PanCanadian (Sinclair having been held responsible for the loss by expiry of the second of two PNG Leases) were colourable. The allegedly colourable nature of those actions does not provide an independent basis of a claim by IFP. Those assertions are merely adjectival to IFP's complaint about PanCanadian's ultimate decision to enter into the farm-out agreement. As noted above, it is crucial to IFP's position that it retained a form of quasi-property interest in the resources of the Eyehill Creek even if it only had a 20% working interest in resources developed by thermal methods. My colleagues agree with IFP and find that the working interest was larger than that.

[335] Assuming that premise to be correct, IFP's position is therefore that PanCanadian had no right to unilaterally do primary production on the Eyehill Creek property to the exclusion of IFP's residual interests, let alone to transfer such a right to Wiser. If so, it would not make any difference if Sinclair acted in a clandestine way. IFP's emphasis on the actions of Sinclair calls into question the premise asserted by IFP that neither PanCanadian nor Wiser could do primary production without the IFP's agreement. ***Bhasin*** recognized a duty of honest contractual performance, but did not otherwise supplement the existing areas of law which recognize good faith, such as in insurance or employment law, as discussed more fully below. ***Bhasin*** held:

> [70] The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest ... Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency ..... The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

[336] As said, the duty of honest contractual performance does not re-cast the parties' rights as set out in the Deal. Further, the basis of a finding as to honesty in the performance of a contract seems to be axiomatically a question of mixed fact and law, if not a question of fact. Although IFP argues, in effect, that the actions of Sinclair approached skulduggery, the QB Reasons do not find dishonesty by PanCanadian and there does not appear to be a basis for such a finding.

[337] A commercial interpretation of a contract does not require that the contract be profitable for every party to it. Failure of a party to disclose a plan to exercise a contractual right until it is considered opportune is not automatically a breach of good faith, let alone a breach of the contract. That said, I do not disagree with the majority that there can be cases where in the performance of a contract one party might act in a manner leading the other party not to appreciate their interests were being thrown under the bus, and that such manner of acting may breach the contract. To me this is an issue of fact or mixed fact and law. This leads me to the discussion of reasonable expectations.

[338] As I am not persuaded that reasonable expectations are a free-standing judicial contract evaluation tool, IFP needed to identify a way in which its reasonable expectations arose in this case such as to assist IFP here. The claimant party is not obliged to show this with some sort of geometric logic, to paraphrase Captain Queeg. But if a reasonable reading of the Deal does not support the sort of veto that IFP asserts can be based on its reasonable expectations, a veto cannot be grounded in reasonable expectations in law. As discussed below, I am not persuaded that there are internal or external forces lending support to the reasonable expectations of IFP.

[339] There are specialized areas of law where reasonable expectations have been discussed in connection with private law contract interpretation or execution. At the outset I contrast reasonable expectations from the public or administrative law doctrine of legitimate expectations which only inform the duty of procedural fairness and grant no substantive rights: ***Black v Canada (Prime Minister)***, (2001) 54 OR (3d) 215 at para 62, 199 DLR (4th) 228.

Public Expectations

[340] First, reasonable expectations by members of society generally (public expectations) may have a role in implying terms into specialized types of contracts. These expectations are of a public or general nature, invoking public policy, and are not influenced by what a particular party's perspective may be. For example, an implied term of reasonable notice of termination is imported if an employment contract is silent on notice. Contracts of insurance import an implied term of utmost good faith (see also industry expectations, below). Contract language and legislation may expressly displace public expectations.

[341] As to public policy, recently in ***Ferme Vi-Ber Inc v Financière agricole du Québec***, 2016 SCC 34, [2016] 1 SCR 1032 the Supreme Court recognized a form of private law contract involving individuals and the state that was not governed by public law. The Supreme Court said the private law contract at issue was not a contract of insurance or a true social insurance program but its social objectives created requirements of good faith and contractual fairness in the

execution of the contract by the state. The Supreme Court said that the concept of reasonable expectations of an insured person under an insurance contract did not apply because it was not a contract of insurance. But it added:

> [63] The scope of the rule [of interpretation based on the reasonable expectations of the insured] ... was applied in the United States in three ways: (1) to resolve any ambiguity in the terms of the contract in favour of the insured in order to satisfy his or her reasonable expectation; (2) to give the insured a right to all the coverage he or she was entitled to expect, unless there was an "unequivocal plain and clear manifestation of the company's intent to exclude coverage"; or (3) to give the insured such coverage even in cases in which "painstaking study of the policy provisions would have negated those expectations" (p. 103). The first and third of these scenarios correspond, respectively, to what some authors have called the "minimum" and "maximum" dimensions of the doctrine .... *However, none of them allows the meaning of a clear provision to be disregarded in favour of the expectations of the insured, except, in the third case, insofar as the interpretation of the provision requires "painstaking study" to determine its true meaning."* [Emphasis added]

[342] The Supreme Court also said that, in Québec law, the reasonable expectations rule must apply solely in its minimum dimension, that is, only when there is ambiguity. This brought into play the Civil Code of Québec. Accordingly, there is nothing in the public policy discussion in ***Ferme Vi-Ber*** which assists IFP.

[343] An application of reasonable expectations of a public nature arises in the tendering contract situation which, as Lord Bingham pointed out in ***Blackpool and Fylde Aero Club Ltd,*** [1990] 3 All ER 25 (CA) is "heavily weighted in favour of the invitor" (cited in ***MJB Enterprises Ltd. v. Defence Construction (1951) Ltd***, [1999] 1 SCR 619 at para 41). See also ***Marine Atlantic Inc v Topsail Shipping Company Limited***, 2014 NLCA 41, 379 DLR 4th 442, suggesting that the content of fairness in tendering may be defined by the parties' reasonable expectations. But the Deal is not such a contract.

[344] Public policy may also touch on expectations in contract law concerning restrictive covenants: see e.g., ***MEDIchair LP v DME Medequip Inc***, 2016 ONCA 168, 397 DLR (4th) 224. There is nothing of that here.

[345] Reasonable expectations supportable by external policy considerations may also arise in franchise agreements because usually the franchisor has a substantial advantage over the franchisee: see ***Addison Chevrolet Buick GMC Limited v General Motors of Canada Limited***, 2016 ONCA 324 at para 64, 130 OR (3rd) 161, leave denied (February 2, 2017) [2016] SCCA No 317 (QL) (SCC No. 37115). But, once again, those sorts of expectations will ultimately be linked

to and identified from the content of the franchise agreements. In other words, the reasonableness reference arises in that context, not subjectively. That is also not this case.

[346] General public expectations were called in aid of the interpretation of a contract in relation to the gaming business, but that was a case where there were understandings regarded as constituting part of the activity involved. The contract was not entirely in writing, so one can understand how reasonable expectations might figure in deciding what the unwritten aspects were: see e.g., ***Moreira v Ontario Lottery and Gaming Corporation***, 2013 ONCA 121, 296 CCC 3rd 245, leave denied (2013) [2013] SCCA No. 192 (QL) (SCC Nos. 35344, 35346). Also, a general consensus of what an ordinary consumer might expect entering into a contract may figure in whether a contract was reached at all: ***Girouard v Druet***, 2012 NBCA 40 at para 4, 349 DLR 4th 116.

[347] None of the foregoing forms of reasonable expectations apply in this case in my case.

Industry Expectations

[348] Second, reasonable expectations of persons involved in a specific industry (industry expectations) may also have a role in assessing whether an *ambiguous* clause or term of a contract should be given a specific meaning. Again, such expectations are not subjective: compare ***Black v Canada (Prime Minister)***. In a sense, reasonable expectations grounded in the practice of the relevant industry may be circumstantial evidence of what would be the likely objective meaning of the clause or term and therefore its case-specific meaning. Once again, however, these expectations are general and not drawn from a particular party's perspective of what it considers reasonable. And once again, contract language and legislation may expressly displace such expectations.

[349] An application of reasonable expectations in the industry-specific category (and to an extent also in the public policy category) arises in insurance contracts, where ambiguous terms are assessed in light of general reasonable expectations: see ***Reid Crowther & Partners Ltd v Simcoe & Erie General Insurance Co***, [1993] 1 SCR 252 at p 269; ***Canadian National Railway Company v Royal and Sun Alliance Insurance Company of Canada***, 2008 SCC 66 at para 30, [2008] 3 SCR 453; ***Lloyds Syndicate 1221 (Millenium Syndicate) v Coventree Inc***, 2012 ONCA 341 at para 15, 291 OAC 178, leave denied (2012) [2012] SCCS No. 276 (QL) (SCC No 34876); and ***Progressive Homes Ltd v. Lombard General Insurance Company***, 2010 SCC 33 at paras 23, 51-57, [2010] 2 SCR 245.

[350] This application of reasonable expectations having some relevance in the face of ambiguity has been occasionally seen in other situations when such expectations are linked to industry practices and business efficacy such as exemplified in ***Keephills Aggregate Co v Riverview Properties Inc***, 2011 ABCA 101 at para12, 44 Alta LR 5th 264:

> [12] There is, of course, a general rule that it is not the function of the court to rewrite a contract for the parties. Nor is it their role to relieve one of the parties against the

> consequences of an improvident contract: .... *However, courts should prefer interpretations that are consistent with the reasonable expectations of the parties, including compelling notions of business efficacy in such a context, so long as such an interpretation can be supported by the text*:... [Emphasis added]

See also ***Swan Group Inc v Bishop***, 2013 ABCA 29 para 20, 78 Alta LR 5th 217.

[351] But in those cases, the reasonable expectations are once again keyed to ambiguity of a contract term on the one hand, and general notions of business efficacy on the other. Once again subjective expectations have no role.

Expectations in Fiduciary Relationships or in Unjust Enrichment Cases

[352] Third, reasonable expectations may arise in fiduciary relationships and cases of unjust enrichment. But despite the sentiments of IFP's witness, the law of fiduciary relationships and unjust enrichment do not apply here. As pointed out in ***Bhasin*** at para 86:

> The duty of honest performance ... should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (*uberrimae fidei*) such as an insurance contract, which among other things obliges the parties to disclose material facts: *Whiten*. But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.

[353] IFP has not cited any authority to suggest that its expectations—of what it was entitled to under the Deal, and what PanCanadian owed it in terms of respecting IFP's interests (however reasonable those expectations might have been) — could modify what, on objective interpretation, the Deal can be reasonably read to say. It is the Deal, not IFP's expectations, which define what would be a breach of the contract.

[354] Although I concede that the majority has set out a compelling argument that the terms of the Deal between the parties, read in light of business concepts, should be read otherwise, I am of the view that it was a matter of ordinary and objective contract construction for the QB Reasons to decide what the Deal involved. The position of IFP as to the legal scope of 'reasonable expectations' is not entirely clear but its claimed expectations are, in my respectful view, not clearly expressed in how the Deal was articulated. Reasonable expectations in this context should not be external concept of law that would displace any content of the Deal.

[355] As exemplified by the decision of the Quebec Court of Appeal in ***Churchill Falls (Labrador) Corporation Limited v Hydro-Québec***, 2016 QCCA 1229, leave granted (April 20, 2017) [2016] SCCA No 431 (QL) (SCC No 37238), albeit in the context of principles of the Civil Code of Quebec, the Courts must be wary of rescuing parties from deals which turn out to be unfavourable in how the parties accepted to be their wording.

[356] IFP's position is that its reasonable expectations were grounded in the Deal; that is, they were based primarily on the aspirations and terms of the Memorandum of Understanding; an interpretation of the Asset Exchange Agreement and Joint Operating Agreement, and a veto over what PanCanadian could do with the Eyehill Creek resources.

[357] So recognized, the contention of IFP comes back to its reading of the Deal and its claim that its residual interest (supporting a right to object to primary production at a certain level), should prevail. I do not find this persuasive as a matter of fact as well as a matter of principle in construction of the Deal and would defer to the QB Reasons on this issue.

[358] IFP also criticizes the QB Reasons at para 212 for referring to the failure of IPF to point to "any specific provision of the contract or industry practice that would indicate its expectations were reasonable". IFP submits that this statement was "inconsistent with the case law and the very reason the court developed the 'reasonable expectations doctrine'." As discussed above, I am unable to discern the scope of the "doctrine" that IFP is talking about. To my mind, there is no error in the QB Reasons.

[359] Finally, IFP suggests that one sort of reasonable expectation that any contractor would have is that it will not be deprived by the actions of the other party of "substantially the whole benefit of the contract": see e.g. ***Shelanu Inc v Print Three Franchising Corporation*** (2003), 64 OR (3d) 533 at paras 113-14. But that line of authority falls into the category mentioned above of reasonable expectations that the contract will not be breached by the other party. It also repeats the position of IFP about the residual interest claimed by IFP.

[360] Although there may be debate about concepts like "fundamental breach" of contract, the notion proposed by IFP should not be allowed to spill over into a matter of reasonable expectations in some sort of good faith sense. This lawsuit is grounded in submissions related to breach of contract. It hinges on what the objective reading of the contract is, and it is that process that defines the "whole benefit of the contract" in my view. This is not a subjective matter. Nor does it turn on the attitude of PanCanadian as reflected in its conduct.

[361] I would reject this ground of appeal about reasonable expectations.

IX. Conclusion

[362] In light of the foregoing, the finding of the QB Reasons that there was no breach of the Deal is in my view reasonable. The position of IFP that it was entitled to something more from the Deal— based on the premise that the Deal gave IFP a working interest sufficient to permit it to veto the farm-out agreement — could be reasonably rejected. Given this conclusion, I might

refrain from discussing the Grounds related to damages. But if I were with the majority, I would concur in how the majority deals with the issue of damages.

[363] In my respectful view, the appeal must be dismissed.

Appeal heard on October 16 and November 10, 2015

Reasons filed at Calgary, Alberta
this 26th day of May, 2017

Watson J.A.

Appearances:

P. Edwards and R. de Waal
for the Appellant

G.N. Stapon, Q.C. and L.M. Gill
for the Respondents

TAB 9

CITATION: Lydian International Limited (Re), 2020 ONSC 4006
COURT FILE NO.: CV-19-00633392-00CL
DATE: 2020-07-10

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

RE: 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 LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Elizabeth Pillon*, *Maria Konyukhova*, *Sanja Sopic*, and *Nicholas Avis*, for the Applicants

D. J. Miller and *Rachel Bergino*, for Alvarez & Marsal Inc.

Robert Mason and *Virginie Gauthier*, for Osisko Bermuda Limited

Pamela Huff and *Chris Burr*, for Resource Capital Fund VI L.P.

David Bish and *Michael Pickersgill*, for Orion Capital Management

Alexander Steele, for Caterpillar Financial Services (UK) Limited

Bruce Darlington, for ING Bank N.V./Abs Svensk Exportkredit (publ)

John LeRoux, *Hasan Ciftehan*, *Mehmet Ali Ekingen and Atilla Bozkay*, each in their capacity as a Shareholders of Lydian International Limited

HEARD by ZOOM Hearing and DECIDED: **June 29, 2020**

REASONS RELEASED: **July 10, 2020**

ENDORSEMENT

[1] Lydian International Limited, Lydian Canada Ventures Corporation and Lydian U.K. Corporation Limited (the "Applicants") bring this motion for an order (the "Sanction and Implementation Order"), among other things:

a) declaring that the Meeting of Affected Creditors held on June 19, 2020 was duly convened and held, all in accordance with the Meeting Order;

b) sanctioning and approving the Applicants' Plan of Arrangement (the "Plan") as approved by a requisite majority of Affected Creditors at the Meeting, in accordance with the Plan Meeting Order (each as defined below), a copy of which is attached as Schedule "A" to the draft Sanction and Implementation Order; and

c) granting various other related relief (as more particularly outlined below).

[2] The Applicants submit that the Plan represents the culmination of the Applicants' restructuring efforts and allows for the resolution of these CCAA Proceedings. The Monitor and the majority of the Affected Creditors are supportive of the Plan and if sanctioned and implemented, the Plan will provide a path forward for Lydian Canada and Lydian UK as part of a privatized Restructured Lydian Group (as defined in the Plan) and ultimately lead to the termination of these CCAA Proceedings.

[3] Shortly after the conclusion of the hearing on June 29, 2020, which was conducted by Zoom, I granted the motion with reasons to follow.

[4] The facts with respect to this motion are more fully set out in the Affidavit of Edward A. Sellers sworn June 24, 2020 (the "Sellers Sanction Affidavit"), the Affidavit of Edward A. Sellers sworn June 15, 2020 (the "Sellers Meeting Affidavit") and the Affidavit of Mark Caiger sworn June 11, 2020 (the "BMO Affidavit"). Mr. Sellers and Mr. Caiger were not cross-examined. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Sellers Sanction Affidavit, the Sellers Meeting Affidavit, and the Plan. All references to currency in this factum are references to United States dollars, unless otherwise indicated.

Background

[5] The Applicants are three entities at the top of the Lydian Group. The Lydian Group owns a development-stage gold mine in south-central Armenia through its wholly owned non-applicant operating subsidiary Lydian Armenia. The Applicants contend that they have been unable to access their main operating asset, the Amulsar mine, since June 2018 due to blockades and the associated actions and inactions of the Government of Armenia ("GOA"), and as a result, this has prevented the Applicants from completing construction of the mine and generating revenue in the ordinary course.

[6] The Applicants further contend that the effects of the blockades, amongst other factors, caused the Applicants to seek protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). An Initial Order was granted on December 23, 2019. Alvarez & Marsal Canada Inc. was appointed as Monitor.

[7] In the two years since the blockades began, the Applicants contend that they have used their best efforts to resolve the factors that led to their insolvency, including engaging in negotiations with the GOA, defending their commercial rights and commencing legal proceedings in Armenia to attempt to remove the blockades but these efforts have yet to result in the Applicants re-gaining access to the Amulsar site.

[8] In early 2018, the Applicants retained BMO to canvass the market for potential refinancing or sale options. BMO has conducted multiple rounds of a sales process to market the Lydian Group's mining assets. BMO also ran a process to solicit interest in financing the Applicants' potential Treaty Arbitration. These efforts have not yet resulted in a transaction capable of satisfying the claims of the Applicants' secured lenders.

[9] Since the blockades began, the Senior Lenders have been funding the Applicants' efforts to find a solution to the situation caused by the blockades. The Senior Lenders provided additional financial support to the Lydian Group totalling in excess of $43 million.

[10] As of March 31, 2020, the Lydian Group owed its secured lenders more than $406.8 million.

[11] According to the Applicants, the secured lenders are no longer willing to support the Applicants' efforts to monetize their assets. The Equipment Financiers CAT and ING have taken enforcement steps and Ameriabank has issued preliminary notice of enforcement.

[12] Further, the Applicants point out that the liquidity made available to the Applicants since April 30, 2020 has been conditioned on the Applicants: (i) proposing a restructuring that would be equivalent to the Senior Lenders enforcing their security over the shares of Lydian Canada; and (ii) meeting a deadline to exit the CCAA Proceedings imposed by a majority of the Applicants' Senior Lenders, or further enforcement steps would be taken.

[13] The Applicants submit that the Plan represents the most efficient mechanism to effect an orderly transition of the Lydian Group's affairs. The Applicants contend that the Plan minimizes adverse collateral impacts on Lydian Armenia, provides for winding down the proceedings before this court and the Jersey Court and avoids uncoordinated enforcement steps being taken on the Lydian Group's property to the detriment of the Lydian Group's stakeholders generally.

The Plan

[14] The Plan recognizes and continues the priority position of the Senior Lenders in the Restructured Lydian Group. The Senior Lenders make up the only class eligible to vote on the Plan and receive a distribution thereunder.

[15] According to the Applicants, secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders. Stakeholders with claims at the Lydian International level will continue to have their claims on the Plan Implementation Date, which are intended to be addressed through

the proposed J&E Process in Jersey. Equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan.

[16] The purpose of the Plan is to (a) implement a corporate and financial restructuring of the Applicants, (b) provide for the assignment or settlement of all intercompany debts owing to the Applicants prior to the Effective Time to, among other things, minimize adverse tax consequences to Lydian Armenia and its stakeholders, (c) provide for the equivalent of an assignment of substantially all of the assets of Lydian International to an entity owned and controlled by the Senior Lenders ("SL Newco"), through an amalgamation of Lydian Canada with SL Newco resulting in a new entity ("Restructured Lydian"), and (d) provide a release of all of the existing indebtedness and obligations owing by Lydian International to the Senior Lenders. The Plan will result in the privatization of the Lydian Group to continue as the Restructured Lydian Group.

[17] The steps involved in the Plan's execution are described in detailed in paragraphs 71 to 74 of the Sellers Meeting Affidavit.

[18] The Plan provides for certain releases. The releases are more fully described in the Sellers Meeting Affidavit at paragraph 83.

[19] Mr. Sellers in the Sellers Sanction Affidavit at para. 16 states that the releases were critical components of the negotiations and decision-making process for the D&Os and Senior Lenders in obtaining support for the Plan and resolving these CCAA Proceedings for the benefit of the Restructured Lydian Group, including Lydian Armenia, and all of its stakeholders.

[20] Mr. Sellers further states that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings, which resulted directly in the preservation of the Lydian Group's business, provided numerous opportunities for the Applicants to seek to monetize their assets for the benefit of stakeholders generally and led to the successful negotiation of the Plan for the benefit of the Restructured Lydian Group.

[21] The Plan provides for a Plan Implementation Date on or prior to June 30, 2020. The majority of the Applicants' Senior Lenders have agreed to fund the costs associated with implementing the Plan and termination of the CCAA Proceedings and the J&E Process in Jersey, through the DIP Exit Facility Amendment, which will make a DIP Exit Credit Facility available to the Applicants totalling an estimated additional $1.866 million.

[22] The test that a debtor company must satisfy in seeking the Court's approval for a plan of compromise or arrangement under the CCAA is well established:

a) there must be strict compliance with all statutory requirements;

b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA and prior Orders of the Court in the CCAA proceedings; and

c) the plan must be fair and reasonable.

Issues

[23] The issues for determination on this motion are whether:

a) the Plan is fair and reasonable and should be sanctioned;

b) the releases contemplated by the Plan are appropriate;

c) the increase to the DIP Charge to capture the amounts to be advanced under the DIP Exit Credit Facilities is appropriate;

d) the Stay Period should be extended;

e) the unredacted Sellers Sanction Affidavit should be sealed; and

f) the Monitor's activities, as detailed in the Fifth Report, Sixth Report and Seventh Report, should be approved and the fees of Monitor and its counsel through to June 23, 2020 should be approved.

LAW AND ANALYSIS

Approval of the Plan

[24] To determine whether there has been strict compliance with all statutory requirements, the court considers factors such as whether: (a) the applicant meets the definition of a "debtor company" under section 2 of the CCAA; (b) the applicant has total claims against it in excess of C$5 million; (c) the notice calling the creditors' meeting was sent in accordance with the order of the court; (d) the creditors were properly classified; (e) the meeting of creditors was properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.

[25] The Applicants submit that they have complied with the procedural requirements of the CCAA, the Initial Order, the Amended and Restated Initial Order, the Meeting Order and all other Orders granted by this Court during these CCAA Proceedings. In particular:

a) at the time the Initial Order was granted, the Applicants were found to be "debtor companies" to which the CCAA applied and that the Applicants' liabilities exceeded the C$5 million threshold amount under the CCAA;

b) the classification of the Applicants' Senior Lenders into one voting class (namely, the Affected Creditors class) was approved pursuant to the Meeting Order. This classification was not opposed at the hearing to approve the Meeting, nor was the Meeting Order appealed; the Applicants properly effected notice in accordance with the Meeting Order prior to the

Meeting. In addition, the Applicants issued a press release on June 15, 2020 announcing their intention to seek an Order of the Court to file the Plan and call, hold and conduct a meeting of the Senior Lenders;

c) the Meeting was properly constituted and the voting on the Plan was carried out in accordance with the Meeting Order; and

d) the Plan was approved by the Required Majority.

[26] Sections 6(3), 6(5) and 6(6) of the CCAA provide that the Court may not sanction a plan unless the plan contains certain specified provisions concerning Crown claims, employee claims and pension claims. The Applicants' submit that these provisions of the CCAA are satisfied by the Plan. Crown claims and employee claims are treated by the Plan as Unaffected Claims, meaning that such claims, if any, are not compromised or otherwise affected. The Applicants do not maintain any pension plans, and thus section 6(6) of the CCAA does not apply. In compliance with s. 6(8) of the CCAA, the Plan does not provide for any recovery to equity holders.

[27] I accept the foregoing submissions. I am satisfied that the statutory prerequisites to approval of the Plan have been satisfied, and that there has been strict compliance with all statutory requirements.

[28] The Applicants submit that no unauthorized steps have been taken in these CCAA Proceedings and throughout the entirety of these CCAA Proceedings, they have kept this Court and Monitor appraised of all material aspects of the Applicants' conduct, activities, and key issues they have worked to resolve. I accept this submission.

[29] The Applicants' submit that when considering whether a plan of compromise and arrangement is fair and reasonable, the court should consider the relative degree of prejudice that would flow from granting or refusing to grant the relief sought. Courts should also consider whether the proposed plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (see: *Re Canadian Airlines Corp*, 2000 ABQB 442 at paras. 3, 94, 96, and 137 – 138; and *Re Canwest Global Communications Corp*, 2010 ONSC 4209).

[30] The CCAA permits the filing of a Plan by an Applicant to its secured creditors. The Applicants' submit the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement (*Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA); and *1078385 Ontario Ltd., (Re)*, 2004 CanLII 55041 (ONCA) at paras 30-31 (CanLII), affirming 2004 CanLII 66329 (ONSC)).

[31] The Plan was presented to the Senior Lenders, who are the Applicants' only secured creditors and they voted on the Plan as a single class. The Senior Lenders voted in favour of the Plan by the Required Majority. The value of the claims of Orion and Osisko, who voted in

favour of the Plan comprise 77.8% of the total value of the Affected Creditors who were present and voting.

[32] RCF, a secured lender and 32% shareholder, did not vote in favour of the Plan. RCF has advised that it "does not intend at this time to propose or fund an alternative to the Plan, and in the absence of such an alternative we expect that the Court will have no choice but to issue the Sanction and Implementation Order."

[33] I have been advised that an issue as between the Senior Lenders and ING has been resolved and for greater certainty this Plan does not compromise any claim that ING may have in respect of proceeds from a successfully-asserted arbitration claim. In addition, the Senior Lenders have agreed that, after payment of all claims of the Senior Lenders to proceeds from a successfully-asserted arbitration claim whether on account of: (i) claims of the Senior Lenders prior to the Plan Implementation Date; or (ii) further advances made by the Senior Lenders (or their affiliates) after the Plan Implementation Date, (whether such further advances are made as equity, secured debt or unsecured debt), the proceeds will be paid to Lydian Armenia in an amount sufficient and to be used to pay ING's claims against Lydian Armenia prior to any further monies being returned to equity holders.

[34] The Applicants submit that the structure and the nature of the releases in the Plan recognizes and continues the priority position of the Senior Lenders. Secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders.

[35] The Applicants state that they have considered and believe the Plan is the best available outcome for the Applicants, and the interests of the stakeholders generally in the Lydian Group.

[36] As noted in the BMO Affidavit, despite multiple rounds of the SISP and the Treaty Arbitration financing solicitation process, the Applicants submit that no transaction which would satisfy the Lydian Group's secured obligations is currently available to the Applicants.

[37] The Applicants submit that the monetization of Treaty Arbitration is also not open to the Applicants at this time, and if initiated would require an extended period to litigate and significant additional financial resources.

[38] The Applicants submit that for the purposes of valuing an estate at a plan sanction hearing, the "value has to be determined on a current basis. […] It is inappropriate to value the assets on a speculative or (remote) possibility basis." A relevant consideration in this analysis is the scope and extent of previous sale or capital raising efforts undertaken by the company and any financial advisors. In support of this submission, the Applicants reference: *Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA), para 36 (CanLII); *Philip Services Corp., Re*, 1999 CanLII 15012 (ONSC) at para 9 (CanLII) *1078385 Ontario Ltd., (Re*), 2004 CanLII 55041 (ONCA) at paras 30-31 (CanLII), affirming *1078385 Ontario Ltd. (Re)*, 2004 CanLII 66329 (ONSC) (CanLII).

[39] The Applicants submit that the outcome of the Plan, that being the distribution of the Applicants' estates to the Senior Lenders, is essentially identical to what would be achieved with any other options available in the circumstances. Without the Plan, the Senior Lenders could (a) privatize the Applicants' assets through the enforcement of share pledges and other security, or (b) could credit bid their debt to acquire the shares or assets; or (c) enforce their secured positions following the Applicants filing for bankruptcy, administration, or liquidation proceedings across multiple jurisdictions. In each scenario (as with the Plan), the Applicants' assets are transitioned to the Senior Lenders.

[40] The foregoing submissions were not challenged.

[41] The Monitor supports the Plan. As noted in the Monitor's Seventh Report, "it is the Monitor's view that the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable."

[42] I am aware that concerns with respect to the fairness of the Plan have been raised by numerous shareholders of Lydian International and oral submissions were made by John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen and Atilla Bozkay.

[43] In addition, a number of emails were sent directly to the court, which were forwarded to counsel to the Monitor. In addition, certain emails were sent to the Monitor. None of the emails were in a proper evidentiary form.

[44] The concerns of the shareholders included criminal complaints of activities in Armenia, the content of certain press releases and the impact of the COVID-19 pandemic. Some shareholders requested a delay of three months in these proceedings.

[45] As previously noted, equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan. Simply put, the shareholders of Lydian International will not receive any compensation for their shareholdings. This is a reflection of the insolvency of the Applicants and the priority position afforded to shareholders by the CCAA.

[46] I recognize that the shareholders' monetary loss will be crystalized if the Plan is sanctioned. However, a monetary loss resulting from the ownership, purchase or sale of their equity interest is an "equity claim" as defined in s. 2(1) of the CCAA. This definition is significant as s. 6(8) of the CCAA provides:

> 6(8) Payment – equity claims – No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[47] The Plan does not provide for payment in full of claims that are not equity claims. Consequently, equity claimants are not in the position to receive any compensation.

[48] The economic reality facing the shareholders existed prior to the COVID-19 pandemic. The Applicants were insolvent when they filed these proceedings on December 23, 2019. The financial situation facing the Applicants has not improved since the filing. In fact, it has declined. The mine is not operating with the obvious result that it is not generating revenues and interest continues to accrue on the secured debt. The fact that shareholders will receive no compensation is unfortunate but is a reflection of reality which does not preclude a finding that the Plan is fair and reasonable for the purposes of this motion.

[49] The Senior Lenders have voted in sufficient numbers in favour of the Plan. I am satisfied that there are no viable alternatives, and, in my view, it is not feasible to further delay these proceedings.

[50] Section 6.6 of the Plan provides for full and final releases in favour of the Released Parties, who consist of (a) the Applicants, their employees, agents and advisors (including counsel) and each of the members of the Existing Lydian Group's current and former directors and officers; (b) the Monitor and its counsel; and (c) the Senior Lenders and each of their respective affiliates, affiliated funds, their directors, officers, employees, agents and advisors (including counsel) (collectively, the "Ancillary Releases"). A chart setting out the impact of the releases is attached as Schedule "A" to these reasons.

[51] The Applicants submit that the releases apply to the extent permitted by law and expressly do not apply to, among other things:

a) Lydian Canada's, Lydian UK's or the Senior Lenders' obligations under the Plan or incorporated into the Plan;

b) obligations of any Existing Lydian Group member other than Lydian International under the Credit Agreement and Stream Agreement, and any agreements entered into relating to the foregoing, from and after the Plan Implementation Date;

c) any claims arising from the willful misconduct or gross negligence of any applicable Released Party; and

d) any Director from any Director Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[52] Unsecured creditors' claims, other than the Ancillary Releases in favour of the Directors, are not compromised or released and remain in the Restructured Lydian Group.

[53] The Applicants submit that it is accepted that there is jurisdiction to sanction plans containing releases if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad. There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan (see: *Re Canadian Airlines Corp*, 2000 ABQB 442

at para 92 (CanLII) CCAA at s. 5(1); *Re Metcalfe & Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 61 and 70 (CanLII); *Re Canwest Global Communications Corp*, 2010 ONSC 4209 at para 28-30 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 85-88 (CanLII).

[54] The Applicants submit that in considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the courts have considered the following factors:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.

[55] The Applicants submit that the releases were critical components of the decision-making process for the Applicants' directors and officers and Senior Lenders' participation in these CCAA Proceedings in proposing the Plan and the Applicants submit that they would not have brought forward the Plan absent the inclusion of the releases.

[56] The Applicants also submit that the support of the Senior Lenders is essential to the Plan's viability. Without such support, which is conditional on the releases, the Plan would not succeed.

[57] The Applicants submit that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. The extensive efforts of the Applicants' directors and officers and the Senior Lenders and Monitor resulted in the negotiation of the Plan, which forms the foundation for the completion of these CCAA Proceedings. The Senior Lenders financial contributions through forbearances, additional advances and DIP and Exit Financing were instrumental.

[58] The Applicants also submit that the releases are an integral part of the CCAA Plan which provides an orderly and effective alternative to uncoordinated and disruptive secured lender enforcement proceedings. The Plan permits unsecured creditors future potential recovery in the Restructured Lydian Group, which may not exist in bankruptcy (*Re Metcalfe &Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 71 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 80-82 (CanLII).

[59] The Applicants submit that this Court has exercised its authority to grant similar releases, including in circumstances where the released claims included claims of parties who did not vote on the plan and were not eligible to receive distributions (*Target Canada Co. et al*. (2 June 2016), Toronto CV-15-10832-00CL (Ont. Sup. Ct. [Comm. List]) Sanction and Vesting Order at Schedule "B" art. 7 (Monitor's website); *Rubicon Minerals Corporation et al*. (8 December 2016), Toronto CV-16-11566-00CL (Ont. Sup. Ct. [Comm. List]) Sanction Order at Schedule "A" art. 7 (Monitor's website); and *Nortel Networks Corporation et al*. (30 November 2016), Toronto 09-CL-7950 (Ont. Sup. Ct. [Comm. List]) Plan of Compromise and Arrangement at art. 7 (Monitor's website)).

[60] Full disclosure of the releases was made in (a) the draft Plan that was circulated to the Service List and filed with this Court as part of the Applicants' Motion Record (returnable June 18, 2020); and (b) the Plan attached to the Meeting Order. The Applicants also issued the Press Releases. This notification process ensured that the Applicants' stakeholders had notice of the nature and effect of the Plan and releases.

[61] The foregoing submissions with respect to the releases were not challenged.

[62] In my view, each of the Released Parties has made a contribution to the development of the Plan. In arriving at this determination, I have taken into account the activities of the Released Parties as described in the Reports of the court-appointed Monitor. I am satisfied that it is appropriate for the Plan to include the releases in favour of the Released Parties.

[63] The development of this Plan has been challenging and as the Monitor has stated, "the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable".

[64] I accept this assessment and find that the Plan is fair and reasonable in the circumstances.

DIP Charge

[65] The terms of the DIP Exit Facility Amendment are described in the Sellers Sanction Affidavit. The DIP Exit Facility Amendment provides for exit financing totalling $1.866 million to assist in implementing the Plan and taking the necessary ancillary steps to terminate the CCAA Proceedings and support the J&E Process.

[66] This Court has the jurisdiction to authorize funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA. These same provisions of the CCAA provide this Court with the authority to approve amendments to a DIP agreement and secure all obligations arising from the amended DIP loans with an increased DIP charge.

[67] The Applicants submit that, based on the following, the DIP Amendment should be approved and the increase to the DIP Facility should be secured by the DIP Charge:

a) the DIP Exit Credit Facility is necessary to enable the Applicants to implement the Plan;

b) the Monitor is supportive of the DIP Exit Facility Amendment;

c) the DIP Exit Facility Amendment is not anticipated to give rise to any material financial prejudice; and

d) the DIP Lenders are the majority of Senior Lenders.

[68] I am satisfied that the requested relief in respect to the DIP Amendment is reasonably necessary and appropriate in the circumstances.

Sealing Request

[69] The Applicants seek to seal the unredacted Sellers Sanction Affidavit on the basis that the redacted portions of the Sellers Sanction Affidavit contain commercially sensitive information, the disclosure of which could be harmful to stakeholders.

[70] The redactions currently being sought are consistent with previous Orders in these CCAA Proceedings. In my view, the documents in question contain sensitive commercial information. Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, 2002 Sec. 41 at para. 53 I am satisfied that the request for a sealing order is appropriate and is granted.

Stay Period

[71] On the Plan Implementation Date, the CCAA Proceedings with respect to Lydian UK and Lydian Canada will be terminated, such that Lydian International will be the only remaining Applicant in the CCAA Proceedings. The Applicants are requesting an extension of the Stay Period for Lydian International until and including the earlier of (i) the issuance of the Monitor's CCAA Termination Certificate and (ii) December 21, 2020 to enable the remaining Applicant and the Monitor to take the steps necessary to implement the Plan and terminate the CCAA Proceedings and initiate the J&E Process. The Applicants are also requesting an extension of the Stay Period for the Non-Applicant Stay Parties (other than Lydian US) until and including the earlier of the issuance of the Monitor's Plan Implementation Certificate.

[72] I am satisfied that the Applicants in requesting the extension of the Stay Period have demonstrated that circumstances exist that make the order appropriate; and that they have acted and are acting in good faith and with due diligence such that the request is appropriate.

Approval of Monitor's Activities

[73] The Applicants are seeking an order approving the Monitor's activities to date, as detailed in the Fifth Report, Sixth Report and the Seventh Report (collectively, the "Reports").

This Court has already approved the activities of the Monitor that were detailed in its previous reports. There was no opposition to the request.

[74] I am satisfied that the Reports and the activities described therein should be approved. The Reports were prepared in a manner consistent with the Monitor's duties and the provisions of the CCAA and in compliance with the Initial Order. The Reports are approved in accordance with the language provided in the draft order.

Approval of Monitor's Fees

[75] The Applicants further seek approval of the fees and disbursements of (i) the Monitor for the period April 14, 2020 to June 23, 2020, inclusive, and (ii) counsel to the Monitor for the period April 16, 2020 to June 23, 2020. The Applicants have reviewed the fees of the Monitor and its counsel and support the payment of the same.

[76] I am satisfied that the fee requests are appropriate in the circumstances and they are approved.

DISPOSITION

[77] The Applicants' motion is granted. The Plan is sanctioned and approved. The ancillary relief referenced in the motion is also granted and an Order reflecting the foregoing has been signed.

Chief Justice Geoffrey B. Morawetz

Date: July 10, 2020

SCHEDULE "A"

Lydian International Limited et al.

Impact of the Releases Described in s. 6.6 of the Plan

Lydian Jersey		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Guarantee of Equipment Lessors ING, CAT, Ameriabank	Not Released. Addressed in the J&E Process in Jersey	Section 6.6 (carve-out (E))
Other Unsecured Claims Includes Maverix Metals claim against Lydian Jersey	Not Released. Addressed in the J&E Process in Jersey.	Section 6.6 (carve-out (E))
Equity Claims Held by RCF, Orion, and public Shareholders	Not Released. Addressed in the J&E Process in Jersey.	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Intercompany Claims Claims by Lydian Jersey against Lydian Canada and other subsidiaries	Assigned to Lydian Canada	Section 6.3(h)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian Canada		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors[1] ING, CAT, Ameriabank	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Jersey in Lydian Canada	Not Released (but subject to amalgamation with SL Newco)	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

[1] This includes contractual rights as outlined in the Waiver and Consent Agreement between Lydian Jersey, Lydian Canada, Lydian UK and Lydian Armenia dated November 26, 2018 (the "**Waiver**").

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian UK		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors ING, CAT, Ameriabank[2]	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in Lydian UK	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

[2] This includes the contractual rights outlined in the Waiver.

11910728 Canada Inc. ("DirectorCo")		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in DirectorCo	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal cousnel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian International Holdings Limited, Lydian Resources Armenia Limited, and Lydian Resources Kosovo Limited		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Other Secured Claims Includes claim of Maverix Metals in shares of Lydian Resources Armenia Limited, which is subordinated to claims of Senior Lenders	Not Released	Section 6.6
Unsecured Claims Includes Maverix Metals claim against Lydian International Holdings Limited	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian UK in Lydian International Holdings Limited, and shareholdings of Lydian International Holdings Limited in Lydian Resources Armenia ("**BVI**") and Lydian Resources Kosovo Limited Includes Maverix Metals' share pledge in BVI	Not Released	Section 6.6 (carve-out (E))
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian Armenia		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Equipment Lessor Secured Claims ING, CAT and Ameriabank (to the extent secured by their collateral)	Not Released	Section 6.6 (carve-out (E))
Equipment Lessor Unsecured Claims ING, CAT and Ameriabank (unsecured deficiency claims)	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims e.g. Trade creditors	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings held by BVI / DirectorCo (as sole shareholder representative of BVI	Not Released	Section 3.5
D&O Claims Claims against the Directors	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6 (i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian US Lydian Zoloto, Lydian Resources Georgia Limited ("Lydian Georgia") and Georgian Resource Company LLC ("Lydian GRC", and collectively with Lydian US, Lydian Zoloto and Lydian Georgia, the "Released Guarantors" under the Plan)		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Claims	Not Released	Section 6.6
Equity Claims (a) Shareholdings of Lydian Jersey in Lydian US, Lydian Georgia and Lydian Zoloto; and (b) Shareholdings of Lydian Georgia in Lydian GRC	(a) Not Released. Per s. 6.4 of the Plan, Lydian US and Lydian Zoloto to be wound-up and dissolved pursuant to the laws of Colorado and Armenia, respectively. (b) Lydian Georgia shares held by Lydian Jersey to be transferred to Lydian Georgia Purchaser on Plan Implementation Date. (b) Shares of Lydian GRC held by Lydian Georgia not released. See note re: Lydian Georgia above.	Section 3.5 and section 6.4
D&O Claims, Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

TAB 10

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does

not permit a release of claims against third parties and that the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entre to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

Interpreting the CCAA as permitting the inclusion of third-party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

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APPEAL from the sanction order of C.L. Campbell J., [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

The judgment of the court was delivered by

BLAIR J.A.: --

A. Introduction

[1] In August 2007, a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis

through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument, we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as Cineplex Odeon Corp. (Re) (2001), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

[6] For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The parties

[7] The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third-party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer and several holding companies and energy companies.

[8] Each of the appellants has large sums invested in ABCP -- in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants -- slightly over $1 billion -- represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways. [page518]

The ABCP market

[10] Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment -- usually 30 to 90 days -- typically with a low-interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

[11] ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

[12] The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP, the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

[13] As I understand it, prior to August 2007, when it was frozen, the ABCP market worked as follows.

[14] Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

[15] The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP

[page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

[17] The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature, there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

[18] When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

[19] The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes -- partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

[21] The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two-thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

[22] Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian

ABCP market.

The Plan

(a) Plan overview

[24] Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution". The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper -- which has been frozen and therefore effectively worthless for many months -- into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

[26] Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

[27] The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1 million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be

designed to secure votes in favour of the Plan by various Noteholders and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

(b) The releases

[28] This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in art. 10.

[29] The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers and other market participants -- in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" -- from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

[30] The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

[31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

(a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below-cost financing for margin funding facilities that are

designed to make the notes more secure;
(b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts;
(c) the Canadian banks provide below-cost financing for the margin funding facility; and
(d) other parties make other contributions under the Plan.

[32] According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation".

The CCAA proceedings to date

[33] On March 17, 2008, the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25. The vote was overwhelmingly in support of the Plan -- 96 per cent of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99 per cent of those connected with the development of the Plan voted positively, as did 80 per cent of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two-thirds in value of the claims -- required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge

issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

[36] The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations.

C. Law and Analysis

[39] There are two principal questions for determination on this appeal:

(1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its

directors?

(2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]

(1) Legal authority for the releases

[40] The standard of review on this first issue -- whether, as a matter of law, a CCAA plan may contain third-party releases -- is correctness.

[41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [See Note 1 below] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

(a) on a proper interpretation, the CCAA does not permit such releases;

(b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;

(c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867;

(d) the releases are invalid under Quebec rules of public order; and because

(e) the prevailing jurisprudence supports these conclusions.

[42] I would not give effect to any of these submissions.

Interpretation, "gap filling" and inherent jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of

(a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entre to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which gives the Act its efficacy: Canadian Red Cross Society (Re), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

[45] Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

[46] These issues have recently been canvassed by the

Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", [See Note 2 below] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "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": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

[48] More broadly, I believe that the proper approach to the judicial interpretation and application of statutes -- particularly those like the CCAA that are skeletal in nature -- is succinctly and accurately summarized by Jackson and Sarra in their recent article, supra, at p. 56:

The exercise of a statutory authority requires the statute to

be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Qubec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

[49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a

reorganization or compromise or arrangement under which the company could continue in business.

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

[52] In this respect, I agree with the following statement of Doherty J.A. in Elan, supra, at pp. 306-307 O.R.:

> [T]he Act was designed to serve a "broad constituency of investors, creditors and employees". [See Note 3 below] Because of that "broad constituency" the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.

(Emphasis added)

Application of the principles of interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian

ABCP market itself.

[54] The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

[55] This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP Dealers, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as Asset Providers and Liquidity Providers, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore -- as the application judge found -- in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and . . . providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark, at para. 50, that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments, at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, it is unduly technical to classify

the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

(Emphasis added)

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

[57] I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The statutory wording

[58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

(a) the skeletal nature of the CCAA;

(b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in

(c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

[59] Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [page530]
>
> . . . . .
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and

> Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A-12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

[61] The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement". I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688,

[2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

[63] There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan -- including the provision for releases -- becomes binding on all creditors (including the dissenting minority).

[64] T&N Ltd. and Others (Re), supra, is instructive in this regard. It is a rare example of a court focusing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. Companies Act 1985, a provision virtually identical to the scheme of the CCAA -- including the concepts of compromise or arrangement. [See Note 4 below]

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the EL claimants)

would assert their claims. In return, T&N's former employees and dependants (the EL claimants) agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

[66] Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The court rejected this argument. Richards J. adopted previous jurisprudence -- cited earlier in these reasons -- to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [See Note 5 below] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many

years to give the term its widest meaning. Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.
(Emphasis added)

[67] I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in T&N were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

[68] Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind all creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [See Note 6 below] and obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The required nexus

[69] In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be

made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

[70] The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan. This nexus exists here, in my view.

[71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

(a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534]

(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;

(c) the Plan cannot succeed without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and

(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

[72] Here, then -- as was the case in T&N -- there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being

released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

> I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

[73] I am satisfied that the wording of the CCAA -- construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation -- supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

[75] We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of Canadian Airlines (Re), however, the releases in those restructurings -- including Muscletech -- were not opposed. The appellants argue that those cases are wrongly decided because the court simply does not have the authority to approve such releases.

[76] In Canadian Airlines (Re) the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the wellspring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in Michaud v. Steinberg, [See Note 7 below] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92). [page536]

[78] Respectfully, I would not adopt the interpretive

principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court-sanctioning statutory mechanism that makes them binding on unwilling creditors.

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are Michaud v. Steinberg, supra; NBD Bank, Canada v. Dofasco Inc. (1999), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("Stelco I"). I do not think these cases assist the appellants, however. With the exception of Steinberg, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that Steinberg does not express a correct view of the law, and I decline to follow it.

[80] In Pacific Coastal Airlines, Tysoe J. made the following comment, at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

[81] This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question, it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to

certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of res judicata or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

[82] The facts in Pacific Coastal are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

[83] Nor is the decision of this court in the NBD Bank case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly owned subsidiary of Dofasco. The bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors". Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the bank. On appeal, he argued that since the bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process -- in short, he was personally protected by the CCAA release.

[84] Rosenberg J.A., writing for this court, rejected this argument. The appellants here rely particularly upon his following observations, at paras. 53-54:

> In my view, the appellant has not demonstrated that

allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.

In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. (Footnote omitted)

[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third-party releases was not under consideration at all. What the court was determining in NBD Bank was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in NBD to the facts now before the Court" (para. 71). Contrary to the facts of this case, in NBD Bank the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, NBD Bank is of little assistance in determining whether the court has authority to sanction a plan that calls for third-party releases.

[86] The appellants also rely upon the decision of this court in Stelco I. There, the court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement, one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis--vis the creditors themselves and not directly involving the company.

(Citations omitted; emphasis added)
See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

[87] This court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the [page539] need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third-party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: Stelco Inc. (Re), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("Stelco II"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

> In [Stelco I] -- the classification case -- the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company . . . [H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.

(Emphasis added)

[89] The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third-party releases here are very closely connected to the ABCP restructuring process.

[90] Some of the appellants -- particularly those represented by Mr. Woods -- rely heavily upon the decision of the Quebec

Court of Appeal in Michaud v. Steinberg, supra. They say that it is determinative of the release issue. In Steinberg, the court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 -- English translation):

> Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . . [page540]
>
> The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

[91] Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third-party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' and Their Officers and Employees Creditors Arrangement Act -- an awful mess -- and likely not attain its purpose, which is to enable the company to survive in the face of its creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of

> operation, contrary to its purposes and, for this reason, is to be banned.

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para., 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms encompass all that should enable the person who has recourse to it to fully dispose of his debts, both those that exist on the date when he has recourse to the statute and those contingent on the insolvency in which he finds himself . . .

(Emphasis added)

[93] The decision of the court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself", however. On occasion, such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in Steinberg, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

[94] Finally, the majority in Steinberg seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases -- as I have concluded it does -- the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

[95] Accordingly, to the extent Steinberg stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in Steinberg considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 amendments

[96] Steinberg led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

(2) A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. [page542]

Resignation or removal of directors

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

[97] Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third-party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? Expressio unius est exclusio alterius, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

[98] The maxim is not helpful in these circumstances, however. The reality is that there may be another explanation why Parliament acted as it did. As one commentator has noted: [See Note 8 below]

Far from being a rule, [the maxim expressio unius] is not

even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

[99] As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in Steinberg. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associs lte), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

[101] Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect: Halsbury's Laws of England, 4th ed. reissue, vol. 44(1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., supra, at 183; E.A. Driedger and Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed., (Markham, Ont.: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The division of powers and paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the Constitution Act, 1867, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the Civil Code of Quebec. [page544]

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p.

661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

[104] That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action -- normally a matter of provincial concern -- or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion with respect to legal authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "fair and reasonable"

[106] The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

[108] I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties -- including leading Canadian financial institutions -- that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end, he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

[109] The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers; (ii) limits the type of damages that may be claimed (no punitive damages, for example); (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order; and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: Fotini's Restaurant Corp. v. White Spot Ltd., [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, [page546] that the need "to avoid the potential cascade of litigation that . . . would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

[113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

(a) The parties to be released are necessary and essential to the restructuring of the debtor;

(b) the claims to be released are rationally related to the purpose of the Plan and necessary for it;

(c) the Plan cannot succeed without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the

Plan;

(e) the Plan will benefit not only the debtor companies but creditor Noteholders generally;

(f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,

(g) the releases are fair and reasonable and not overly broad or offensive to public policy.

[114] These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, [page547] Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

[116] All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only

acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

[117] In insolvency restructuring proceedings, almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices", inasmuch as everyone is adversely affected in some fashion.

[118] Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of all Noteholders, not just the interests of the appellants, whose notes represent only about 3 per cent of that total. That is what he did.

[119] The application judge noted, at para. 126, that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out [page548] specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized, at para. 134, that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity

among all stakeholders.

[120] In my view, we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

[121] For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

Appeal dismissed.

SCHEDULE "A" -- CONDUITS

Apollo Trust
Apsley Trust
Aria Trust
Aurora Trust
Comet Trust
Encore Trust
Gemini Trust
Ironstone Trust
MMAI-I Trust
Newshore Canadian Trust
Opus Trust
Planet Trust
Rocket Trust
Selkirk Funding Trust
Silverstone Trust
Slate Trust
Structured Asset Trust
Structured Investment Trust III
Symphony Trust
Whitehall Trust

SCHEDULE "B" -- APPLICANTS

ATB Financial
Caisse de dpt et placement du Qubec
Canaccord Capital Corporation [page549]
Canada Mortgage and Housing Corporation
Canada Post Corporation
Credit Union Central Alberta Limited
Credit Union Central of BC
Credit Union Central of Canada

Credit Union Central of Ontario
Credit Union Central of Saskatchewan
Desjardins Group
Magna International Inc.
National Bank of Canada/National Bank Financial Inc.
NAV Canada
Northwater Capital Management Inc.
Public Sector Pension Investment Board
The Governors of the University of Alberta

SCHEDULE "C" -- COUNSEL

(1) Benjamin Zarnett and Frederick L. Myers, for the Pan-Canadian Investors Committee

(2) Aubrey E. Kauffman and Stuart Brotman, for 4446372 Canada Inc. and 6932819 Canada Inc.

(3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

(4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd.

(5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals)

(6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

(7) Mario J. Forte, for Caisse de Dpt et Placement du Qubec

(8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550]

(9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.)

(10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

(11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

(12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

(13) Usman Sheikh, for Coventree Capital Inc.
(14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.
(15) Neil C. Saxe, for Dominion Bond Rating Service
(16) James A. Woods, Sbastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aroports de Montral, Aroports de Montral Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Mtropolitaine de Transport (AMT), Giro Inc., Vtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP
(17) Scott A. Turner, for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.
(18) R. Graham Phoenix, for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Notes

Note 1: Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

Note 2: Georgina R. Jackson and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., Annual Review of Insolvency Law, 2007 (Vancouver, B.C.: Carswell, 2007).

Note 3: Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

Note 4: The legislative debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the Companies Act 1985 (U.K.): see House of Commons Debates (Hansard), supra.

Note 5: See Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192; Ontario Business Corporations Act, R.S.O. 1990, c. B.16, s. 182.

Note 6: A majority in number representing two-thirds in value of the creditors (s. 6).

Note 7: Steinberg was originally reported in French: Steinberg Inc. c. Michaud, [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

Note 8: Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

TAB 11

CITATION: Nelson Education Limited (Re), 2015 ONSC 5557
COURT FILE NO.: CV15-10961-00CL
DATE: 20150908

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

BEFORE: Newbould J.

COUNSEL: *Benjamin Zarnett, Jessica Kimmel and Caroline Descours,* for the Applicants

Robert W. Staley, Kevin J. Zych and Sean Zweig, for the First Lien Agent and the First Lien Steering Committee

John L. Finnigan, D.J. Miller and Kyla E.M. Mahar, for Royal Bank of Canada

Orestes Pasparaskis, for the Monitor

HEARD: August 13 and 27, 2015

ENDORSEMENT

[1] The applicants Nelson Education Ltd. ("Nelson") and Nelson Education Holdings Ltd. sought and obtained protection under the CCAA on May 12, 2015. They now apply for approval of the sale of substantially all of the assets and business of Nelson to a newly incorporated entity to be owned indirectly by Nelson's first ranked secured lenders (the "first lien lenders") pursuant to a credit bid made by the first lien agent. Nelson also seeks ancillary orders relating to the sale.

The effect of the credit bid, if approved, is that the second lien lenders will receive nothing for their outstanding loans.

[2] RBC is one of 22 first lien lenders, a second lien lender and agent for the second lien lenders. At the time of its motion to replace the Monitor, RBC did not accept that the proposed sale should be approved. RBC now takes no position on the sale approval motion other than to oppose certain ancillary relief sought by the applicants. RBC also has moved for an order that certain amounts said to be owing to it and their portion of a consent fee should be paid by Nelson prior to the completion of the sale. The applicants and the first lien lenders oppose the relief sought by RBC.

Nelson business

[3] Nelson is a Canadian education publishing company, providing learning solutions to universities, colleges, students, teachers, professors, libraries, government agencies, schools, professionals and corporations across the country.

[4] The business and assets of Nelson were acquired by an OMERS entity and certain other funds from the Thomson Corporation in 2007 together with U.S. assets of Thomson for U.S. $7.75 billion, of which US$550 million was attributed to the Canadian business. The purchase was financed with first lien debt of approximately US$311.5 million and second lien debt of approximately US$171.3 million.

[5] The maturity date under the first lien credit agreement was July 3, 2014 and the maturity date under the second lien credit agreement was July 3, 2015. Nelson has not paid the principal balances owing under either loan. It paid interest on the first lien credit up to the filing of this CCAA application. It has paid no interest on the second lien credit since April 2014. As of the filing date, Nelson was indebted in the aggregate principal amounts of approximately US$269 million, plus accrued interest, costs and fees, under the first lien credit agreement and

approximately US$153 million, plus accrued interest, costs and fees, under the second lien credit agreement.

[6] Because these loans are denominated in U.S. dollars, the recent decline in the Canadian dollar against the United States dollar has significantly increased the Canadian dollar balance of the loans. Nelson generates substantially all of its revenue in Canadian dollars and is not hedged against currency fluctuations. Based on an exchange rate of CAD/USD of 1.313, as of August 10, 2015, the Canadian dollar principal balances of the first and second lien loans are $352,873,910 and $201,176,237.

[7] According to Mr. Greg Nordal, the CEO of Nelson, the business of Nelson has been affected by a general decline in the education markets over the past few years. Notwithstanding the industry decline over the past few years, Nelson has maintained strong EBITDA over each of the last several years.

Discussions leading to the sale to the first lien lenders

[8] In March 2013, Nelson engaged Alvarez & Marsal Canada Securities ULC ("A&M"), the Canadian corporate finance arm of Alvarez & Marsal to assist it in reviewing and considering potential strategic alternatives. RBC, the second lien agent also engaged a financial advisor in March 2013 and the first lien steering committee engaged a financial advisor in June 2013. RBC held approximately 85% of the second lien debt.

[9] Commencing in April 2013, Nelson and its advisors entered into discussions with stakeholders including the RBC as second lien agent, the first lien steering committee and their advisors. Nelson sought to achieve as its primary objective a consensual transaction that would be supported by all of the first lien lenders and second lien lenders. These discussions took place until September 2014. No agreement with the first lien lenders and second lien lenders was reached.

[10] In April 2014, Nelson and the second lien lenders agreed to two extensions of the cure period under the second lien credit agreement in respect of the second lien interest payment due on March 31, 2014, to May 30, 2014. In connection with these extensions, Nelson made a partial payment of US$350,000 in respect of the March interest payment and paid certain professional fees of the second lien lenders. Nelson requested a further extension of the second lien cure period beyond May 30, 2014, but the second lien lenders did not agree. Thereafter, Nelson defaulted under the second lien credit agreement and failed to make further interest payments to the second lien lenders.

[11] The first lien credit agreement matured on July 3, 2014. On July 7, 2014, Nelson proposed an amendment and extension of that agreement and solicited consent from its first lien lenders. RBC, as one of the first lien lenders was prepared to consent to the Nelson proposal, being a consent and support agreement, but no agreement was reached with the other first lien lenders and it did not proceed.

[12] In September, 2014, Nelson proposed in a term sheet to the first lien lenders a transaction framework for a sale or restructuring of the business on the terms set out in a term sheet dated September 10, 2014 and sought their support. In connection with the first lien term sheet, Nelson entered into a first lien support agreement with first lien lenders representing approximately 88% of the principal amounts outstanding under the first lien credit agreement. The consenting first lien lenders comprised 21 of the 22 first lien lenders, the only first lien lender not consenting being RBC. Consent fees of approximately US$12 million have been paid to the consenting first lien lenders.

[13] The first lien term sheet provided that Nelson would conduct a comprehensive and open sale or investment sales process (SISP) to attempt to identify one or more potential purchasers of, or investors in, the Nelson business on terms that would provide for net sale or investment proceeds sufficient to pay in full all obligations under the first lien credit agreement or that was otherwise acceptable to first lien lenders holding at least 66 2/3% of the outstanding obligations under the first lien credit agreement. If such a superior offer was not identified pursuant to the

SISP, the first lien lenders would become the purchaser and purchase substantially all of the assets of Nelson in exchange for the conversion by all of the first lien lenders of all of the debt owing to them under the first lien credit agreement into a new first lien term facility and for common shares of the purchaser.

[14] In September 2014, the company engaged A&M to assist with the SISP. By that time, A&M had been advising the Company for over 17 months and had gained an understanding of the Nelson Business and the educational publishing industry. The SISP was structured as a two-phase process.

[15] Phase 1 involved (i) contacting 168 potential purchasers, including both financial and strategic parties located in Canada, the United States and Europe, and 11 potential lenders to ascertain their potential interest in a transaction, (ii) initial due diligence and (iii) receipt by Nelson of non-binding letters of interest ("LOIs"). The SISP provided that interested parties could propose a purchase of the whole or parts of the business or an investment in Nelson.

[16] Seven potential purchasers submitted LOIs under phase 1, six of which were offers to purchase substantially all of the Nelson business and one of which was an offer to acquire only the K-12 business. Nelson reviewed the LOIs with the assistance of its advisors, and following consultation with the first lien steering committee and its advisors, invited five of the parties that submitted LOIs to phase 2 of the SISP. Phase 2 of the SISP involved additional due diligence, data room access and management presentations aimed at completion of binding documentation for a superior offer.

[17] Three participants submitted non-binding offers by the deadline of December 19, 2014, two of which were for the purchase of substantially all of the Nelson business and one of which was for the acquisition of the K-12 business. All three offers remained subject to further due diligence and reflected values that were significantly below the value of the obligations under the first lien credit agreement.

[18] On December 19, 2014, one of the participants advised A&M that it required additional time to complete and submit its offer, which additional time was granted. An offer was subsequently submitted but not ultimately advanced by the bidder.

[19] Nelson, with the assistance of its advisors, maintained communications throughout its restructuring efforts with Cengage Learnings, the company that has the U.S. business that was sold by Thomson and which is a key business partner of Nelson. Cengage submitted an expression of interest for the higher education business that, even in combination with the offer received for the K-12 business, was substantially lower than the amount of the first lien debt. In February 2015, Cengage and Nelson terminated discussions about a potential sale transaction.

[20] Ultimately, phase 2 of the SISP did not result in a transaction that would generate proceeds sufficient to repay the obligations under the first lien credit agreement in full or would otherwise be supported by the first lien lenders. Accordingly, with the assistance of A&M and its legal advisors, and in consultation with the first lien steering committee, Nelson determined that it should proceed with the sale transaction pursuant to the first lien support agreement.

Sale transaction

[21] The sale transaction is an asset purchase. It will enable the Nelson business to continue as a going concern. It includes:

(a) the transfer of substantially all of Nelson's assets to a newly incorporated entity to be owned indirectly by the first lien lenders;

(b) the assumption by the purchaser of substantially all of Nelson's trade payables, contractual obligations and employment obligations incurred in the ordinary course and as reflected in its balance sheet, excluding some obligations including the obligations under the second lien credit agreement and an intercompany promissory note of approximately $102.3 million owing by Nelson to Nelson Education Holdings Ltd.;

(c) an offer of employment by the purchaser to all of Nelson's employees; and

(d) a release by the first lien lenders of all of the indebtedness owing under the first lien credit agreement in exchange for: (i) 100% of the common shares of a newly incorporated entity that will own 100% of the common shares of the purchaser, and (ii) the obligations under a new US$200 million first lien term facility to be entered into by the Purchaser.

[22] The relief sought by the applicants apart from the approval of the sale transaction involves ancillary relief, including authorizing the distribution from Nelson's cash on hand to the first lien lenders of outstanding fees and interest, effecting mutual releases of parties associated with the sale transaction, and deeming a shareholders' rights agreement to bind all shareholders of the purchaser. This ancillary relief is opposed by RBC.

Analysis

(i) Sale approval

[23] RBC says it takes no position on the sale, although it opposes some of the terms and seeks an order paying the second lien lenders their pre-filing interest and expense claims. Whether RBC is entitled to raise the issues that it has requires a consideration of the intercreditor agreement of July 5, 2007 made between the agents for the first lien lenders and the second lien lenders.

[24] Section 6.1(a) of the intercreditor agreement provides that the second lien lenders shall not object to or oppose a sale and of the collateral and shall be deemed to have consented to it if the first lien claimholders have consented to it. It provides:

> The Second Lien Collateral Agent on behalf of the Second Lien Claimholders agrees that it will raise no objection or oppose a sale or other disposition of any Collateral free and clear of its Liens and other claims under Section 363 of the

> Bankruptcy Code (or any similar provision of any other Bankruptcy Law or any order of a court of competent jurisdiction) if the First Lien Claimholders have consented to such sale or disposition of such assets and the Second Lien Collateral Agent and each other Second Lien Claimholder will be deemed to have consented under Section 363 of the Bankruptcy Code (or any similar provision of any other Bankruptcy Law or any order of a court of competent jurisdiction) to any sale supported by the First Lien Claimholders and to have released their Liens in such assets. (underlining added)

[25] Section 6.11 of the intercreditor agreement contained a similar provision. RBC raises the point that for these two sections to be applicable, the first lien claimholders must have consented to the sale, and that the definition of first lien claimholders means that all of the first lien lenders must have consented to the sale. In this case, only 88% of the first lien lenders consented to the sale, the lone holdout being RBC. The definition in the intercreditor agreement of first lien claimholder is as follows:

> "**First Lien Claimholders**" means, at any relevant time, the holders of First Lien Obligations at that time, including the First Lien Collateral Agent, the First Lien Lenders, any other "Secured Party" (as defined in the First Lien Credit Agreement) and the agents under the First Lien Loan Documents.

[26] The intercreditor agreement is governed by the New York law and is to be construed and enforced in accordance with that law. The first lien agent filed an opinion of Allan L. Gropper, a former bankruptcy judge in the Southern District of New York and undoubtedly highly qualified to express proper expert opinions regarding the matters in issue. Mr. Gropper did not, however, discuss the principles of interpretation of a commercial contract under New York law, and in the absence of such evidence, I am to take the law of New York so far as contract interpretation is concerned as the same as our law. In any event, New York law regarding the interpretation of a contract would appear to be the same as our law. See *Cruden v. Bank of N.Y.*, 957 F.2d 961, 976 (2d Cir. 1992) and *Rainbow v. Swisher*, 72 N.Y. 2d 106, 531 N.Y.S. 775, 527 N.E.2d 258 (1988).

Mr. Gropper did opine that the sections in question are valid and enforceable in accordance with their terms.[1]

[27] The intercreditor agreement, like a lot of complex commercial contracts, appears to have a hodgepodge of terms piled on, or added to, one another, with many definitions and exceptions to exceptions. That is what too often appears to happen when too many lawyers are involved in stirring the broth. It is clear that there are many definitions, including a reference to First Lien Lenders, which is defined to be the Lenders as defined in the First Lien Loan Documents, which is itself a defined term, meaning the First Lien Credit Agreement and the Loan Documents. The provisions of the first lien credit agreement make clear that the Lenders include all those who have lent under that agreement, including obviously RBC.

[28] Under section 8.02(d) of the first lien credit agreement, more than 50% of the first lien lenders (the "Required Lenders") may direct the first lien agent to exercise on behalf of the first lien lenders all rights and remedies available to. In this case 88% of the first lien lenders, being all except RBC, directed the first lien agent to credit bid all of the first lien debt. This credit bid was thus made on behalf of all of the first lien lenders, including RBC.

[29] While the definition of First Lien Claimholders is expansive and refers to both the First Lien Collateral Agent (the first lien agent) and the First Lien Lenders, suggesting a distinction between the two, once the Required Lenders have caused a credit bid to be made by the First Lien Collateral Agent, RBC in my view is taken to have supported the sale that is contemplated by the credit bid.

[1] I do not think that Mr. Gropper's views on what particular sections of the agreement meant is the proper subject of expert opinion on foreign law. Such an expert should confine his evidence to a statement of what the law is and how it applies generally and not express his opinion on the very facts in issue before the court. See my comments in *Nortel Networks Corp. (Re)* (2014), 20 C.B.R. (6th) 171 para. 103.

[30] It follows that RBC is deemed under section 6.11 of the intercreditor agreement to have consented to the sale supported by the first lien claimholders. It is nevertheless required that I determine whether the sale and its terms should be approved. It is also important to note that no sale agreement has been signed and it awaits an order approving the form of Asset Purchase Agreement submitted by Nelson in its motion materials.

[31] This is an unusual CCAA case. It involves the acquisition of the Nelson business by its senior secured creditors under a credit bid made after a SISP conducted before any CCAA process and without any prior court approval of the SISP terms. The result of the credit bid in this case will be the continuation of the Nelson business in the hands of the first lien lenders, a business that is generating a substantial EBITDA each year and which has been paying its unsecured creditors in the normal course, but with the extinguishment of the US $153 million plus interest owed to the second lien lenders.

[32] Liquidating CCAA proceedings without a plan of arrangement are now a part of the insolvency landscape in Canada, but it is usual that the sale process be undertaken after a court has blessed the proposed sale methodology with a monitor fully participating in the sale process and reporting to the court with its views on the process that was carried out[2]. None of this has occurred in this case. One issue therefore is whether the SISP carried out before credit bid sale that has occurred involving an out of court process can be said to meet the *Soundair*[3] principles and that the credit bid sale meets the requirements of section 36(3) of the CCAA.

[33] I have concluded that the SISP and the credit bid sale transaction in this case does meet those requirements, for the reasons that follow.

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[2] See *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 at paras. 35-40 and *Re Brainhunter Inc.* [2009] O.J. No. 5207 at paras. 12-13.

[3] *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

[34] Alvarez & Marsal Canada Inc. was named the Monitor in the Initial Order over the objections of RBC, but shortly afterwards on the come-back motion by RBC, was replaced as Monitor by FTI Consulting Inc. The reasons for this change are contained in my endorsement of June 2, 2015. There was no suggestion of a lack of integrity or competence on the part of A&M or Alvarez & Marsal Canada Inc. In brief, the reason was that A&M had been retained by Nelson in 2013 as a financial advisor in connection with its debt situation, and in September 2014 had been retained to undertake the SISP process that has led to the sale transaction to the first lien lenders. I did not consider it right to put Alvarez & Marsal Canada Inc. in the position of providing independent advice to the Court on the SISP process that its affiliate had conducted, and that it would be fairer to all concerned that a different Monitor be appointed in light of the fact that the validity of the SISP process was going to be front and centre in the application of Nelson to have the sale agreement to the first lien lenders approved. Accordingly FTI was appointed to be the Monitor.

[35] FTI did a thorough review of all relevant facts, including interviewing a large number of people involved. In its report to the Court the Monitor expressed the following views:

> (a) The design of the SISP was typical of such marketing processes and was consistent with processes that have been approved by the courts in many CCAA proceedings;
>
> (b) The SISP allowed interested parties adequate opportunity to conduct due diligence, both A&M and management appear to have been responsive to all requests from potentially interested parties and the timelines provided for in the SISP were reasonable in the circumstances;
>
> (c) The activities undertaken by A&M were consistent with the activities that any investment banker or sale advisor engaged to assist in the sale of a business would be expected to undertake;

(d) The selection of A&M as investment banker would not have had a detrimental effect on the SISP or the value of offers;

(e) Both key senior management and A&M were incentivised to achieve the best value available and there was no impediment to doing so;

(f) The SISP was undertaken in a thorough and professional manner;

(g) The results of the SISP clearly demonstrate that none of the interested parties would, or would be likely to, offer a price for the Nelson business that would be sufficient to repay the amounts owing to the first lien lenders under the first lien credit agreement

(h) The SISP was a thorough market test and can be relied on to establish that there is no value beyond the first lien debt.

[36] The Monitor expressed the further view that:

(a) There is no realistic prospect that Nelson could obtain a new source of financing sufficient to repay the first lien debt;

(b) An alternative debt restructuring that might create value for the second lien lenders is not a viable alternative at this time;

(c) There is no reasonable prospect of a new sale process generating a transaction at a value in excess of the first lien debt;

(d) It does not appear that there are significant operational improvements reasonably available that would materially improve profitability in the short-term such that the value of the Nelson business would increase to the extent necessary to repay the first lien debt and, accordingly, there is no apparent benefit from delaying the sale of the business.

[37] *Soundair* established factors to be considered in an application to approve a sale in a receivership. These factors have widely been considered in such applications in a CCAA proceeding. They are:

> (a) whether sufficient effort has been made to obtain the best price and that the receiver or debtor (as applicable) has not acted improvidently;
>
> (b) whether the interests of all parties have been considered;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

[38] These factors are now largely mirrored in section 36(3) of the CCAA that requires a court to consider a number of factors, among other things, in deciding to authorize a sale of a debtor's assets. It is necessary to deal briefly with them.

(a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances. In this case, despite the fact that there was no prior court approval to the SISP, I accept the Monitor's view that the process was reasonable.

(b) Whether the monitor approved the process leading to the proposed sale or disposition. In this case there was no monitor at the time of the SISP. This factor is thus not strictly applicable as it assumes a sale process undertaken in a CCAA proceeding. However, the report of FTI blessing the SISP that took place is an important factor to consider.

(c) Whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy. The Monitor did not make such a statement in its

report. However, there is no reason to think that a sale or disposition under a bankruptcy would be more beneficial to the creditors. The creditors negatively affected could not expect to fare better in a bankruptcy.

(d) The extent to which the creditors were consulted. The first lien steering committee was obviously consulted. Before the SISP, RBC, the second lien lenders' agent, was consulted and actively participated in the reconstruction discussions. I take it from the evidence that RBC did not actively participate in the SISP, a decision of its choosing, but was provided some updates.

(e) The effects of the proposed sale or disposition on the creditors and other interested parties. The positive effect is that all ordinary course creditors, employees, suppliers and customers will be protected. The effect on the second lien lenders is to wipe out their security and any chance of their loans being repaid. However, apart from their being deemed to have consented to the sale, it is clear that the second lien lenders have no economic interest in the Nelson assets except as might be the case some years away if Nelson were able to improve its profitability to the point that the second lien lenders could be paid something towards the debt owed to them. RBC puts this time line as perhaps five years and it is clearly conjecture. The first lien lenders however are not obliged to wait in the hopes of some future result. As the senior secured creditor, they have priority over the interests of the second lien lenders.

There are some excluded liabilities and a small amount owing to former terminated employees that will not be paid. As to these the Monitor points out that there is no reasonable prospect of any alternative solution that would provide a recovery for those creditors, all of whom rank subordinate to the first lien lenders.

(f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. The Monitor is of the view that the results

> of the SISP indicate that the consideration is fair and reasonable in the circumstances and that the SISP can, and should, be relied on for the purposes of such a determination. There is no evidence to the contrary and I accept the view of the Monitor.

[39] In the circumstances, taking into account the *Soundair* factors and the matters to be considered in section 36(3) of the CCAA, I am satisfied that the sale transaction should be approved. Whether the ancillary relief should be granted is a separate issue, to which I now turn.

(ii) Ancillary claimed relief

(a) Vesting order

[40] The applicants seek a vesting order vesting all of Nelson's right, title and interest in and to the purchased assets in the purchaser, free and clear of all interests, liens, charges and encumbrances, other than the permitted encumbrances and assumed liabilities contemplated in the Asset Purchase Agreement. It is normal relief given in an asset sale under the CCAA and it is appropriate in this case.

(b) Payment of amounts to first lien lenders

[41] As a condition to the completion of the transaction, Nelson is to pay all accrued and unpaid interest owing to the first lien lenders and all unpaid professional fees of the first lien agent and the first lien lenders outstanding under the first lien credit agreement. RBC does not oppose this relief.

[42] If the cash is not paid out before the closing, it will be an asset of the purchaser as all cash on hand is being acquired by the purchaser. Thus the first lien lenders will have the cash. However, because the applicant is requesting a court ordered release by the first lien lenders of all obligations under the first lien credit agreement, the unpaid professional fees of the first lien

agent and the first lien lenders that are outstanding under the first lien credit agreement would no longer be payable after the closing of the transaction. Presumably this is the reason for the payment of these prior to the closing.

[43] These amounts are owed under the provisions of the first lien credit agreement and have priority over the interests of the second lien lenders under the intercreditor agreement. However, on June 2, 2015 it was ordered that pending further order, Nelson was prevented from paying any interest or other expenses to the first lien lenders unless the same payments owing to the second lien lenders. Nelson then chose not to make any payments to the first lien lenders. It is in effect now asking for an order nunc pro tunc permitting the payments to be made. I have some reluctance to make such an order, but in light of no opposition to it and that fact that it is clear from the report of the Monitor that there is no value in the collateral for the second lien lenders, the payment is approved.

(c) Releases

[44] The applicants request an order that would include a broad release of the parties to the Asset Purchase Agreement as well as well as other persons including the first lien lenders.

[45] The Asset Purchase Agreement has not been executed. In accordance with the draft approval and vesting order sought by the applicants, it is to be entered into upon the entry of the approval and vesting order. The release contained in the draft Asset Purchase Agreement in section 5.12 provides that the parties release each other from claims in connection with Nelson, the Nelson business, the Asset Purchase Agreement, the transaction, these proceedings, the first lien support agreement, the supplemental support agreement, the payment and settlement agreement, the first lien credit agreement and the other loan documents or the transactions contemplated by them. Released parties are not released from their other obligations or from claims of fraud. The release also does not deal with the second lien credit agreement or the second lien lenders.

[46] The first lien term sheet made a part of the support agreement contained terms and conditions, but it stated that they would not be effective until definitive agreements were made by the applicable parties and until they became effective. One of the terms was that there would be a release "usual and customary for transactions of this nature", including a release by the first lien lenders in connection with "all matters related to the Existing First Lien Credit Agreement, the other Loan Documents and the transactions contemplated herein". RBC was not a party to the support agreement or the first lien term sheet.

[47] The release in the Asset Purchase Agreement at section 5.12 provides that "each of the Parties on behalf of itself and its Affiliates does hereby forever release…". "Affiliates" is defined to include "any other Person that directly or indirectly…controls…such Person". The party that is the purchaser is a New Brunswick numbered company that will be owned indirectly by the first lien lenders. What instructions will or have been given by the first lien lenders to the numbered company to sign the Asset Purchase Agreement are not in the record, but I will assume that the First Lien Agent has or will authorize it and that RBC as a first lien lenders has not and will not authorize it.

[48] Releases are a feature of approved plans of compromise and arrangement under the CCAA. The conditions for such a release have been laid down in *ATB Financial v. Metcalf and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at paras. 43 and 70. Third party releases are authorized under the CCAA if there is a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan. In *Metcalfe*, Blair J.A. found compelling that the claims to be released were rationally related to the purpose of the plan and necessary for it and that the parties who were to have claims against them released were contributing in a tangible and realistic way to the plan[4].

[4] This case does not involve a plan under the CCAA. One of the reasons for this may be that pursuant to section 6.9(b) of the intercreditor agreement, in the event the applicants commence any restructuring proceeding in Canada and put forward a plan, the applicants, the first lien lenders and the second lien lenders agreed that the first lien

[49] While there is no CCAA plan in this case, I see no reason not to consider the principles established in *Metcalfe* when considering a sale such as this under the CCAA, with any necessary modifications due to the fact that it is not a sale pursuant to a plan. The application of those principles dictates in my view that the requested release by the first lien lenders should not be ordered.

[50] The beneficiaries of the release by the first lien lenders are providing nothing to the first lien lenders in return for the release. The substance of the support agreement was that Nelson agreed to try to fetch as much as it could through a SISP but that if it could not get enough to satisfy the first lien lenders, it agreed to a credit bid by the first lien lenders. Neither Nelson nor the first lien agent or supplemental first lien agent or any other party gave up anything in return for a release from the first lien lenders. So far as RBC releasing a claim that it may have as a first lien lender against the other first lien lenders, nothing has been provided to RBC by the other first lien lenders in return for such a release. RBC as a first lien lender would be required to give up any claim it might have against the other parties to the release for any matters arising prior to or after the support agreement while receiving nothing in return for its release.

In the circumstances, I decline to approve the release by the first lien lenders requested by the applicants to be included in the approval and vesting order.

(d) Stockholders and Registration Rights Agreement

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lenders and the second lien lenders should be classified together in one class. The second lien lenders agreed that they would only vote in favour of a plan if it satisfied one of two conditions, there was no contractual restriction on their ability to vote against a plan.

[51] The applicants seek to have a Stockholders and Registration Rights Agreement declared effective and binding on all persons entitled to receive common shares of Purchaser Holdco in connection with the transaction as though such persons were signatories to the Stockholders and Registration Rights Agreement.

[52] The Stockholders and Registration Rights Agreement is a contract among the purchaser's parent company, Purchaser Holdco, and the holders of Purchaser Holdco's common shares. After implementation of the transaction, the first lien lenders will be the holders of 100% of the shares of Purchaser Holdco. The Stockholders and Registration Rights Agreement was negotiated and agreed to by Purchaser Holdco and the First Lien Steering Committee (all first lien lenders except RBC). The First Lien Steering Committee would like RBC to be bound by the agreement. The evidence of this is in the affidavit of Mr. Nordal, the President and CEO of Nelson, who says that based on discussions with Mr. Chadwick, the First Lien Steering Committee requires that all of the first lien lenders to be bound to the terms of the Stockholders and Registration Rights Agreement. This is of course double hearsay as Mr. Chadwick acts for Nelson and not the First Lien Steering Committee.

The effect of what is being requested is that RBC as a shareholder of Purchaser Holdco would be bound to some shareholder agreement amongst the shareholders of Purchaser Holdco. While the remaining 88% of the shareholders of Purchaser Holdco might want to bind RBC, I see nothing in the record that would justify such a confiscation of such shareholder rights. I agree with RBC that extending the Court's jurisdiction in these CCAA proceedings and exercising it to assist the purchaser's parent company with its corporate governance is not appropriate. The purchaser and its parent company either have the contractual right to bind all first lien lenders to terms as future shareholders, or they do not.

RBC Motion

(a) Second lenders' pre-filing interest and second lien agent's fees

[53] RBC seeks an order that directing Nelson to pay to RBC in its capacity as the second lien agent the second lien interest outstanding at the filing date of CDN$1,316,181.73 and the second lien fees incurred prior to the filing date of US$15,365,998.83.

[54] Mr. Zarnett in argument conceded that these amounts are owed under the second lien credit agreement. There are further issues, however, being (i) whether they continue to be owed due to the intercreditor agreement (ii) whether RBC is entitled under the intercreditor agreement to request the payment and (iii) whether RBC is entitled to be paid these under the intercreditor agreement before the first lien lenders are paid in full.

[55] There is a distinction between a lien subordination agreement and a payment subordination agreement. Lien subordination is limited to dealings with the collateral over which both groups of lenders hold security. It gives the senior lender a head start with respect to any enforcement actions in respect of the collateral and ensures a priority waterfall from the proceeds of enforcement over collateral. It entitles second lien lenders to receive and retain payments of interest, principal and other amounts in respect of a second lien obligation unless the receipt results from an enforcement step in respect of the collateral. By contrast, payment subordination means that subordinate lenders have also subordinated in favour of the senior lender their right to payment and have agreed to turn over all money received, whether or not derived from the proceeds of the common collateral[5]. The intercreditor agreement is a lien subordination agreement, as stated in section 8.2.

[56] Nelson and the first lien agent say that RBC has no right to ask the Court to order any payments to it from the cash on hand prior to the closing of the transaction. They rely on the language of section 3.1(a)(1) that provides that until the discharge of the first lien obligations, the second lien collateral agent will not exercise any rights or remedies with respect to any collateral,

[5] See 65 A.B.A. Bus Law. 809-883 (May 2010).

institute any action or proceeding with respect to such remedies including any enforcement step under the second lien documents. RBC says it is not asking to enforce its security rights but merely asking that it be paid what it is owed and is permitted to receive under the intercreditor agreement, which does not subordinate payments but only liens. It points to section 3.1(c) that provides that:

> (c) Notwithstanding the foregoing (i.e. section 3.1(a)(1)) the Second Lien Collateral Agent and any Second Lien Claimholder may (1)… and may take such other action as it deems in good faith to be necessary to protect its rights in an insolvency proceeding" and (4) may file any… motions… which assert rights… available to unsecured creditors…arising under any insolvency… proceeding.

[57] My view of the intercreditor agreement language and what has occurred is that RBC has not taken enforcement steps with respect to collateral. It has asked that payments owing to it under the second lien credit agreement up to the date of filing be paid.

[58] Payment of what the second lien lenders are entitled to under the second lien credit agreement is protected under the intercreditor agreement unless it is as the result of action taken by the second lien lenders to enforce their security. Section 3.1(f) of the intercreditor agreement provides as follows:

> (f) Except as set forth is section 3.1(a) and section 4 to the extent applicable, nothing in this Agreement shall prohibit the receipt by the Second Lien Collateral Agent or any Second Lien Claimholders of the required payments of interest, principal and other amounts owed in respect of the Second Lien Obligations or receipt of payments permitted under the First Lien Loan Documents, including without limitation, under section 7.09(a) of the First Lien Credit Agreement, so long as such receipt is not the direct or indirect result of the exercise by the Second Lien Collateral Agent or any Second Lien Claimholders of rights or remedies as a secured creditor (including set off) or enforcement in contravention of this Agreement. ... (underlining added).

[59] Section 3.1(a) prohibits the second lien lenders from exercising any rights or remedies with respect to the collateral before the first liens have been discharged. Section 4 requires any collateral or proceeds thereof received by the first lien collateral agent from a sale of collateral to

be first applied to the first lien obligations and requires any payments received by the second lien lenders from collateral in connection with the exercise of any right or remedy in contravention of the agreement must be paid over to the first lien collateral agent.

[60] It do not agree with the first lien collateral agent that payment to RBC before the sale closes of amounts owing pre-filing under the second lien credit agreement would be in contravention of section 4.1. That section deals with cash from collateral being received by the first lien collateral agent in connection with a sale of collateral, and provides that it shall be applied to the first lien obligations until those obligations have been discharged. In this case, the cash on hand before any closing will not be received by the first lien collateral agent at all. It will be received after the closing by the purchaser.

[61] The first lien collateral agent has made a credit bid on behalf of the first lien lenders. Pursuant to section 3.1(b), that credit bid is deemed to be an exercise of remedies with respect to the collateral held by the first lien lenders. Under the last paragraph of section 3.1(c), until the discharge of the first lien obligations has occurred, the sole right of the second lien collateral agent and the second lien claimholders with respect to the collateral is to hold a lien on the collateral pursuant to the second lien collateral documents and to receive a share of the proceeds thereof, if any, after the discharge of the first lien obligations has occurred. That provision is as follows:

> Without limiting the generality of the foregoing, unless and until the discharge of the First Lien Obligations has occurred, except as expressly provided in Sections 3.1(a), 6.3(b) and this Section 3.1(c), the sole right of the Second Lien Collateral Agent and the Second Lien Claimholders with respect to the Collateral is to hold a Lien of the Collateral pursuant to the Second Lien Collateral Documents for the period and to the extend granted therein and to receive a share of the proceeds thereof, if any, after the Discharge of First Lien Obligations has occurred.

[62] RBC points out that its rights under section 3.1(f) to receive payment of amounts owing to the second lien lenders is not subject to section 3.1(c) at all. It is not suggested by the first lien collateral agent that this is a drafting error, but it strikes me that it may be. The provision at the

end of section 3.1(c) is inconsistent with section 3.1(f) as section 3.1(c) is not an exception to section 3.1(f).

[63] Both the liens of the first lien lenders and the second lien lenders are over all of the assets of Nelson. Cash is one of those assets. Therefore if payment were now made to RBC from that cash, the cash would be paid to RBC from the collateral for amounts owing under the second lien credit agreement before the obligations to the first lien lenders were discharged. The obligations to the first lien lenders will be discharged when the sale to the purchaser takes place and the first lien obligations are cancelled.

[64] There is yet another provision of the intercreditor agreement that must be considered. It appears to say that if a judgment is obtained in favour of a second lien lender after exercising rights as an unsecured creditor, the judgment is to be considered a judgment lien subject to the intercreditor agreement for all purposes. Section 3.1(e) provides:

> (e) Except as otherwise specifically set forth in Sections 3.1(a) and (d), the Second Lien Collateral Agent and the Second Lien Claimholders may exercise rights and remedies as unsecured creditors against the Company or any other Grantor that has guaranteed or granted Liens to secure the Second Lien Obligations in accordance with the terms of the Second Lien Loan Documents and applicable law; provided that in the event that any Second Lien Claimholder becomes a judgment creditor in respect of Collateral as a result of its enforcement of its rights as an unsecured creditor with respect to the Second Lien Obligations, **such judgment Lien** shall be subject to the terms of this Agreement for all purposes (including in relation to the First Lien Obligations) as the other Liens securing the Second Lien Obligations are subject to this Agreement. (Emphasis added).

[65] What exactly is meant by a "judgment Lien" is not stated in the intercreditor agreement and is not a defined term. If an order is made in this CCAA proceeding that the pre-filing obligations to the second lien collateral agent are to be paid from the cash on hand that Nelson holds, is that a "judgment Lien" meaning that it cannot be exercised before the first lien obligations are discharged? In this case, as the first lien obligations will be discharged as part of the closing of the transaction, does that mean that once the order is made approving the sale and

the transaction closes, the cash on hand will go to the purchaser and the judgment Lien will not be paid? It is not entirely clear. But the section gives some indication that a judgment held as a result of the second lien agent exercising rights as an unsecured creditor cannot be used to attach collateral contrary to the agreement if the first lien obligations have not been discharged.

[66] I have been referred to a number of cases in which statements have been made as to the need for the priority of secured creditors to be recognized in CCAA proceedings, particularly when distributions have been ordered. While in this case we are not dealing with a distribution generally to creditors, the principles are well known and undisputed. However, in considering the priorities between the first and second lien holders in this case, the intercreditor agreement is what must govern, even with all of its warts.

[67] In this case, the cash on hand held by Nelson is collateral, and subject to the rights of the first lien lenders in that collateral. An order made in favour of RBC as second lien agent would reduce that collateral. The overall tenor of the intercreditor agreement, including section 3.1(e), leads me to the conclusion that such an order in favour of RBC should not be made. I do say, however, that the issue is not at all free from doubt and that no credit should be given to those who drafted and settled the intercreditor agreement as it is far from a model of clarity. I decline to make the order sought by RBC.

[68] I should note that RBC has made a claim that that Nelson and the first lien lenders who signed the First Lien Support Agreement acted in bad faith and disregarded the interests of the second lien lenders under the intercreditor agreement. RBC claims that the first lien lenders induced Nelson to breach the second lien credit agreement and that this breach resulted in damages to the second lien agent in the amounts of US$15,365,998.83 on account of interest and CDN$1,316,181.73 on account of fees. RBC says that these wrongs should be taken into account in considering whether the credit bid should be accepted and that the powers under section 11 of the CCAA should be exercised to order these amounts to be paid to RBC as second lien agent.

[69] I decline to do so. No decision on this record could be possibly be made as to whether these wrongs took place. The claim for inducing breach of contract surfaced in the RBC factum filed just two days before the hearing and it would be unfair to Nelson or the first lien lenders to have to respond without the chance to fully contest these issues. Moreover, even the release sought by the applicants would not prevent RBC or any second lien lender from bringing an action for wrongs committed. RBC is able to pursue relief for these alleged wrongs in a separate action.

(b) Consent fee

[70] The first lien lenders who signed the First Lien Support Agreement were paid a consent fee. That agreement, and particularly the term sheet made a part of it, provided that those first lien lenders who signed the agreement would be paid a consent fee.

[71] RBC contends that because the consent fee was calculated for each first lien lender that signed the First Lien Support Agreement on the amount of the loans that any consenting first lien lenders held under the first lien credit agreement, the consent fee was paid on account of the loans and thus because all first lien lenders were to be paid equally on their loans on a pro rata basis, RBC is entitled to be paid its share of the consent fees.

[72] Section 2.14 of the first lien credit agreement provides in part, as follows:

> If, other than as expressly provided elsewhere herein, **any Lender shall obtain on account of the Loans made by it**, or the participations in L/C Obligations and Swing Line Loans held by it, **any payment** (whether voluntary, involuntary, through the exercise of any right of setoff, or otherwise) **in excess of its ratable share** (or other share contemplated hereunder) thereof, such Lender shall immediately (a) notify the Administrative Agent of such fact, and (b) purchase from the other Lenders such participations in the Loans made by them and/or such subparticipations in the participations in L/C Obligations or Swing Line

> Loans held by them, as the case may be, as shall be necessary to cause such purchasing Lender to share the excess payment in respect of such Loans or such participations, as the case may be, pro rata with each of them . . . [emphasis added].

[73] RBC says that while the section refers to a first lien lender obtaining a payment "on account" of its loan, U.S. authorities under the U.S. Bankruptcy Code have held that the words "on account of" do not mean "in exchange for" but rather mean "because of." As the consent payments are calculated on the amount of the loan of any first lien lender who signed the term sheet, RBC says that they were made because of their loan and thus RBC is entitled to its share of the consent fees that were paid by virtue of section 2.14 of the first lien credit agreement.

[74] I do not accept that argument. The consent fees were paid because the consenting first lien lenders signed the First Lien Support Agreement. The fact that their calculation depended on the amount of the loan made by each consenting first lien lender does not mean they were made because of the loan. RBC declined to sign the First Lien Support Agreement and is not entitled to a consent fee.

Conclusion

[75] An order is to go in accordance with these reasons. As there has been mixed success, there shall be no order as to costs.

Newbould J.

Date: September 8, 2015

TAB 12

CITATION: Nortel Networks Corporation (Re), 2010 ONSC 1708
COURT FILE NO.: 09-CL-7950
DATE: 20100326

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: 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 NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION, Applicants

BEFORE: MORAWETZ J.

COUNSEL: Derrick Tay, Jennifer Stam and Suzanne Wood, for the Applicants

Lyndon Barnes and Adam Hirsh, for the Nortel Directors

Benjamin Zarnett, Gale Rubenstein, C. Armstrong and Melaney Wagner, for Ernst & Young Inc., Monitor

Arthur O. Jacques, for the Nortel Canada Current Employees

Deborah McPhail, for the Superintendent of Financial Services (non-PBGF)

Mark Zigler and Susan Philpott, for the Former and Long-Term Disability Employees

Ken Rosenberg and M. Starnino, for the Superintendent of Financial Services in its capacity as Administrator of the Pension Benefit Guarantee Fund

S. Richard Orzy and Richard B. Swan, for the Informal Nortel Noteholder Group

Alex MacFarlane and Mark Dunsmuir, for the Unsecured Creditors' Committee of Nortel Networks Inc.

Leanne Williams, for Flextronics Inc.

Barry Wadsworth, for the CAW-Canada

Pamela Huff, for the Northern Trust Company, Canada

Joel P. Rochon and Sakie Tambakos, for the Opposing Former and Long-Term Disability Employees

Robin B. Schwill, for the Nortel Networks UK Limited (In Administration)

Sorin Gabriel Radulescu, In Person

Guy Martin, In Person, on behalf of Marie Josee Perrault

Peter Burns, In Person

Stan and Barbara Arnelien, In Person

HEARD: MARCH 3, 4, 5, 2010

ENDORSEMENT

INTRODUCTION

[1] On January 14, 2009, Nortel Networks Corporation ("NNC"), Nortel Networks Limited "(NNL"), Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (collectively, the "Applicants") were granted a stay of proceedings pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") and Ernst & Young Inc. was appointed as Monitor.

[2] The Applicants have historically operated a number of pension, benefit and other plans (both funded and unfunded) for their employees and pensioners, including:

(i) Pension benefits through two registered pension plans, the Nortel Networks Limited Managerial and Non-Negotiated Pension Plan and the Nortel Networks Negotiated Pension Plan (the "Pension Plans"); and

(ii) Medical, dental, life insurance, long-term disability and survivor income and transition benefits paid, except for survivor termination benefits, through Nortel's Health and Welfare Trust (the "HWT").

[3] Since the CCAA filing, the Applicants have continued to provide medical, dental and other benefits, through the HWT, to pensioners and employees on long-term disability ("Former and LTD Employees") and active employees ("HWT Payments") and have continued all current service contributions and special payments to the Pension Plans ("Pension Payments").

[4] Pension Payments and HWT Payments made by the Applicants to the Former and LTD Employees while under CCAA protection are largely discretionary. As a result of Nortel's insolvency and the significant reduction in the size of Nortel's operations, the unfortunate reality

is that, at some point, cessation of such payments is inevitable. The Applicants have attempted to address this situation by entering into a settlement agreement (the "Settlement Agreement") dated as of February 8, 2010, among the Applicants, the Monitor, the Former Employees' Representatives (on their own behalf and on behalf of the parties they represent), the LTD Representative (on her own behalf and on behalf of the parties she represents), Representative Settlement Counsel and the CAW-Canada (the "Settlement Parties").

[5] The Applicants have brought this motion for approval of the Settlement Agreement. From the standpoint of the Applicants, the purpose of the Settlement Agreement is to provide for a smooth transition for the termination of Pension Payments and HWT Payments. The Applicants take the position that the Settlement Agreement represents the best efforts of the Settlement Parties to negotiate an agreement and is consistent with the spirit and purpose of the CCAA.

[6] The essential terms of the Settlement Agreement are as follows:

(a) until December 31, 2010, medical, dental and life insurance benefits will be funded on a pay-as-you-go basis to the Former and LTD Employees;

(b) until December 31, 2010, LTD Employees and those entitled to receive survivor income benefits will receive income benefits on a pay-as-you-go basis;

(c) the Applicants will continue to make current service payments and special payments to the Pension Plans in the same manner as they have been doing over the course of the proceedings under the CCAA, through to March 31, 2010, in the aggregate amount of $2,216,254 per month and that thereafter and through to September 30, 2010, the Applicants shall make only current service payments to the Pension Plans, in the aggregate amount of $379,837 per month;

(d) any allowable pension claims, in these or subsequent proceedings, concerning any Nortel Worldwide Entity, including the Applicants, shall rank *pari passu* with ordinary, unsecured creditors of Nortel, and no part of any such HWT claims shall rank as a preferential or priority claim or shall be the subject of a constructive trust or trust of any nature or kind;

(e) proofs of claim asserting priority already filed by any of the Settlement Parties, or the Superintendent on behalf of the Pension Benefits Guarantee Fund are disallowed in regard to the claim for priority;

(f) any allowable HWT claims made in these or subsequent proceedings shall rank *pari passu* with ordinary unsecured creditors of Nortel;

(g) the Settlement Agreement does not extinguish the claims of the Former and LTD Employees;

(h) Nortel and, *inter alia*, its successors, advisors, directors and officers, are released from all future claims regarding Pension Plans and the HWT, provided that nothing in the release shall release a director of the Applicants from any matter referred to in subsection 5.1(2) of the CCAA or with respect to fraud on the part of any Releasee, with respect to that Releasee only;

(i) upon the expiry of all appeals and rights of appeal in respect thereof, Representative Settlement Counsel will withdraw their application for leave to appeal the decision of the Court of Appeal, dated November 26, 2009, to the Supreme Court of Canada on a with prejudice basis; [1]

(j) a CCAA plan of arrangement in the Nortel proceedings will not be proposed or approved if that plan does not treat the Pension and HWT claimants *pari passu* to the other ordinary, unsecured creditors ("Clause H.1"); and

(k) if there is a subsequent amendment to the *Bankruptcy and Insolvency Act* ("BIA") that "changes the current, relative priorities of the claims against Nortel, no party is precluded by this Settlement Agreement from arguing the applicability" of that amendment to the claims ceded in this Agreement ("Clause H.2").

[7] The Settlement Agreement does *not* relate to a distribution of the HWT as the Settlement Parties have agreed to work towards developing a Court-approved distribution of the HWT corpus in 2010.

[8] The Applicants' motion is supported by the Settlement Parties and by the Board of Directors of Nortel.

[9] The Official Committee of Unsecured Creditors of Nortel Networks Inc. ("UCC"), the informal Nortel Noteholder Group (the "Noteholders"), and a group of 37 LTD Employees (the "Opposing LTD Employees") oppose the Settlement Agreement.

[10] The UCC and Noteholders oppose the Settlement Agreement, principally as a result of the inclusion of Clause H.2.

[11] The Opposing LTD Employees oppose the Settlement Agreement, principally as a result of the inclusion of the third party releases referenced in [6h] above.

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[1] On March 25, 2010, the Supreme Court of Canada released the following: *Donald Sproule et al. v. Nortel Networks Corporation et al.* (Ont.) (Civil) (By Leave) (33491) (The motions for directions and to expedite the application for leave to appeal are dismissed. The application for leave to appeal is dismissed with no order as to costs./La requête en vue d'obtenir des directives et la requête visant à accélérer la procédure de demande d'autorisation d'appel sont rejetées. La demande d'autorisation d'appel est rejetée; aucune ordonnance n'est rendue concernant les dépens.): <http://scc.lexum.umontreal.ca/en/news_release/2010/10-03-25.3a/10-03-25.3a.html>

THE FACTS

A. Status of Nortel's Restructuring

[12] Although it was originally hoped that the Applicants would be able to restructure their business, in June 2009 the decision was made to change direction and pursue sales of Nortel's various businesses.

[13] In response to Nortel's change in strategic direction and the impending sales, Nortel announced on August 14, 2009 a number of organizational updates and changes including the creation of groups to support transitional services and management during the sales process.

[14] Since June 2009, Nortel has closed two major sales and announced a third. As a result of those transactions, approximately 13,000 Nortel employees have been or will be transferred to purchaser companies. That includes approximately 3,500 Canadian employees.

[15] Due to the ongoing sales of Nortel's business units and the streamlining of Nortel's operations, it is expected that by the close of 2010, the Applicants' workforce will be reduced to only 475 employees. There is a need to wind-down and rationalize benefits and pension processes.

[16] Given Nortel's insolvency, the significant reduction in Nortel's operations and the complexity and size of the Pension Plans, both Nortel and the Monitor believe that the continuation and funding of the Pension Plans and continued funding of medical, dental and other benefits is not a viable option.

B. The Settlement Agreement

[17] On February 8, 2010 the Applicants announced that a settlement had been reached on issues related to the Pension Plans, and the HWT and certain employment related issues.

[18] Recognizing the importance of providing notice to those who will be impacted by the Settlement Agreement, including the Former Employees, the LTD Employees, unionized employees, continuing employees and the provincial pension plan regulators ("Affected Parties"), Nortel brought a motion to this Court seeking the approval of an extensive notice and opposition process.

[19] On February 9, 2010, this Court approved the notice program for the announcement and disclosure of the Settlement (the "Notice Order").

[20] As more fully described in the Monitor's Thirty-Sixth, Thirty-Ninth and Thirty-Ninth Supplementary Reports, the Settlement Parties have taken a number of steps to notify the Affected Parties about the Settlement.

[21] In addition to the Settlement Agreement, the Applicants, the Monitor and the Superintendent, in his capacity as administrator of the Pension Benefits Guarantee Fund, entered into a letter agreement on February 8, 2010, with respect to certain matters pertaining to the Pension Plans (the "Letter Agreement").

[22] The Letter Agreement provides that the Superintendent will not oppose an order approving the Settlement Agreement ("Settlement Approval Order"). Additionally, the Monitor and the Applicants will take steps to complete an orderly transfer of the Pension Plans to a new administrator to be appointed by the Superintendent effective October 1, 2010. Finally, the Superintendent will not oppose any employee incentive program that the Monitor deems reasonable and necessary or the creation of a trust with respect to claims or potential claims against persons who accept directorships of a Nortel Worldwide Entity in order to facilitate the restructuring.

POSITIONS OF THE PARTIES ON THE SETTLEMENT AGREEMENT

The Applicants

[23] The Applicants take the position that the Settlement is fair and reasonable and balances the interests of the parties and other affected constituencies equitably. In this regard, counsel submits that the Settlement:

(a) eliminates uncertainty about the continuation and termination of benefits to pensioners, LTD Employees and survivors, thereby reducing hardship and disruption;

(b) eliminates the risk of costly and protracted litigation regarding Pension Claims and HWT Claims, leading to reduced costs, uncertainty and potential disruption to the development of a Plan;

(c) prevents disruption in the transition of benefits for current employees;

(d) provides early payments to terminated employees in respect of their termination and severance claims where such employees would otherwise have had to wait for the completion of a claims process and distribution out of the estates;

(e) assists with the commitment and retention of remaining employees essential to complete the Applicants' restructuring; and

(f) does not eliminate Pension Claims or HWT Claims against the Applicants, but maintains their quantum and validity as ordinary and unsecured claims.

[24] Alternatively, absent the approval of the Settlement Agreement, counsel to the Applicants submits that the Applicants are not required to honour such benefits or make such payments and

such benefits could cease immediately. This would cause undue hardship to beneficiaries and increased uncertainty for the Applicants and other stakeholders.

[25] The Applicants state that a central objective in the Settlement Agreement is to allow the Former and LTD Employees to transition to other sources of support.

[26] In the absence of the approval of the Settlement Agreement or some other agreement, a cessation of benefits will occur on March 31, 2010 which would have an immediate negative impact on Former and LTD Employees. The Applicants submit that extending payments to the end of 2010 is the best available option to allow recipients to order their affairs.

[27] Counsel to the Applicants submits that the Settlement Agreement brings Nortel closer to finalizing a plan of arrangement, which is consistent with the sprit and purpose of the CCAA. The Settlement Agreement resolves uncertainties associated with the outstanding Former and LTD Employee claims. The Settlement Agreement balances certainty with clarity, removing litigation risk over priority of claims, which properly balances the interests of the parties, including both creditors and debtors.

[28] Regarding the priority of claims going forward, the Applicants submit that because a deemed trust, such as the HWT, is not enforceable in bankruptcy, the Former and LTD Employees are by default *pari passu* with other unsecured creditors.

[29] In response to the Noteholders' concern that bankruptcy prior to October 2010 would create pension liabilities on the estate, the Applicants committed that they would not voluntarily enter into bankruptcy proceedings prior to October 2010. Further, counsel to the Applicants submits the court determines whether a bankruptcy order should be made if involuntary proceedings are commenced.

[30] Further, counsel to the Applicants submits that the court has the jurisdiction to release third parties under a Settlement Agreement where the releases (1) are connected to a resolution of the debtor's claims, (2) will benefit creditors generally and (3) are not overly broad or offensive to public policy. See *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.), [*Metcalfe*] at para. 71, leave to appeal refused, [2008] S.C.C.A. No. 337 and *Re Grace* [2008] O.J. No. 4208 (S.C.J.) [*Grace 2008*] at para. 40.

[31] The Applicants submit that a settlement of the type put forward should be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all the circumstances. Elements of fairness and reasonableness include balancing the interests of parties, including any objecting creditor or creditors, equitably (although not necessarily equally); and ensuring that the agreement is beneficial to the debtor and its stakeholders generally, as per *Re Air Canada*, [2003] OJ. No. 5319 (S.C.J.) [*Air Canada*]. The Applicants assert that this test is met.

The Monitor

[32] The Monitor supports the Settlement Agreement, submitting that it is necessary to allow the Applicants to wind down operations and to develop a plan of arrangement. The Monitor submits that the Settlement Agreement provides certainty, and does so with input from employee stakeholders. These stakeholders are represented by Employee Representatives as mandated by the court and these Employee Representatives were given the authority to approve such settlements on behalf of their constituents.

[33] The Monitor submits that Clause H.2 was bargained for, and that the employees did give up rights in order to have that clause in the Settlement Agreement; particularly, it asserts that Clause H.1 is the counterpoint to Clause H.2. In this regard, the Settlement Agreement is fair and reasonable.

[34] The Monitor asserts that the court may either (1) approve the Settlement Agreement, (2) not approve the Settlement Agreement, or (3) not approve the Settlement Agreement but provide practical comments on the applicability of Clause H.2.

Former and LTD Employees

[35] The Former Employees' Representatives' constituents number an estimated 19,458 people. The LTD Employees number an estimated 350 people between the LTD Employee's Representative and the CAW-Canada, less the 37 people in the Opposing LTD Employee group.

[36] Representative Counsel to the Former and LTD Employees acknowledges that Nortel is insolvent, and that much uncertainty and risk comes from insolvency. They urge that the Settlement Agreement be considered within the scope of this reality. The alternative to the Settlement Agreement is costly litigation and significant uncertainty.

[37] Representative Counsel submits that the Settlement Agreement is fair and reasonable for all creditors, but especially the represented employees. Counsel notes that employees under Nortel are unique creditors under these proceedings, as they are not sophisticated creditors and their personal welfare depends on receiving distributions from Nortel. The Former and LTD Employees assert that this is the best agreement they could have negotiated.

[38] Representative Counsel submits that bargaining away of the right to litigate against directors and officers of the corporation, as well at the trustee of the HWT, are examples of the concessions that have been made. They also point to the giving up of the right to make priority claims upon distribution of Nortel's estate and the HWT, although the claim itself is not extinguished. In exchange, the Former and LTD Employees will receive guaranteed coverage until the end of 2010. The Former and LTD Employees submit that having money in hand today is better than uncertainty going forward, and that, on balance, this Settlement Agreement is fair and reasonable.

[39] In response to allegations that third party releases unacceptably compromise employees' rights, Representative Counsel accepts that this was a concession, but submits that it was satisfactory because the claims given up are risky, costly and very uncertain. The releases do not go beyond s. 5.1(2) of the CCAA, which disallows releases relating to misrepresentations and

wrongful or oppressive conduct by directors. Releases as to deemed trust claims are also very uncertain and were acceptably given up in exchange for other considerations.

[40] The Former and LTD Employees submit that the inclusion of Clause H.2 was essential to their approval of the Settlement Agreement. They characterize Clause H.2 as a no prejudice clause to protect the employees by not releasing any future potential benefit. Removing Clause H.2 from the Settlement Agreement would be not the approval of an agreement, but rather the creation of an entirely new Settlement Agreement. Counsel submits that without Clause H.2, the Former and LTD Employees would not be signatories.

CAW

[41] The CAW supports the Settlement Agreement. It characterizes the agreement as Nortel's recognition that it has a moral and legal obligation to its employees, whose rights are limited by the laws in this country. The Settlement Agreement temporarily alleviates the stress and uncertainty its constituents feel over the winding up of their benefits and is satisfied with this result.

[42] The CAW notes that some members feel they were not properly apprised of the facts, but all available information has been disclosed, and the concessions made by the employee groups were not made lightly.

Board of Directors

[43] The Board of Directors of Nortel supports the Settlement Agreement on the basis that it is a practical resolution with compromises on both sides.

Opposing LTD Employees

[44] Mr. Rochon appeared as counsel for the Opposing LTD Employees, notwithstanding that these individuals did not opt out of having Representative Counsel or were represented by the CAW. The submissions of the Opposing LTD Employees were compelling and the court extends it appreciation to Mr. Rochon and his team in co-ordinating the representatives of this group.

[45] The Opposing LTD Employees put forward the position that the cessation of their benefits will lead to extreme hardship. Counsel submits that the Settlement Agreement conflicts with the spirit and purpose of the CCAA because the LTD Employees are giving up legal rights in relation to a $100 million shortfall of benefits. They urge the court to consider the unique circumstances of the LTD Employees as they are the people hardest hit by the cessation of benefits.

[46] The Opposing LTD Employees assert that the HWT is a true trust, and submit that breaches of that trust create liabilities and that the claim should not be released. Specifically, they point to a $37 million shortfall in the HWT that they should be able to pursue.

[47] Regarding the third party releases, the Opposing LTD Employees assert that Nortel is attempting to avoid the distraction of third party litigation, rather than look out for the best interests of the Former and LTD Employees. The Opposing LTD Employees urge the court not to release the only individuals the Former and LTD Employees can hold accountable for any breaches of trust. Counsel submits that Nortel has a common law duty to fund the HWT, which the Former and LTD Employees should be allowed to pursue.

[48] Counsel asserts that allowing these releases (a) is not necessary and essential to the restructuring of the debtor, (b) does not relate to the insolvency process, (c) is not required for the success of the Settlement Agreement, (d) does not meet the requirement that each party contribute to the plan in a material way and (e) is overly broad and therefore not fair and reasonable.

[49] Finally, the Opposing LTD Employees oppose the *pari passu* treatment they will be subjected to under the Settlement Agreement, as they have a true trust which should grant them priority in the distribution process. Counsel was not able to provide legal authority for such a submission.

[50] A number of Opposing LTD Employees made in person submissions. They do not share the view that Nortel will act in their best interests, nor do they feel that the Employee Representatives or Representative Counsel have acted in their best interests. They shared feelings of uncertainty, helplessness and despair. There is affidavit evidence that certain individuals will be unable to support themselves once their benefits run out, and they will not have time to order their affairs. They expressed frustration and disappointment in the CCAA process.

UCC

[51] The UCC was appointed as the representative for creditors in the U.S. Chapter 11 proceedings. It represents creditors who have significant claims against the Applicants. The UCC opposes the motion, based on the inclusion of Clause H.2, but otherwise the UCC supports the Settlement Agreement.

[52] Clause H.2, the UCC submits, removes the essential element of finality that a settlement agreement is supposed to include. The UCC characterizes Clause H.2 as a take back provision; if activated, the Former and LTD Employees have compromised nothing, to the detriment of other unsecured creditors. A reservation of rights removes the finality of the Settlement Agreement.

[53] The UCC claims it, not Nortel, bears the risk of Clause H.2. As the largest unsecured creditor, counsel submits that a future change to the BIA could subsume the UCC's claim to the Former and LTD Employees and the UCC could end up with nothing at all, depending on Nortel's asset sales.

Noteholders

[54] The Noteholders are significant creditors of the Applicants. The Noteholders oppose the settlement because of Clause H.2, for substantially the same reasons as the UCC.

[55] Counsel to the Noteholders submits that the inclusion of H.2 is prejudicial to the non-employee unsecured creditors, including the Noteholders. Counsel submits that the effect of the Settlement Agreement is to elevate the Former and LTD Employees, providing them a payout of $57 million over nine months while everyone else continues to wait, and preserves their rights in the event the laws are amended in future. Counsel to the Noteholders submits that the Noteholders forego millions of dollars while remaining exposed to future claims.

[56] The Noteholders assert that a proper settlement agreement must have two elements: a real compromise, and resolution of the matters in contention. In this case, counsel submits that there is no resolution because there is no finality in that Clause H.2 creates ambiguity about the future. The very object of a Settlement Agreement, assert the Noteholders, is to avoid litigation by withdrawing claims, which this agreement does not do.

Superintendent

[57] The Superintendent does not oppose the relief sought, but this position is based on the form of the Settlement Agreement that is before the Court.

Northern Trust

[58] Northern Trust, the trustee of the pension plans and HWT, takes no position on the Settlement Agreement as it takes instructions from Nortel. Northern Trust indicates that an oversight left its name off the third party release and asks for an amendment to include it as a party released by the Settlement Agreement.

LAW AND ANALYSIS

A. Representation and Notice Were Proper

[59] It is well settled that the Former Employees' Representatives and the LTD Representative (collectively, the "Settlement Employee Representatives") and Representative Counsel have the authority to represent the Former Employees and the LTD Beneficiaries for purposes of entering into the Settlement Agreement on their behalf: *see Grace 2008, supra* at para 32.

[60] The court appointed the Settlement Employee Representatives and the Representative Settlement Counsel. These appointment orders have not been varied or appealed. Unionized employees continue to be represented by the CAW. The Orders appointing the Settlement Employee Representatives expressly gave them authority to represent their constituencies "for the purpose of settling or compromising claims" in these Proceedings. Former Employees and LTD Employees were given the right to opt out of their representation by Representative Settlement Counsel. After provision of notice, only one former employee and one active employee exercised the opt-out right.

B. Effect of the Settlement Approval Order

[61] In addition to the binding effect of the Settlement Agreement, many additional parties will be bound and affected by the Settlement Approval Order. Counsel to the Applicants submits that the binding nature of the Settlement Approval Order on all affected parties is a crucial element to the Settlement itself. In order to ensure all Affected Parties had notice, the Applicants obtained court approval of their proposed notice program.

[62] Even absent such extensive noticing, virtually all employees of the Applicants are represented in these proceedings. In addition to the representative authority of the Settlement Employee Representatives and Representative Counsel as noted above, Orders were made authorizing a Nortel Canada Continuing Employees' Representative and Nortel Canada Continuing Employees' Representative Counsel to represent the interests of continuing employees on this motion.

[63] I previously indicated that "the overriding objective of appointing representative counsel for employees is to ensure that the employees have representation in the CCAA process": *Re Nortel Networks Corp.*, [2009] O.J. No. 2529 at para 16. I am satisfied that this objective has been achieved.

[64] The Record establishes that the Monitor has undertaken a comprehensive notice process which has included such notice to not only the Former Employees, the LTD Employees, the unionized employees and the continuing employees but also the provincial pension regulators and has given the opportunity for any affected person to file Notices of Appearance and appear before this court on this motion.

[65] I am satisfied that the notice process was properly implemented by the Monitor.

[66] I am satisfied that Representative Counsel has represented their constituents' interests in accordance with their mandate, specifically, in connection with the negotiation of the Settlement Agreement and the draft Settlement Approval Order and appearance on this Motion. There have been intense discussions, correspondence and negotiations among Representative Counsel, the Monitor, the Applicants, the Superintendent, counsel to the Board of the Applicants, the Noteholder Group and the Committee with a view to developing a comprehensive settlement. NCCE's Representative Counsel have been apprised of the settlement discussions and served with notice of this Motion. Representatives have held Webinar sessions and published press releases to inform their constituents about the Settlement Agreement and this Motion.

C. Jurisdiction to Approve the Settlement Agreement

[67] The CCAA is a flexible statute that is skeletal in nature. It has been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *Re Nortel,* [2009] O.J. No. 3169 (S.C.J.) at paras. 28-29, citing *Metcalfe, supra,* at paras. 44 and 61.

[68] Three sources for the court's authority to approve pre-plan agreements have been recognized:

> (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
>
> (b) the power of the court to make an order "on such terms as it may impose" pursuant to s. 11(4) of the CCAA; and
>
> (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects: see *Re Nortel,* [2009] O.J. No. 3169 (S.C.J.) at para. 30, citing *Re Canadian Red Cross Society*, [1998] O.J. No. 3306 (Gen. Div.) [*Canadian Red Cross*] at para. 43; *Metcalfe, supra* at para. 44.

[69] In *Re Stelco Inc.*, (2005), 78 O.R. (3d) 254 (C.A.), the Ontario Court of Appeal considered the court's jurisdiction under the CCAA to approve agreements, determining at para. 14 that it is not limited to preserving the *status quo*. Further, agreements made prior to the finalization of a plan or compromise are valid orders for the court to approve: *Grace 2008, supra* at para. 34.

[70] In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or arrangement: see, for example, *Re Nortel*, [2009] O.J. No. 5582 (S.C.J.); *Re Nortel* [2009] O.J. 5582 (S.C.J.) and *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

[71] I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors: see *Re Calpine Canada Energy Ltd.*, [2007] A.J. No. 917 (C.A.) [*Calpine*] at para. 23, affirming [2007] A.J. No. 923 (Q.B.); *Canadian Red Cross, supra*; *Air Canada, supra*; *Grace 2008, supra*, and *Re Grace Canada* [2010] O.J. No. 62 (S.C.J.) [*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Re Nortel*, 2010 ONSC 1096 (S.C.J.).

D. Should the Settlement Agreement Be Approved?

[72] Having been satisfied that this court has the jurisdiction to approve the Settlement Agreement, I must consider whether the Settlement Agreement *should* be approved.

[73] A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parries, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

i) Sprit and Purpose

[74] The CCAA is a flexible instrument; part of its purpose is to allow debtors to balance the conflicting interests of stakeholders. The Former and LTD Employees are significant creditors and have a unique interest in the settlement of their claims. This Settlement Agreement brings these creditors closer to ultimate settlement while accommodating their special circumstances. It is consistent with the spirit and purpose of the CCAA.

ii) Balancing of Parties' Interests

[75] There is no doubt that the Settlement Agreement is comprehensive and that it has support from a number of constituents when considered in its totality.

[76] There is, however, opposition from certain constituents on two aspects of the proposed Settlement Agreement: (1) the Opposing LTD Employees take exception to the inclusion of the third party releases; (2) the UCC and Noteholder Groups take exception to the inclusion of Clause H.2.

Third Party Releases

[77] Representative Counsel, after examining documentation pertaining to the Pension Plans and HWT, advised the Former Employees' Representatives and Disabled Employees' Representative that claims against directors of Nortel for failing to properly fund the Pension Plans were unlikely to succeed. Further, Representative Counsel advised that claims against directors or others named in the Third Party Releases to fund the Pension Plans were risky and could take years to resolve, perhaps unsuccessfully. This assisted the Former Employees' Representatives and the Disabled Employees' Representative in agreeing to the Third Party Releases.

[78] The conclusions reached and the recommendations made by both the Monitor and Representative Counsel are consistent. They have been arrived at after considerable study of the issues and, in my view, it is appropriate to give significant weight to their positions.

[79] In *Grace 2008, supra*, and *Grace 2010, supra*, I indicated that a Settlement Agreement entered into with Representative Counsel that contains third party releases is fair and reasonable where the releases are necessary and connected to a resolution of claims against the debtor, will benefit creditors generally and are not overly broad or offensive to public policy.

[80] In this particular case, I am satisfied that the releases are necessary and connected to a resolution of claims against the Applicants.

[81] The releases benefit creditors generally as they reduces the risk of litigation against the Applicants and their directors, protect the Applicants against potential contribution claims and indemnity claims by certain parties, including directors, officers and the HWT Trustee; and

reduce the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs.

[82] Further, in my view, the releases are not overly broad or offensive to public policy. The claims being released specifically relate to the subject matter of the Settlement Agreement. The parties granting the release receive consideration in the form of both immediate compensation and the maintenance of their rights in respect to the distribution of claims.

Clause H.2

[83] The second aspect of the Settlement Agreement that is opposed is the provision known as Clause H.2. Clause H.2 provides that, in the event of a bankruptcy of the Applicants, and notwithstanding any provision of the Settlement Agreement, if there are any amendments to the BIA that change the current, relative priorities of the claims against the Applicants, no party is precluded from arguing the applicability or non-applicability of any such amendment in relation to any such claim.

[84] The Noteholders and UCC assert that Clause H.2 causes the Settlement Agreement to not be a "settlement" in the true and proper sense of that term due to a lack of certainty and finality. They emphasize that Clause H.2 has the effect of undercutting the essential compromises of the Settlement Agreement in imposing an unfair risk on the non-employee creditors of NNL, including NNI, after substantial consideration has been paid to the employees.

[85] This position is, in my view, well founded. The inclusion of the Clause H.2 creates, rather than eliminates, uncertainty. It creates the potential for a fundamental alteration of the Settlement Agreement.

[86] The effect of the Settlement Agreement is to give the Former and LTD Employees preferred treatment for certain claims, notwithstanding that priority is not provided for in the statute nor has it been recognized in case law. In exchange for this enhanced treatment, the Former Employees and LTD Beneficiaries have made certain concessions.

[87] The Former and LTD Employees recognize that substantially all of these concessions could be clawed back through Clause H.2. Specifically, they acknowledge that future Pension and HWT Claims will rank *pari passu* with the claims of other ordinary unsecured creditors, but then go on to say that should the BIA be amended, they may assert once again a priority claim.

[88] Clause H.2 results in an agreement that does not provide certainty and does not provide finality of a fundamental priority issue.

[89] The Settlement Parties, as well as the Noteholders and the UCC, recognize that there are benefits associated with resolving a number of employee-related issues, but the practical effect of Clause H.2 is that the issue is not fully resolved. In my view, Clause H.2 is somewhat inequitable from the standpoint of the other unsecured creditors of the Applicants. If the creditors are to be bound by the Settlement Agreement, they are entitled to know, with certainty and finality, the effect of the Settlement Agreement.

[90] It is not, in my view, reasonable to require creditors to, in effect, make concessions in favour of the Former and LTD Employees today, and be subject to the uncertainty of unknown legislation in the future.

[91] One of the fundamental purposes of the CCAA is to facilitate a process for a compromise of debt. A compromise needs certainty and finality. Clause H.2 does not accomplish this objective. The inclusion of Clause H.2 does not recognize that at some point settlement negotiations cease and parties bound by the settlement have to accept the outcome. A comprehensive settlement of claims in the magnitude and complexity contemplated by the Settlement Agreement should not provide an opportunity to re-trade the deal after the fact.

[92] The Settlement Agreement should be fair and reasonable in all the circumstances. It should balance the interests of the Settlement Parties and other affected constituencies equitably and should be beneficial to the Applicants and their stakeholders generally.

[93] It seems to me that Clause H.2 fails to recognize the interests of the other creditors of the Applicants. These creditors have claims that rank equally with the claims of the Former Employees and LTD Employees. Each have unsecured claims against the Applicants. The Settlement Agreement provides for a transfer of funds to the benefit of the Former Employees and LTD Employees at the expense of the remaining creditors. The establishment of the Payments Charge crystallized this agreed upon preference, but Clause H.2 has the effect of not providing any certainty of outcome to the remaining creditors.

[94] I do not consider Clause H.2 to be fair and reasonable in the circumstances.

[95] In light of this conclusion, the Settlement Agreement cannot be approved in its current form.

[96] Counsel to the Noteholder Group also made submissions that three other provisions of the Settlement Agreement were unreasonable and unfair, namely:

(i) ongoing exposure to potential liability for pension claims if a bankruptcy order is made before October 1, 2010;

(ii) provisions allowing payments made to employees to be credited against employees' claims made, rather than from future distributions or not to be credited at all; and

(iii) lack of clarity as to whether the proposed order is binding on the Superintendent in all of his capacities under the *Pension Benefits Act* and other applicable law, and not merely in his capacity as Administrator on behalf of the Pension Benefits Guarantee Fund.

[97] The third concern was resolved at the hearing with the acknowledgement by counsel to the Superintendent that the proposed order would be binding on the Superintendent in all of his capacities.

[98] With respect to the concern regarding the potential liability for pension claims if a bankruptcy order is made prior to October 1, 2010, counsel for the Applicants undertook that the Applicants would not take any steps to file a voluntary assignment into bankruptcy prior to October 1, 2010. Although such acknowledgment does not bind creditors from commencing involuntary bankruptcy proceedings during this time period, the granting of any bankruptcy order is preceded by a court hearing. The Noteholders would be in a position to make submissions on this point, if so advised. This concern of the Noteholders is not one that would cause me to conclude that the Settlement Agreement was unreasonable and unfair.

[99] Finally, the Noteholder Group raised concerns with respect to the provision which would allow payments made to employees to be credited against employees' claims made, rather than from future distributions, or not to be credited at all. I do not view this provision as being unreasonable and unfair. Rather, it is a term of the Settlement Agreement that has been negotiated by the Settlement Parties. I do note that the proposed treatment with respect to any payments does provide certainty and finality and, in my view, represents a reasonable compromise in the circumstances.

DISPOSITION

[100] I recognize that the proposed Settlement Agreement was arrived at after hard-fought and lengthy negotiations. There are many positive aspects of the Settlement Agreement. I have no doubt that the parties to the Settlement Agreement consider that it represents the best agreement achievable under the circumstances. However, it is my conclusion that the inclusion of Clause H.2 results in a flawed agreement that cannot be approved.

[101] I am mindful of the submission of counsel to the Former and LTD Employees that if the Settlement Agreement were approved, with Clause H.2 excluded, this would substantively alter the Settlement Agreement and would, in effect, be a creation of a settlement and not the approval of one.

[102] In addition, counsel to the Superintendent indicated that the approval of the Superintendent was limited to the proposed Settlement Agreement and would not constitute approval of any altered agreement.

[103] In *Grace 2008, supra*, I commented that a line-by-line analysis was inappropriate and that approval of a settlement agreement was to be undertaken in its entirety or not at all, at para. 74. A similar position was taken by the New Brunswick Court of Queen's Bench in *Wandlyn Inns Limited (Re)* (1992) 15 C.B.R. (3d) 316. I see no reason or basis to deviate from this position.

[104] Accordingly, the motion is dismissed.

[105] In view of the timing of the timing of the release of this decision and the functional funding deadline of March 31, 2010, the court will make every effort to accommodate the parties if further directions are required.

[106] Finally, I would like to express my appreciation to all counsel and in person parties for the quality of written and oral submissions.

MORAWETZ J.

Date: March 26, 2010

TAB 13

CITATION: Re Green Relief Inc.
2020 ONSC 6837
COURT FILE NO.: CV-20-00639217-00CL
DATE: 20201109

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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 **GREEN RELIEF INC.** (the "**Applicant**")

BEFORE: Koehnen J.

COUNSEL: C *Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell,* for the Applicant

Peter Osborne, Christopher Yung for the directors Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel.

Mark Abradjian for Tony Battaglia in his capacity as shareholder and creditor

David Ward for 2650064 Ontario Inc.

Alex Henderson for Susan Basmaji

Gavin Finlayson for Auxley Cannabis Group Inc. and Kolab Project Inc.

Anton Granic on his own behalf

Rory McGovern, for Steve LeBlanc

Alan Dick and Adrienne Boudreau for Thomas Saunders

Steven Weisz and Amanda McInnis for Lyn Mary Bravo

Brian Duxbury for Warren Bravo

Alex Henderson for Susan Basmaji

Robert Kennaley, Joshua W. Winter for Henry Schilthuis and Mark Lloyd

Danny Nunes, for the Monitor

HEARD: November 2 and 3, 2020

ENDORSEMENT

[1] The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.

[2] For the reasons set out below, I:

a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.

b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.

c. Decline to extend the benefit of the release to Susan Basmaji.

I. The Sale Transaction

[3] Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing, Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.

[4] 265 Co. will pay $5,000,000 for the common shares. Approximately $1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will

pay Residual Co. up to $7,000,000 as an earn out during the first two fiscal years following closing. The earn out is based on a payment of 25% of annual EBITDA above $5,000,000.

[5] Section 36(3) of the CCAA provides that, when deciding whether to authorize a sale of assets, the court should consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the Monitor approved the process leading to the proposed sale;

(c) whether the Monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which creditors were consulted;

(e) the effects of the proposed sale or distribution on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[6] These factors are consistent with the principles set out in *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON CA) at para. 16 for the approval of a sales transaction.

[7] I am satisfied that the principles of *Soundair* and the factors set out in section 36 (3) of the CCAA have been met here.

[8] The process leading to the Transaction was reasonable in the circumstances. While there was no formal sale and investor solicitation process, the transaction was the culmination of a seven-month long Notice of Intention and CCAA proceeding. The proceeding involved vigorously competing stakeholders and a competitive bidding process between interested purchasers. The competing stakeholder groups had ample opportunity to bring the business to the attention of potential purchasers. I am satisfied that there was ample information available and ample time for stakeholders to participate in the purchase process or bring the purchase to the attention of market players who may be interested in acquiring Green Relief. The Monitor approved the process and the Transaction. The Monitor notes that its liquidation analysis demonstrates that the Transaction is preferable to a bankruptcy. While creditors were not formally consulted on the process, they had ample information about it as a result of the ongoing CCAA proceeding. Creditors appeared at the various hearings. At times they made submissions in favour of an alternative bid, which submissions I gave effect to. The creditors who have made submissions before me on this motion approve of the Transaction and the release. No creditors ever objected to the process that was being followed. The Transaction makes funds available for creditors and is the best transaction available.

[9] No one opposes the Transaction. Those who spoke in opposition on the motion did not oppose the Transaction but opposed only the release.

II. The Release

[10] The release is opposed by the founders of Green Relief, Steven Leblanc, Warren Bravo and Lynn Bravo. They are supported on this motion by three other shareholders, Thomas Saunders, Henry Schilthuis and Mark Lloyd. For ease of reference, I will refer to those who oppose the release as the Objectors.

[11] There is a long, bitter history of litigation and threats of litigation between the founders, the existing board and Green Relief's approximately 700 other shareholders.

[12] The Objectors argue that I should reject the release because:

(i) It was improper to include it as a condition precedent to the Transaction.

(ii) I have no jurisdiction to approve the release.

(iii) The release fails to meet the test set out in case law concerning releases.

(iv) The release is too broad in scope.

(i) Release as a Condition Precedent

[13] The Objectors note that the term sheet that preceded this motion and that I approved, did not contain any releases, let alone as a condition precedent to a transaction. Mr. Leblanc says he did not oppose the term sheet because it did not refer to releases. As negotiations towards a final agreement developed, the Company and the Monitor advised that Green Relief would be bringing a motion to approve releases. When the issue of a motion to approve releases arose, 265 Co. advised that it was agnostic about releases and that the releases were not theirs to give or ask for. The Objectors note that, instead of a motion to approve a release, Green Relief presented a transaction that contains a release as a condition precedent. The Objectors submit that the court should not be strong-armed in this fashion.

[14] Both Green Relief and the Monitor did advise the court they would be bringing a motion to seek permission to include a release in the Transaction. It is certainly preferable for parties to live by representations they make to the court rather than represent one thing and do another. There is no evidence before me about how the release came to be a condition precedent in the transaction. 265 Co. made no representations in support of the release although it wants the Transaction to be approved. I infer from 265 Co.'s submissions that it does not care about the release and that the release was inserted at the insistence of others.

[15] That certain parties have characterized the release as a condition precedent, is irrelevant to my analysis. Given that Green Relief and the Monitor represented to the court that they would be seeking the court's approval for any release, I will hold them to that representation. I do not feel in any way constrained to accept or reject the release simply because it has been included as a condition precedent. I consider myself free to approve the Transaction with or without the release.

(ii) Jurisdiction to Grant Release

[16] The Objectors submit that I have no jurisdiction to grant the release because the wording of the CCAA does not permit it on the facts of this case.

[17] The Objectors begin their analysis with section 5.1 (1) of the CCAA which provides:

> 5.1 (1) **A compromise or arrangement** made in respect of a debtor company **may include** in its terms provision for the **compromise of claims against directors** of the company **that arose before the commencement of proceedings under this Act** and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations (emphasis added).

[18] The Objectors note that the section contains two qualifications. First it provides that a compromise or arrangement may include a release. Second, it limits the release to prefiling claims

[19] The Objectors note that the cases to which Green Relief points for the authority to grant a release address the release at the same time as the plan is being approved. Here, there is no plan to approve yet.

[20] The Objectors submit that the distinction is significant because a plan is only approved after a claims process, negotiation for a plan, a meeting approving the plan and a two thirds majority vote in favour of the plan. Those steps are important in their view because they refine the claims against the company and ascertain the value of those claims.

[21] Green Relief has not yet conducted a claims process or proposed a plan. Instead, the objective is to complete the Transaction, put $3,500,000 into Residual Co. and conduct a claims process once Residual Co. has been funded.

[22] Green Relief has not yet decided whether it will address litigation claims inside or outside the CCAA claims process.

[23] While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.

[24] The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In large part I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

[25] Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.

[26] At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.* 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

(iii) The Test for a Release

[27] In *Lydian International Limited (Re)* 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

(a) Whether the claims to be released are rationally connected to the purpose of the plan;

(b) Whether the plan can succeed without the releases;

(c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) Whether the releases are fair, reasonable and not overly-broad.

[28] As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

[29] In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian*, it warrants separate identification on the facts of the case before me.

[30] The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test. The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

The Quality of the Claims being Released

[31] As noted earlier, the principal Objectors are the founders of Green Relief Steven Leblanc, Warren Bravo and Lynn Bravo. Relations between the founders on the one hand and the existing board and other shareholders are poisoned.

[32] On the motion before me, shareholders spoke out against the founders and made submissions to the effect that the release should not preclude any claims by shareholders against the founders. Those shareholders see themselves as having been deprived of their entire investment, in some cases their life savings, because of alleged misrepresentations or improper transactions by the founders. None of those allegations are before me. I raise them only to set the highly litigious context in which the release arises. The release does not propose to release claims against the founders but only releases claims against current directors, Green Relief's legal counsel, the Monitor and its legal counsel.

[33] This proceeding has been highly litigious from the outset, particularly in light of the relatively modest size of the estate at issue. It has been marred by litigation over who is a shareholder, who is or should be a director and who is a creditor.

[34] This follows on a highly contentious corporate history involving struggles between shareholder groups, allegations of misrepresentation and allegations of fraud.

[35] The Objectors' primary opposition to the release is based on their desire to bring an action against the current directors, the Company's legal advisors during the CCAA proceedings, the Monitor and its counsel for their conduct during the CCAA proceedings. The Objectors submit that the current Board, the Monitor and their legal counsel misled the court by suggesting that they had a transaction in the offing that would have injected $20,000,000 into Green Relief. The Objectors say that the releasees did insufficient due diligence to determine whether the proposed purchaser in fact had $20,000,000 available.

[36] The Objectors submit that the Company has incurred needless professional fees because of the fruitless pursuit of the $20,000,000 transaction and that Green Relief suffered a loss of chance in that it was deprived of the ability to pursue alternative transactions.

[37] If anything, the proposed action demonstrates the need for a release. In the overall circumstances of the case, the threat of litigation against the current board, the Company's counsel, the Monitor and its counsel is unfounded and disproportionate. To demonstrate this requires some context and background.

[38] At the outset of the proceeding, 265 Co. proposed to extend a $5,000,000 operating loan to Green Relief. The loan provided no money for creditors. The board feared that accepting the loan would inevitably put Green Relief further into debt and ultimately end up with 265 Co. having ownership of Green Relief without having provided anything for other stakeholders. Mr. Leblanc supported the 265 Co. proposal and urged that I adopt it.

[39] The board urged me to allow them to pursue a proposal from another investor, Mr. Vercouteren. The Vercouteren proposal would have injected $20,000,000 into Green Relief. As it turns out, the Vercouteren proposal did not materialize. Initially the court was advised that the Vercouteren proposal was being delayed because of administrative holdups attributable to the Covid 19 pandemic. A few months later it was discovered that the delays were attributable to the fact that the Vercouteren proposal was contingent upon the completion of another transaction in Europe. The nature of that transaction, its status, closing date, likelihood of closing and reason for not closing to date were never revealed.

[40] It is fair to say that when I discovered this, I expressed frustration to the Applicant for having failed to disclose the true status of the Vercouteren proposal from the outset. The Applicant assured me that they had done due diligence on Mr. Vercouteren and had been assured by his counsel, a reputable law firm, that he was a person of financial substance with the means to complete a transaction of the sort he had proposed.

[41] With the benefit of hindsight one can debate whether the board acted perfectly, their conduct, however, ultimately led to the situation we find ourselves in now which is one that has 265 Co. offering more money to creditors and potentially other stakeholders than its initial proposal did. The proposal I am being asked to approve would see 265 Co. inject $5,000,000 of which $1,500,000 would be for operating purposes and $3,500,000 would be for distribution to creditors. In addition, the 265 Co. proposal contains an earn out of up to an additional $7,000,000 for distribution to creditors. While I agree that it does not offer $20,000,000, the reality is that $20,000,000 was not on the table.

[42] Mr. McGovern, on behalf of Mr. Leblanc submits that the fact that the current offer of 265 Co. is superior to the prior offer does not end the analysis because the board and its advisors got that superior offer by engaging in questionable conduct. According to Mr. McGovern, this introduces moral hazard into the equation which is undesirable.

[43] On that analysis, if anyone has been damaged by the alleged moral hazard, it is 265 Co. which has been led to improve its previous offers based on allegedly misleading information. However, 265 Co. does not complain. It wishes to close the Transaction.

[44] Mr. Dick on behalf of Mr. Saunders and Mr. Kennaley on behalf of Messrs. Schilthuis and Lloyd submit that the Objectors should be able to pursue their loss of chance claim. They argue that there were no other bids for Green Relief because the size of the Vercouteren proposal inhibited others from bidding. While perhaps initially appealing as a basis to speculate about what other bids may have been available, I do not accept the submission for three reasons.

[45] First, the Vercouteren proposal did not stop 265 Co. from making its $5,000,000 operating loan proposal. It also did not stop 265 Co. from making a significantly more superior offer later subject to an exit right based on what its due diligence revealed. Anyone who was seriously interested in the business could have made an offer with a due diligence exit right. There is nothing unusual in that type of proposal

[46] Second, the founders supported 265 Co.'s initial inferior proposal. Had they truly believed Green Relief was worth $20,000,000, it is unlikely they would have done so. In addition, the founders were ideally placed to find other financial solutions preferable to the one on offer. They did not do so. Even when they learned that the current proposal was conditional on the release, the Objectors did not suggest that the company return to the drawing board to search for another transaction. The Objectors want me to approve the Transaction but with the release removed.

[47] Third, no creditor objects to the Transaction. Any hope of a transaction that would offer more funds for creditors, let alone shareholders, than the Transaction does is illusory. At an earlier stage in this proceeding, Mr. Weisz stated that "Green Relief is hopelessly insolvent": see my endorsement of April 20, 2020 at para. 6. At the time, Green Relief was in default of leases, had tax arrears of over $100,000 and was over five months in arrears on a mortgage in favour of Rescom. Hopelessly insolvent companies do not have enough money to pay off creditors, let alone provide value to shareholders. This particular hopelessly insolvent company is a cannabis business. The entire cannabis industry is undergoing a fundamental shakeup. There is no shortage of CCAA proceedings involving players in the cannabis industry. The harsh business reality is that creditors, let alone shareholders, will come out short in these restructurings. If anyone stands to gain from a superior offer, it is creditors. Yet no creditor, apart from Ms. Bravo who asserts that she is a creditor, wants to pursue a claim against anyone for their conduct of the CCAA proceeding.

[48] In those circumstances, I am satisfied that whatever right of action is being removed by the release is so insubstantial that the court need not be concerned about depriving anyone of a cause of action that has even a remote chance of success. At best, it is a cause of action that is entirely without legal merit but which might have some economic value if a defendant were prepared to settle on the basis of the claim's nuisance value. Permitting unmeritorious claims to proceed so that the founders can try to extract a nuisance value settlement arising from steps that were approved by the court at each stage would amount to legally authorized extortion which I am not inclined to permit.

[49] In the circumstances described above, the quality of the claims released would incline me to approve the release.

Application of the Lydian Factors

[50] **Releasees necessary and essential:** The released parties here were necessary and essential to the restructuring. A CCAA proceeding quite obviously cannot proceed without a Monitor, Monitor's counsel or company counsel. Similarly, a restructuring cannot proceed without the other releasees like directors, officers and employees.

[51] **Rational connection between claims released and the purpose of the plan:** The claims released are rationally connected to the purpose of the plan. The object of the release is to diminish indemnity claims by the releasees against Residual Co. and the pool of cash that is being created in its hands to satisfy creditor claims. Given that one purpose of a CCAA proceeding is to maximize creditor recovery, a release which helps do that is rationally connected to the purpose of the plan.

[52] **Whether the plan can succeed without the releases** is unknown. The directors have made the releases a condition precedent to the plan. The court should not accept the release simply because it is said to be a condition precedent. In the circumstances of this case, the condition precedent strikes me as more of a strong-arm tactic that courts should resist. I feel myself at liberty to call the directors' bluff and approve the Transaction without the release.

[53] Success of the plan without releases should, however, also be assessed with regard to factors other than potential strong-arming by incumbent directors. Here, the pool of assets immediately available for distribution of creditors is approximately $3,500,000. As noted, the releasees may have a claim on those funds to satisfy any indemnity claims arising out of the litigation. Mr. McGovern's announced desire to sue the Monitor, its counsel, the directors and Green Relief's counsel for their conduct during the restructuring may give rise to indemnity claims of a size that would make a significant dent in the cash available for creditors. That diminution would make the plan significantly less successful and, depending on circumstances, could eliminate assets available for creditors.

[54] **Did the releasees contribute to the plan:** While there is not yet a plan, the releasees have clearly contributed to get the Company to this stage. The Monitor, its counsel, the directors and Company counsel dedicated time and effort to the CCAA proceedings. Professional advisors contributed further by deferring billing and collection. Messrs. Jha and Battaglia contributed $1,500,000 of their personal funds to provide DIP financing at relatively modest interest rates. Mr. Battaglia contributed $220,000. Dr. Jha initially contributed $500,000 and then increased his contribution to $1,250,000 in June 2020.

[55] **Does the release benefit the debtor as well as creditors:** The release benefits the debtor in that it helps facilitate a transaction that will make funds available to creditors. In the absence of the release, the funds available to creditors could be significantly diminished because of indemnity claims by the releasees. Those indemnity claims would include claims for advancement of defence costs. The advancement of defence costs would be claimed in relation to an action that questions the conduct of the releasees during a court supervised and court approved the process. As noted above, the nature of those claims is highly tenuous.

[56] **Creditors knowledge of the nature and effect of the release:** All creditors on the service list were served with materials relating to this motion. Creditors were free to attend the hearing, several did. Those creditors who made submissions on the motion supported the release.

[57] A consideration of the foregoing *Lydian* factors would also incline me to approve the release. If I balance the right to the Objectors to pursue the releasees for their conduct during the CCAA proceeding against the right of creditors to maximize recovery against the Green Relief estate, there is simply no contest. The creditors with proven claims have legitimate, verified demands against the corporate estate. The Objectors have tenuous claims based on objections to a court supervised process that would in effect amount to a collateral attack on court orders. In those circumstances I am satisfied that the release benefits the debtor and creditors generally.

Scope of the Releases

[58] Although the scope of the releases is captured by the factor that Lydian describes as whether the releases are fair, reasonable and not overly broad, I consider the scope of the release here in a standalone section because of the prominence given to it during argument.

[59] The release is found in paragraph 24 of the proposed order. Its material language provides:

> …the current directors, officers, employees, independent contractors that have provided legal or financial services to the Applicant, legal counsel and advisors of the Applicant, and (ii) the Monitor and its legal counsel (collectively, the "Released Parties") shall be … released … from …all … claims …of any nature or

> kind whatsoever … based in whole or in part on any act or omission, … taking place prior to the filing of the Monitor's Certificate and that relate in any manner whatsoever to the Applicant or any of its assets (current or historical), obligations, business or affairs or this CCAA Proceeding, … provided that nothing in this paragraph shall … release… any claim: (i) that is not permitted to be released pursuant to section 5.1(2) of the CCAA, (ii) against the former directors and officers of the Applicant for breach of trust arising from acts or omissions occurring before the date of the Initial Order, (iii) that may be made against any applicable insurance policy of the Applicant prior to the date of the Initial Order, or (iv) that may be made against the current directors and officers that would be covered by the Directors' Charge granted pursuant to the Initial Order.

[60] While the release appears broad at first blush, a closer reading narrows it scope considerably. The parties being released are by and large parties who provided services to the company during the CCAA process. Given that the incremental steps in the CCAA process were approved by the court and were subject to submission by a wide variety of parties, the release is not, prima facie, unreasonable. In addition, while current directors are also released, the longest-serving of those are Messrs. Jha and Battaglia who became directors on March 7, 2019, approximately one year before the Notice of Intention was filed. The time period for which they are being released outside of the court proceedings is therefore relatively limited. On the motion, no one advanced any basis for a claim against them for pre-Notice of Intention conduct.

[61] The release then goes on to carve out certain types of claims that are not being released even as against the limited population of releasees. The carveouts include claims not permitted to be released under section 5.1 (2) of the CCAA and claims that may be made against any applicable insurance policy.

[62] Section 5.1 (2) of the CCAA prohibits releases for, among other things, "wrongful or oppressive conduct by directors. " Just what that means was the subject of much argument on the motion.

[63] On behalf of Green Relief, Mr. Thornton submitted that the carveout for "wrongful or oppressive conduct" is broad and would include negligence claims. In other words, in the Company's view, negligence claims are not being released. Mr. Thornton submitted that the language of section 5.1 (2) of the CCAA effectively releases the directors from statutory liabilities for which they may be liable because the corporation failed to do something even though that failure is not attributable to any wrongdoing by directors. By way of example, directors' statutory liability for unpaid wages would fall into this category and would be captured by the release.

[64] In *BlueStar Battery Systems International Corp., Re*, 2000 CanLII 22 678 (ON SC) Farley J. said the following about the scope of section 5.1 (2) at para 14:

> "However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1 (2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations Act (Ontario) would be of assistance in defining "oppressive conduct". Similarly it would appear that "wrongful conduct" would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal."

[65] This passage would appear to support Mr. Thornton's submission.

[66] Mr. Osborne, on behalf of the current directors took a narrower view of the meaning of "wrongful or oppressive" conduct and described it as referring to "active but not "passive torts". In Mr. Osborne's submission, the release covers claims in respect of which the corporation can indemnify directors, including negligence, but does not include intentional conduct like fraud.

[67] Given the difference of views, some counsel asked me to define specifically what was or was not excluded by section 5.1 (2) while others urged me not to define the scope of the section at this stage.

[68] My inclination is to not to define the scope of the section or the release in a vacuum. Both the release and section 5.1 (2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises.

[69] In that regard I would urge a heavy dose of restraint on all parties. There has been no shortage of animosity and litigation between the parties. Temperatures have run high throughout. Before continuing any existing litigation or commencing new litigation, I would urge all parties to consider whether they are proceeding out of anger and frustration, however justified it may be, or are they proceeding on a rational economic basis because there is a cogent basis for a claim that will lead to recovery considerably in excess of the costs of litigating. This is a situation where suing "out of principle" warrants considerable restraint.

[70] The release also carves out claims "that may be made against any applicable insurance policy of the Applicant prior to the date of the initial order." I was advised during the motion that the directors were unable to obtain insurance after the Notice of Intention was filed in March 2020 but that the company purchased tail coverage that extended coverage for past conduct of directors. The tail coverage expires on November 26, 2020. That still provides plaintiffs with a period of time to commence an action for which there might be insurance coverage and to which the release might therefore not apply. The tail coverage may for example, cover current and former directors for conduct that arose before the Notice of Intention was filed.

[71] To permit such claims to be filed, I am temporarily lifting the stay of proceedings against officers and directors of Green Relief solely for the purpose of initiating claims that would potentially obtain the benefit of the carveouts under the release.

[72] Given my preference for interpreting the release in light of actual circumstances rather than in a vacuum and given my temporary lift of the stay of proceedings against officers and directors, there is considerable benefit to the parties and considerable judicial efficiency in having the release interpreted by the same judicial officer who approved it and who had oversight of the CCAA proceedings. I will therefore remain seized of this issue and order that any issue about whether the release applies (including the issue of insurance coverage) will be determined by me.

[73] To be clear, if any actions are commenced because of the temporary lift stay, the parties will still have to agree that such actions are carved out of the release by virtue of insurance coverage or I will have to determine that issue. The actions will not proceed and need not be defended until such agreement is reached or until I have determined whether the release applies.

Relief requested by Susan Basmaji

[74] Susan Basmaji is a shareholder who asks that I extend the coverage of the release to her. Ms. Basmaji says she motivated a large number of other shareholders to cooperate with the Monitor and the Company to support the Transaction. She says that as a result of those efforts, Mr. Leblanc has commenced a defamation action against her.

[75] I am not inclined to extend the release to Ms. Basmaji. The release was the product of negotiations between various stakeholders. It is not for the court to rewrite the release and bring other parties into the negotiation. I have extremely limited knowledge of the dispute between Mr. Leblanc and Ms. Basmaji and have no basis for concluding whether Ms. Basmaji was essential to the success of the Transaction as Lydian suggests nor do I have enough information about the defamation action to determine whether Ms. Basmaji should benefit from a release. That that said, it strikes me that the litigation between Mr. Leblanc and Ms. Basmaji a dispute to which the exhortation in paragraph 69 above is particularly relevant.

Disposition

[76] For the reasons set out above, I

a. approve the Transaction;

b. approve the release;

c. will remain seized of all issues concerning the interpretation of the release and the insurance coverage referred to in it;

d. lift the stay of proceedings solely to permit actions to be brought up to and including November 26, 2020 in order to capture the benefit of insurance coverage referred to in the release;

e. reimpose the stay of proceedings effective at 12:01 AM on November 27, 2020; and

f. decline to extend the benefit of the release to Susan Basmaji.

Koehnen J.

Date: November 9, 2020

TAB 14

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited, and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

4 On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the "receiver") as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

(b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person.

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the Receiver:

(c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

7 The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers, whether direct or indirect. They were Air Canada and Canadian Airlines International.

8 It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1990. On March 6, 1991, the receiver received an offer from Ontario Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

9 In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited ("922") for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the "922 offers."

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

17 I intend to discuss the performance of those duties separately.

1. Did the Receiver make a sufficient effort to get the best price and did it act providently?

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

20 On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer, which was acceptable, and the 922 offer, which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances *at the time existing* it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer, which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10

months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

25 I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

26 It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the receiver in the OEL offer was not a reasonable one. In *Crown Trust Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.R.], discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or *where there are substantially higher offers which would tend to show that the sale was improvident* will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

31 If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

32 It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

35 The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

36 The court appointed the receiver to conduct the sale of Air Toronto, and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

37 It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

38 I am, therefore, of the opinion the the receiver made a sufficient effort to get the best price, and has not acted improvidently.

2. Consideration of the Interests of all Parties

39 It is well established that the primary interest is that of the creditors of the debtor: see *Crown Trust Co. v. Rosenberg* , supra, and *Re Selkirk* , supra (Saunders J.). However, as Saunders J. pointed out in *Re Beauty Counsellors* , supra at p. 244 [C.B.R.], "it is not the only or overriding consideration."

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and

doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

41 In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

42 While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration, and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to *Re Selkirk* , supra, where Saunders J. said at p. 246 [C.B.R.]:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.R.]:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. *Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical* .

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 109 [O.R.]:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

50 I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record, and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

52 The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate

to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

58 There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg* , supra, which I adopt as my own. The first is at p. 109 [O.R.]:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 [O.R.]:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. The effect of the support of the 922 offer by the two secured creditors.

61 As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

64 The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtor's assets.

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act* , R.S.O. 1980, c. 137, and the *Environmental Protection Act* , R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that

if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

***McKinlay J.A.* :**

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

***Goodman J.A.* (dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3 million to $4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is

sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron* , supra, quoted by Galligan J.A. in his reasons. In *Cameron* , the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between $10 million and $12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada,

jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand,

he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them* ."

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer con stitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

116 In *Re Beauty Counsellors of Canada Ltd.* , supra, Saunders J. said at p. 243 [C.B.R.]:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal

of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent that it knew that CCFl was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

TAB 15

Sattva Capital Corporation (formerly Sattva Capital Inc.) *Appellant*

v.

Creston Moly Corporation (formerly Georgia Ventures Inc.) *Respondent*

and

Attorney General of British Columbia and BCICAC Foundation *Interveners*

Sattva Capital Corporation (anciennement Sattva Capital Inc.) *Appelante*

c.

Creston Moly Corporation (anciennement Georgia Ventures Inc.) *Intimée*

et

Procureur général de la Colombie-Britannique et BCICAC Foundation *Intervenants*

Indexed as: Sattva Capital Corp. *v.* Creston Moly Corp.

2014 SCC 53

File No.: 35026.

2013: December 12; 2014: August 1.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

Répertorié : Sattva Capital Corp. *c.* Creston Moly Corp.

2014 CSC 53

N° du greffe : 35026.

2013 : 12 décembre; 2014 : 1er août.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Moldaver, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Arbitration — Appeals — Commercial arbitration awards — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price shares for payment of finder's fee and entering into arbitration — Leave to appeal arbitral award sought pursuant to s. 31(2) of the Arbitration Act — Leave to appeal denied but granted on appeal to Court of Appeal — Appeal of award dismissed but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in granting leave to appeal — What is appropriate standard of review to be applied to commercial arbitral decisions made under Arbitration Act — Arbitration Act, R.S.B.C. 1996, c. 55, s. 31(2).

Contracts — Interpretation — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price the shares for payment of finder's fee and entering into arbitration — Whether arbitrator reasonably construed contract

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Arbitrage — Appels — Sentences arbitrales commerciales — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation et recours à l'arbitrage — Autorisation d'appel de la sentence arbitrale demandée en application de l'art. 31(2) de l'Arbitration Act — Rejet initial de la demande d'autorisation d'appel, qui est accueillie à l'issue d'un appel devant la Cour d'appel — Rejet de l'appel interjeté de la sentence infirmé par la Cour d'appel — La Cour d'appel a-t-elle accordé à tort l'autorisation d'appel? — Quelle est la norme de contrôle applicable aux sentences arbitrales commerciales rendues sous le régime de l'Arbitration Act? — Arbitration Act, R.S.B.C. 1996, ch. 55, art. 31(2).

Contrats — Interprétation — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation

as a whole — Whether contractual interpretation is question of law or of mixed fact and law.

S and C entered into an agreement that required C to pay S a finder's fee in relation to the acquisition of a molybdenum mining property by C. The parties agreed that under this agreement, S was entitled to a finder's fee of US$1.5 million and was entitled to be paid this fee in shares of C. However, they disagreed on which date should be used to price the shares and therefore the number of shares to which S was entitled. S argued that the share price was dictated by the date set out in the Market Price definition in the agreement and therefore that it should receive approximately 11,460,000 shares priced at $0.15. C claimed that the agreement's "maximum amount" proviso prevented S from receiving shares valued at more than US$1.5 million on the date the fee was payable, and therefore that S should receive approximately 2,454,000 shares priced at $0.70. The parties entered into arbitration pursuant to the B.C. *Arbitration Act* and the arbitrator found in favour of S. C sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *Arbitration Act*, but leave was denied on the basis that the question on appeal was not a question of law. The Court of Appeal reversed the decision and granted C's application for leave to appeal, finding that the arbitrator's failure to address the meaning of the agreement's "maximum amount" proviso raised a question of law. The superior court judge on appeal dismissed C's appeal, holding that the arbitrator's interpretation of the agreement was correct. The Court of Appeal allowed C's appeal, finding that the arbitrator reached an absurd result. S appeals the decisions of the Court of Appeal that granted leave and that allowed the appeal.

Held: The appeal should be allowed and the arbitrator's award reinstated.

Appeals from commercial arbitration decisions are narrowly circumscribed under the *Arbitration Act*. Under s. 31(1), they are limited to questions of law, and leave to appeal is required if the parties do not consent to the appeal. Section 31(2)(a) sets out the requirements for leave at issue in the present case: the court may grant leave if it determines that the result is important to the parties and

et recours à l'arbitrage — L'arbitre a-t-il donné une interprétation raisonnable de l'entente dans son ensemble? — L'interprétation contractuelle constitue-t-elle une question de droit ou une question mixte de fait et de droit?

S et C ont conclu une entente selon laquelle C devait payer à S des honoraires d'intermédiation relativement à l'acquisition d'une propriété minière de molybdène par C. Les parties reconnaissaient qu'en vertu de l'entente, S a droit à des honoraires d'intermédiation de 1,5 million $US, versés en actions de C. Cependant, elles ne s'entendaient pas sur la date qui devrait être retenue pour évaluer le cours de l'action et, par conséquent, sur le nombre d'actions que S doit recevoir. S prétendait que la valeur de l'action était dictée par la date établie dans la définition du cours prévue dans l'entente et, par conséquent, qu'elle devait recevoir environ 11 460 000 actions, à raison de 0,15 $ l'unité. C prétendait que la stipulation relative au « plafond », qui figure dans l'entente, empêchait S de recevoir des actions d'une valeur supérieure à 1,5 million $US à la date du versement des honoraires et donc que S devait obtenir environ 2 454 000 actions, à raison de 0,70 $ l'unité. Les parties ont soumis le différend à l'arbitrage conformément à l'*Arbitration Act* de la Colombie-Britannique et l'arbitre a statué en faveur de S. C a demandé l'autorisation d'interjeter appel de la sentence arbitrale en vertu du par. 31(2) de l'*Arbitration Act*. La demande a été rejetée au motif que la question soulevée n'était pas une question de droit. La Cour d'appel a infirmé la décision et accueilli la demande, présentée par C, en autorisation d'interjeter appel, jugeant que l'omission par l'arbitre d'examiner la signification de la stipulation de l'entente relative au « plafond » soulevait une question de droit. Le juge de la cour supérieure saisi de l'appel a rejeté l'appel de C et conclu que l'interprétation de l'entente par l'arbitre était correcte. La Cour d'appel a accueilli l'appel de C, concluant que l'interprétation de l'arbitre menait à un résultat absurde. S interjette appel des décisions de la Cour d'appel ayant accordé l'autorisation d'appel et ayant accueilli l'appel.

Arrêt : Le pourvoi est accueilli et la sentence arbitrale est rétablie.

L'appel d'une sentence arbitrale commerciale est étroitement circonscrit par l'*Arbitration Act*. Aux termes du par. 31(1), il ne peut être interjeté appel que sur une question de droit, et l'autorisation d'appel est requise lorsque les parties ne consentent pas à l'appel. L'alinéa 31(2)(a) énonce les critères d'autorisation sur lesquels porte le présent litige, à savoir que le tribunal peut accorder

the determination of the point of law may prevent a miscarriage of justice.

In the case at bar, the Court of Appeal erred in finding that the construction of the finder's fee agreement constituted a question of law. Such an exercise raises a question of mixed fact and law, and therefore, the Court of Appeal erred in granting leave to appeal.

The historical approach according to which determining the legal rights and obligations of the parties under a written contract was considered a question of law should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix of the contract.

It may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law; however, the close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. The goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. Accordingly, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Legal errors made in the course of contractual interpretation include the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. Concluding that C's application for leave to appeal raised no question of law is sufficient to dispose of this appeal; however, the Court found it salutary to continue with its analysis.

In order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a), an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case. According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

l'autorisation s'il estime que, selon le cas, l'issue est importante pour les parties et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire.

En l'espèce, la Cour d'appel a assimilé à tort l'interprétation de l'entente relative aux honoraires d'intermédiation à une question de droit. Un tel exercice soulève une question mixte de fait et de droit, et la Cour d'appel a donc commis une erreur en accueillant la demande d'autorisation d'appel.

Il faut rompre avec l'approche historique selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit ressortit à une question de droit. L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel de ce dernier.

Il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit, mais le rapport étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les circonstances dans lesquelles il sera possible d'isoler une question de droit au cours de l'exercice d'interprétation. Le but de l'interprétation contractuelle — déterminer l'intention objective des parties — est, de par sa nature même, axé sur les faits. Par conséquent, le tribunal doit faire preuve de prudence avant d'isoler une question de droit dans un litige portant sur l'interprétation contractuelle. L'interprétation contractuelle peut occasionner des erreurs de droit, notamment appliquer le mauvais principe ou négliger un élément essentiel d'un critère juridique ou un facteur pertinent. Conclure que la demande d'autorisation d'appel présentée par C ne soulevait aucune question de droit suffit à trancher le présent pourvoi; toutefois, la Cour juge salutaire de poursuivre l'analyse.

Pour que l'erreur de droit reprochée soit une erreur judiciaire pour l'application de l'al. 31(2)(a), elle doit se rapporter à une question importante en litige qui, si elle était tranchée différemment, aurait une incidence sur le résultat. Suivant cette norme, le règlement d'un point de droit « peut permettre d'éviter une erreur judiciaire » seulement lorsqu'il existe une certaine possibilité que l'appel soit accueilli. Un appel qui est voué à l'échec ne saurait « permettre d'éviter une erreur judiciaire » puisque les possibilités que l'issue d'un tel appel joue sur le résultat final du litige sont nulles.

At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law by the leave court is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case. The appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit, meaning that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law.

Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the standard of review. The leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal.

The words "may grant leave" in s. 31(2) of the *Arbitration Act* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met. Discretionary factors to consider in a leave application under s. 31(2)(a) include: conduct of the parties, existence of alternative remedies, undue delay and the urgent need for a final answer. These considerations could be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria have been met. However, courts should exercise such discretion with caution.

Appellate review of commercial arbitration awards is different from judicial review of a decision of a statutory tribunal, thus the standard of review framework developed for judicial review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it, is not entirely applicable to the commercial arbitration context. Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. As a result, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

Ce n'est pas à l'étape de l'autorisation qu'il convient d'examiner exhaustivement le fond du litige et de se prononcer définitivement sur l'absence ou l'existence d'une erreur de droit. Cependant, le tribunal saisi de la demande d'autorisation doit procéder à un examen préliminaire de la question de droit pour déterminer si l'appel a une chance d'être accueilli et, par conséquent, de modifier l'issue du litige. Ce qu'il faut démontrer, pour l'application du par. 31(2), c'est que la question de droit invoquée a un fondement défendable, à savoir que l'argument soulevé par le demandeur ne peut être rejeté à l'issue d'un examen préliminaire de la question de droit.

L'examen visant à décider si la question soulevée dans la demande d'autorisation d'appel a un fondement défendable doit se faire à la lumière de la norme de contrôle applicable à l'analyse du bien-fondé de l'appel. Il faut donc procéder à un examen préliminaire ayant pour objet cette norme. Le tribunal saisi de la demande d'autorisation ne procède qu'à un examen préliminaire à l'égard de la norme de contrôle, qui ne lie pas celui qui se penchera sur le bien-fondé de l'appel.

Les termes « peut accorder l'autorisation » figurant au par. 31(2) de l'*Arbitration Act* confèrent au tribunal un pouvoir discrétionnaire résiduel qui lui permet de refuser l'autorisation même quand les critères prévus par la disposition sont respectés. Les facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a) comprennent : la conduite des parties, l'existence d'autres recours, un retard indu et le besoin urgent d'obtenir un règlement définitif. Ces facteurs pourraient justifier le rejet de la demande sollicitant l'autorisation d'interjeter appel d'une sentence arbitrale même dans le cas où il est satisfait aux critères légaux. Cependant, les tribunaux devraient faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire.

L'examen en appel des sentences arbitrales commerciales diffère du contrôle judiciaire d'une décision rendue par un tribunal administratif, de sorte que le cadre relatif à la norme de contrôle judiciaire établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts rendus depuis, ne peut être tout à fait transposé dans le contexte de l'arbitrage commercial. Il demeure que le contrôle judiciaire d'une décision rendue par un tribunal administratif et l'appel d'une sentence arbitrale se ressemblent dans une certaine mesure. Par conséquent, certains éléments du cadre établi dans l'arrêt *Dunsmuir* aident à déterminer le degré de déférence qu'il convient d'accorder aux sentences arbitrales commerciales.

In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise. The question at issue here does not fall into one of those categories and thus the standard of review in this case is reasonableness.

En matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte, comme les questions constitutionnelles ou les questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur. La question dont nous sommes saisis n'appartient pas à l'une ou l'autre de ces catégories; la norme de la décision raisonnable s'applique donc à la présente affaire.

In the present case, the arbitrator reasonably construed the contract as a whole in determining that S is entitled to be paid its finder's fee in shares priced at $0.15. The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both that definition and the "maximum amount" proviso and reconciles them in a manner that cannot be said to be unreasonable. The arbitrator's reasoning meets the reasonableness threshold of justifiability, transparency and intelligibility.

En l'espèce, l'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble en déterminant que S était en droit de recevoir ses honoraires d'intermédiation en actions, à raison de 0,15 $ l'action. La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donne effet à cette dernière et à la stipulation relative au « plafond » en les conciliant d'une manière qui ne peut être considérée comme déraisonnable. Le raisonnement de l'arbitre satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité.

A court considering whether leave should be granted is not adjudicating the merits of the case. It decides only whether the matter warrants granting leave, not whether the appeal will be successful, even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. For this reason, comments by a leave court regarding the merits cannot bind or limit the powers of the court hearing the actual appeal.

Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond. Il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli, même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. C'est pourquoi les remarques sur le bien-fondé de l'affaire formulées par le tribunal saisi de la demande d'autorisation ne sauraient lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs.

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Michael A. Feder and *Tammy Shoranick*, for the appellant.

Darrell W. Roberts, *Q.C.*, and *David Mitchell*, for the respondent.

Jonathan Eades and *Micah Weintraub*, for the intervener the Attorney General of British Columbia.

David Wotherspoon and *Gavin R. Cameron*, for the intervener the BCICAC Foundation.

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Michael A. Feder et *Tammy Shoranick*, pour l'appelante.

Darrell W. Roberts, *c.r.*, et *David Mitchell*, pour l'intimée.

Jonathan Eades et *Micah Weintraub*, pour l'intervenant le procureur général de la Colombie-Britannique.

David Wotherspoon et *Gavin R. Cameron*, pour l'intervenante BCICAC Foundation.

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[1] Rothstein J. — When is contractual interpretation to be treated as a question of mixed fact and law and when should it be treated as a question of law? How is the balance between reviewability and finality of commercial arbitration awards under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now the *Arbitration Act*, hereinafter the "*AA*"), to be determined? Can findings made by a court granting leave to appeal with respect to the merits of an appeal bind the court that ultimately decides the appeal? These are three of the issues that arise in this appeal.

I. Facts

[2] The issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder's fee to Sattva Capital

Version française du jugement de la Cour rendu par

[1] Le juge Rothstein — Dans quelles circonstances l'interprétation contractuelle est-elle une question mixte de fait et de droit et dans quelles circonstances est-elle une question de droit? Comment établir l'équilibre entre le caractère révisable et l'irrévocabilité des sentences arbitrales commerciales prononcées sous le régime de la *Commercial Arbitration Act*, R.S.B.C. 1996, ch. 55 (maintenant l'*Arbitration Act*, ci-après l'« *AA* »)? Les conclusions relatives au bien-fondé de l'appel tirées par le tribunal qui autorise l'appel peuvent-elles lier celui qui est appelé à trancher l'appel? Voilà trois questions qui sont soulevées dans le présent pourvoi.

I. Faits

[2] Les questions soulevées dans le présent pourvoi découlent de l'obligation de Creston Moly Corporation (anciennement Georgia Ventures Inc.) de

Corporation (formerly Sattva Capital Inc.). The parties agree that Sattva is entitled to a finder's fee of US$1.5 million and is entitled to be paid this fee in shares of Creston, cash or a combination thereof. They disagree on which date should be used to price the Creston shares and therefore the number of shares to which Sattva is entitled.

[3] Mr. Hai Van Le, a principal of Sattva, introduced Creston to the opportunity to acquire a molybdenum mining property in Mexico. On January 12, 2007, the parties entered into an agreement (the "Agreement") that required Creston to pay Sattva a finder's fee in relation to the acquisition of this property. The relevant provisions of the Agreement are set out in Appendix I.

[4] On January 30, 2007, Creston entered into an agreement to purchase the property for US$30 million. On January 31, 2007, at the request of Creston, trading of Creston's shares on the TSX Venture Exchange ("TSXV") was halted to prevent speculation while Creston completed due diligence in relation to the purchase. On March 26, 2007, Creston announced it intended to complete the purchase and trading resumed the following day.

[5] The Agreement provides that Sattva was to be paid a finder's fee equal to the maximum amount that could be paid pursuant to s. 3.3 of Policy 5.1 in the TSXV Policy Manual. Section 3.3 of Policy 5.1 is incorporated by reference into the Agreement at s. 3.1 and is set out in Appendix II of these reasons. The maximum amount pursuant to s. 3.3 of Policy 5.1 in this case is US$1.5 million.

[6] According to the Agreement, by default, the fee would be paid in Creston shares. The fee would only be paid in cash or a combination of shares and cash if Sattva made such an election. Sattva made no such election and was therefore entitled to be paid the fee in shares. The finder's fee was to be paid no later than five working days after the closing of the transaction purchasing the molybdenum mining property.

payer des honoraires d'intermédiation à Sattva Capital Corporation (anciennement Sattva Capital Inc.). Les parties reconnaissent que Sattva a droit à des honoraires d'intermédiation de 1,5 million $US, qui peuvent lui être versés en argent, en actions de Creston, ou en argent et en actions. Elles ne s'entendent pas sur la date qui devrait être retenue pour évaluer le cours de l'action et, par conséquent, sur le nombre d'actions que Sattva recevra.

[3] M. Hai Van Le, un directeur de Sattva, a fait part à Creston de la possibilité d'acquérir une propriété minière de molybdène au Mexique. Le 12 janvier 2007, les parties ont conclu une entente (l'« entente »), selon laquelle Creston devait payer à Sattva des honoraires d'intermédiation relativement à l'acquisition de cette propriété. Les dispositions pertinentes de l'entente sont énoncées à l'annexe I.

[4] Le 30 janvier 2007, Creston a conclu une convention d'achat de la propriété, le prix étant fixé à 30 millions $US. Le 31 janvier 2007, Creston a demandé que la négociation de ses actions à la Bourse de croissance TSX (la « Bourse ») soit suspendue afin d'empêcher la spéculation le temps d'achever le contrôle diligent préalable à l'achat. Le 26 mars 2007, Creston a annoncé qu'elle avait l'intention de conclure l'achat, et la négociation à la bourse a repris le lendemain.

[5] Aux termes de l'entente, Sattva doit recevoir des honoraires d'intermédiation correspondant au plafond autorisé par le point 3.3 de la politique 5.1 qui se trouve dans le Guide du financement des sociétés de la Bourse. Le point 3.3 est incorporé par renvoi à l'entente, à l'art. 3.1, et il est reproduit à l'annexe II des présents motifs. Dans le cas qui nous occupe, le plafond autorisé au point 3.3 de la politique 5.1 est de 1,5 million $US.

[6] Aux termes de l'entente, à moins d'indication contraire, les honoraires sont payés sous forme d'actions de Creston. Ils ne seraient versés en argent ou en argent et en actions que si Sattva avait indiqué avoir fait tel choix, ce qu'elle n'a pas fait. Ses honoraires devaient donc lui être versés sous forme d'actions au plus tard cinq jours ouvrables après la conclusion de l'achat de la propriété minière de molybdène.

[7] The dispute between the parties concerns which date should be used to determine the price of Creston shares and thus the number of shares to which Sattva is entitled. Sattva argues that the share price is dictated by the Market Price definition at s. 2 of the Agreement, i.e. the price of the shares "as calculated on close of business day before the issuance of the press release announcing the Acquisition". The press release announcing the acquisition was released on March 26, 2007. Prior to the halt in trading on January 31, 2007, the last closing price of Creston shares was $0.15. On this interpretation, Sattva would receive approximately 11,460,000 shares (based on the finder's fee of US$1.5 million).

[8] Creston claims that the Agreement's "maximum amount" proviso means that Sattva cannot receive cash or shares valued at more than US$1.5 million on the date the fee is payable. The shares were payable no later than five days after May 17, 2007, the closing date of the transaction. At that time, the shares were priced at $0.70 per share. This valuation is based on the price an investment banking firm valued Creston at as part of underwriting a private placement of shares on April 17, 2007. On this interpretation, Sattva would receive approximately 2,454,000 shares, some 9 million fewer shares than if the shares were priced at $0.15 per share.

[9] The parties entered into arbitration pursuant to the *AA*. The arbitrator found in favour of Sattva. Creston sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *AA*. Leave was denied by the British Columbia Supreme Court (2009 BCSC 1079 (CanLII) ("SC Leave Court")). Creston successfully appealed this decision and was granted leave to appeal the arbitrator's decision by the British Columbia Court of Appeal (2010 BCCA 239, 7 B.C.L.R. (5th) 227 ("CA Leave Court")).

[10] The British Columbia Supreme Court judge who heard the merits of the appeal (2011 BCSC

[7] Le différend qui oppose les parties porte sur la date à retenir pour fixer le cours de l'action de Creston et, par conséquent, le nombre d'actions auquel Sattva a droit. Cette dernière prétend que la valeur de l'action est dictée par la définition du « cours », à l'art. 2 de l'entente, c.-à-d. la valeur de l'action [TRADUCTION] « le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition ». Le communiqué de presse a été publié le 26 mars 2007. Avant la suspension de la négociation des actions le 31 janvier 2007, le dernier cours de clôture de l'action de Creston s'établissait à 0,15 $. Suivant cette interprétation, Sattva recevrait environ 11 460 000 actions (selon le calcul effectué en fonction des honoraires d'intermédiation de 1,5 million $US).

[8] Creston prétend que la stipulation relative au « plafond », qui figure dans l'entente, a pour effet de limiter à 1,5 million $US la somme d'argent ou la valeur des actions que peut recevoir Sattva à la date de versement des honoraires. Les actions devaient être cédées au plus tard cinq jours après le 17 mai 2007, date de conclusion de l'achat. À ce moment-là, l'action de Creston valait 0,70 $, selon les calculs effectués par une société bancaire d'investissement en vue d'un placement privé par voie de prise ferme le 17 avril 2007. Suivant cette interprétation, Sattva recevrait environ 2 454 000 actions, soit environ 9 millions d'actions de moins que si chacune valait 0,15 $.

[9] Les parties ont soumis le différend à l'arbitrage conformément à l'*AA*. L'arbitre a statué en faveur de Sattva. Creston a demandé l'autorisation d'interjeter appel de la sentence arbitrale en vertu du par. 31(2) de l'*AA*. La Cour suprême de la Colombie-Britannique a refusé l'autorisation (2009 BCSC 1079 (CanLII) (« formation de la CS saisie de la demande d'autorisation »)). Creston a appelé de cette décision et obtenu l'autorisation de la Cour d'appel de la Colombie-Britannique d'interjeter appel de la sentence arbitrale (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (« formation de la CA saisie de la demande d'autorisation »)).

[10] Le juge de la Cour suprême de la Colombie-Britannique chargé de statuer sur le bien-fondé de

597, 84 B.L.R. (4th) 102 ("SC Appeal Court")) upheld the arbitrator's award. Creston appealed that decision to the British Columbia Court of Appeal (2012 BCCA 329, 36 B.C.L.R. (5th) 71 ("CA Appeal Court")). That court overturned the SC Appeal Court and found in favour of Creston. Sattva appeals the decisions of the CA Leave Court and CA Appeal Court to this Court.

II. Arbitral Award

[11] The arbitrator, Leon Getz, Q.C., found in favour of Sattva, holding that it was entitled to receive its US$1.5 million finder's fee in shares priced at $0.15 per share.

[12] The arbitrator based his decision on the Market Price definition in the Agreement:

> What, then, was the "Market Price" within the meaning of the Agreement? The relevant press release is that issued on March 26 . . . . Although there was no closing price on March 25 (the shares being on that date halted), the "last closing price" within the meaning of the definition was the $0.15 at which the [Creston] shares closed on January 30, the day before trading was halted "pending news" . . . . This conclusion requires no stretching of the words of the contractual definition; on the contrary, it falls literally within those words. [para. 22]

[13] Both the Agreement and the finder's fee had to be approved by the TSXV. Creston was responsible for securing this approval. The arbitrator found that it was either an implied or an express term of the Agreement that Creston would use its best efforts to secure the TSXV's approval and that Creston did not apply its best efforts to this end.

[14] As previously noted, by default, the finder's fee would be paid in shares unless Sattva made an election otherwise. The arbitrator found that

l'appel (2011 BCSC 597, 84 B.L.R. (4th) 102 (« formation de la CS saisie de l'appel »)) a confirmé la sentence arbitrale. Creston a interjeté appel de cette décision devant la Cour d'appel de la Colombie-Britannique (2012 BCCA 329, 36 B.C.L.R. (5th) 71 (« formation de la CA saisie de l'appel »)), laquelle a infirmé la décision de la formation de la CS saisie de l'appel et a donné gain de cause à Creston. Sattva interjette appel des décisions des deux formations de la CA, soit celle saisie de la demande d'autorisation et celle saisie de l'appel, devant la Cour.

II. Sentence arbitrale

[11] L'arbitre, Leon Getz, c.r., a donné gain de cause à Sattva, concluant qu'elle était en droit de recevoir des honoraires d'intermédiation de 1,5 million $US en actions, à raison de 0,15 $ l'action.

[12] L'arbitre a fondé sa décision sur la définition du « cours » figurant dans l'entente :

> [TRADUCTION] Qu'était donc le « cours » au sens de l'entente? Le communiqué de presse pertinent est celui qui a été publié le 26 mars [. . .] Il n'y avait pas de cours de clôture le 25 mars (la négociation des actions était suspendue à cette date). Par conséquent, le « dernier cours de clôture », au sens où cette expression est employée dans la définition, était de 0,15 $, soit le cours de clôture des actions de [Creston] le 30 janvier, le jour précédant la suspension des opérations « jusqu'à nouvel ordre » [. . .] Cette conclusion ne nécessite aucune extension de sens des mots employés dans la définition qui figure au contrat. Au contraire, elle concorde littéralement avec la définition. [par. 22]

[13] L'entente et les honoraires d'intermédiation devaient être approuvés par la Bourse. Creston était chargée d'obtenir cette approbation. L'arbitre a conclu qu'il était implicitement ou expressément prévu dans l'entente que Creston ferait de son mieux pour obtenir l'approbation de la Bourse. Selon lui, Creston n'avait pas fait de son mieux pour y arriver.

[14] Comme nous l'avons expliqué, les honoraires d'intermédiation se payaient en actions à moins d'avis contraire de la part de Sattva. L'arbitre a

Sattva never made such an election. Despite this, Creston represented to the TSXV that the finder's fee was to be paid in cash. The TSXV conditionally approved a finder's fee of US$1.5 million to be paid in cash. Sattva first learned that the fee had been approved as a cash payment in early June 2007. When Sattva raised this matter with Creston, Creston responded by saying that Sattva had the choice of taking the finder's fee in cash or in shares priced at $0.70.

[15] Sattva maintained that it was entitled to have the finder's fee paid in shares priced at $0.15. Creston asked its lawyer to contact the TSXV to clarify the minimum share price it would approve for payment of the finder's fee. The TSXV confirmed on June 7, 2007 over the phone and August 9, 2007 via email that the minimum share price that could be used to pay the finder's fee was $0.70 per share. The arbitrator found that Creston "consistently misrepresented or at the very least failed to disclose fully the nature of the obligation it had undertaken to Sattva" (para. 56(k)) and "that in the absence of an election otherwise, Sattva is entitled under that Agreement to have that fee paid in shares at $0.15" (para. 56(g)). The arbitrator found that the first time Sattva's position was squarely put before the TSXV was in a letter from Sattva's solicitor on October 9, 2007.

[16] The arbitrator found that had Creston used its best efforts, the TSXV could have approved the payment of the finder's fee in shares priced at $0.15 and such a decision would have been consistent with its policies. He determined that there was "a substantial probability that [TSXV] approval would have been given" (para. 81). He assessed that probability at 85 percent.

[17] The arbitrator found that Sattva could have sold its Creston shares after a four-month holding period at between $0.40 and $0.44 per share, netting proceeds of between $4,583,914 and $5,156,934.

conclu que Sattva n'avait pas manifesté de choix. Malgré cela, Creston a déclaré à la Bourse que les honoraires d'intermédiation seraient versés en argent. La Bourse a donc approuvé conditionnellement le versement d'une somme de 1,5 million $US en argent. Sattva a appris qu'un versement en argent de ses honoraires avait été approuvé au début du mois de juin 2007. Quand Sattva a abordé ce point avec Creston, cette dernière a répondu que Sattva avait le choix de percevoir ses honoraires en argent ou en actions, à raison de 0,70 $ l'action.

[15] Sattva a soutenu qu'elle avait droit au versement des honoraires d'intermédiation en actions, à raison de 0,15 $ l'action. Creston a demandé à ses avocats de communiquer avec la Bourse afin qu'elle indique la valeur minimale de l'action qu'elle approuverait pour le versement des honoraires d'intermédiation. La Bourse a confirmé, par téléphone le 7 juin 2007 et par courriel le 9 août de la même année, qu'un cours minimal de 0,70 $ l'action s'appliquait aux fins du calcul des honoraires d'intermédiation. Selon l'arbitre, Creston [TRADUCTION] « a constamment fait des déclarations inexactes quant à l'obligation qu'elle avait contractée envers Sattva ou, à tout le moins, omis d'en divulguer complètement la nature » (par. 56(k)) et qu'« à moins que Sattva n'en décide autrement, elle a le droit aux termes de l'entente de percevoir ces honoraires sous forme d'actions, à raison de 0,15 $ l'action » (par. 56(g)). Selon l'arbitre, la position de Sattva a été véritablement présentée à la Bourse pour la première fois dans la lettre de l'avocat de celle-ci datée du 9 octobre 2007.

[16] L'arbitre était d'avis que si Creston avait fait de son mieux, la Bourse aurait pu approuver le versement des honoraires d'intermédiation sous forme d'actions, à 0,15 $ l'action, et qu'une telle décision aurait été conforme à ses politiques. Il a affirmé que [TRADUCTION] « [la Bourse] aurait fort probablement donné son approbation » (par. 81) et il a évalué cette probabilité à 85 p. 100.

[17] Selon l'arbitre, Sattva aurait pu vendre ses actions de Creston après quatre mois à un prix variant entre 0,40 et 0,44 $ l'unité, ce qui aurait représenté un produit net situé dans une fourchette de

The arbitrator took the average of those two amounts, which came to $4,870,424, and then assessed damages at 85 percent of that number, which came to $4,139,860, and rounded it to $4,140,000 plus costs.

[18] After this award was made, Creston made a cash payment of US$1.5 million (or the equivalent in Canadian dollars) to Sattva. The balance of the damages awarded by the arbitrator was placed in the trust account of Sattva's solicitors.

III. Judicial History

A. *British Columbia Supreme Court — Leave to Appeal Decision, 2009 BCSC 1079*

[19] The SC Leave Court denied leave to appeal because it found the question on appeal was not a question of law as required under s. 31 of the *AA*. In the judge's view, the issue was one of mixed fact and law because the arbitrator relied on the "factual matrix" in coming to his conclusion. Specifically, determining how the finder's fee was to be paid involved examining "the TSX's policies concerning the maximum amount of the finder's fee payable, as well as the discretionary powers granted to the Exchange in determining that amount" (para. 35).

[20] The judge found that even had he found a question of law was at issue he would have exercised his discretion against granting leave because of Creston's conduct in misrepresenting the status of the finder's fee to the TSXV and Sattva, and "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41).

4 583 914 $ à 5 156 934 $. Établissant la moyenne de ces deux sommes d'argent à 4 870 424 $, l'arbitre a ensuite évalué les dommages-intérêts à 85 p. 100 de ce nombre, soit 4 139 860 $, qu'il a ensuite arrondis à la hausse, pour obtenir 4 140 000 $, plus les dépens.

[18] Après le prononcé de cette sentence arbitrale, Creston a versé 1,5 million $US (ou l'équivalent en dollars canadiens) à Sattva. Le solde des dommages-intérêts accordés par l'arbitre a été placé dans le compte en fiducie des avocats de Sattva.

III. Historique judiciaire

A. *Cour suprême de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2009 BCSC 1079*

[19] La Cour suprême de la Colombie-Britannique a rejeté la demande d'autorisation d'appel parce qu'elle était d'avis que la question soulevée n'était pas une question de droit, un critère prévu à l'art. 31 de l'*AA*. Selon le juge, il s'agissait d'une question mixte de fait et de droit puisque l'arbitre avait appuyé sa conclusion sur le [TRADUCTION] « fondement factuel ». Plus précisément, pour déterminer sous quelle forme les honoraires d'intermédiation devaient être versés, il fallait examiner « les politiques de la TSX se rapportant au plafond applicable aux honoraires d'intermédiation, ainsi que les pouvoirs discrétionnaires dont dispose la Bourse pour déterminer le montant des honoraires » (par. 35).

[20] Le juge a conclu que, même s'il avait été d'avis que le litige soulevait une question de droit, il aurait exercé son pouvoir discrétionnaire pour refuser l'autorisation d'appel en raison des déclarations inexactes faites par Creston à propos des honoraires d'intermédiation à la Bourse et à Sattva, et par égard pour le [TRADUCTION] « principe selon lequel l'[*AA*] a notamment pour objectif de favoriser et de préserver l'intégrité du système d'arbitrage » (par. 41).

B. *British Columbia Court of Appeal — Leave to Appeal Decision, 2010 BCCA 239*

[21] The CA Leave Court reversed the SC Leave Court and granted Creston's application for leave to appeal the arbitral award. It found the SC Leave Court "err[ed] in failing to find that the arbitrator's failure to address the meaning of s. 3.1 of the Agreement (and in particular the 'maximum amount' provision) raised a question of law" (para. 23). The CA Leave Court decided that the construction of s. 3.1 of the Agreement, and in particular the "maximum amount" proviso, was a question of law because it did not involve reference to the facts of what the TSXV was told or what it decided.

[22] The CA Leave Court acknowledged that Creston was "less than forthcoming in its dealings with Mr. Le and the [TSXV]" but said that "these facts are not directly relevant to the question of law it advances on the appeal" (para. 27). With respect to the SC leave judge's reference to the preservation of the integrity of the arbitration system, the CA Leave Court said that the parties would have known when they chose to enter arbitration under the *AA* that an appeal on a question of law was possible. Additionally, while the finality of arbitration is an important factor in exercising discretion, when "a question of law arises on a matter of importance and a miscarriage of justice might be perpetrated if an appeal were not available, the integrity of the process requires, at least in the circumstances of this case, that the right of appeal granted by the legislation also be respected" (para. 29).

C. *British Columbia Supreme Court — Appeal Decision, 2011 BCSC 597*

[23] Armstrong J. reviewed the arbitrator's decision on a correctness standard. He dismissed the

B. *Cour d'appel de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2010 BCCA 239*

[21] La Cour d'appel a infirmé la décision de la Cour suprême et a accueilli la demande, présentée par Creston, en autorisation d'interjeter appel de la sentence arbitrale. Selon elle, la Cour suprême avait [TRADUCTION] « commis une erreur en ne reconnaissant pas que l'omission par l'arbitre d'examiner la signification de l'art. 3.1 de l'entente (et plus particulièrement de la stipulation relative au "plafond") soulevait une question de droit » (par. 23). La Cour d'appel a conclu que l'interprétation de l'art. 3.1 de l'entente, et plus particulièrement de la stipulation relative au « plafond », constituait une question de droit parce qu'elle ne reposait pas sur les faits de l'affaire, à savoir les renseignements communiqués à la Bourse et la décision de cette dernière.

[22] La Cour d'appel a reconnu que Creston s'était montrée [TRADUCTION] « moins que franche dans ses démarches auprès de M. Le et de [la Bourse] », mais a déclaré que « ces faits n'intéressent pas directement la question de droit qu'elle soulève en appel » (par. 27). Au sujet de la remarque sur la préservation de l'intégrité du système d'arbitrage formulée par la formation de la CS saisie de la demande d'autorisation d'appel, la formation de la CA saisie de la demande d'autorisation a dit que les parties, quand elles ont choisi de soumettre leur différend à l'arbitrage en vertu de l'*AA*, savaient que l'appel d'une question de droit était possible. De plus, bien que l'irrévocabilité de la sentence arbitrale constitue un facteur important dans l'exercice du pouvoir discrétionnaire, lorsqu'« une question de droit importante est soulevée et qu'il y a risque d'erreur judiciaire en cas d'impossibilité d'interjeter appel, l'intégrité du processus exige, du moins dans les circonstances de l'espèce, que le droit d'appel conféré par la loi soit respecté » (par. 29).

C. *Cour suprême de la Colombie-Britannique — décision sur l'appel, 2011 BCSC 597*

[23] Le juge Armstrong a contrôlé la sentence arbitrale selon la norme de la décision correcte. Il

appeal, holding the arbitrator's interpretation of the Agreement was correct.

[24] Armstrong J. found that the plain and ordinary meaning of the Agreement required that the US$1.5 million fee be paid in shares priced at $0.15. He did not find the meaning to be absurd simply because the price of the shares at the date the fee became payable had increased in relation to the price determined according to the Market Price definition. He was of the view that changes in the price of shares over time are inevitable, and that the parties, as sophisticated business persons, would have reasonably understood a fluctuation in share price to be a reality when providing for a fee payable in shares. According to Armstrong J., it is indeed because of market fluctuations that it is necessary to choose a specific date to price the shares in advance of payment. He found that this was done by defining "Market Price" in the Agreement, and that the fee remained US$1.5 million in $0.15 shares as determined by the Market Price definition regardless of the price of the shares at the date that the fee was payable.

[25] According to Armstrong J., that the price of the shares may be more than the Market Price definition price when they became payable was foreseeable as a "natural consequence of the fee agreement" (para. 62). He was of the view that the risk was borne by Sattva, since the price of the shares could increase, but it could also decrease such that Sattva would have received shares valued at less than the agreed upon fee of US$1.5 million.

[26] Armstrong J. held that the arbitrator's interpretation which gave effect to both the Market Price definition and the "maximum amount" proviso should be preferred to Creston's interpretation of the agreement which ignored the Market Price definition.

[27] In response to Creston's argument that the arbitrator did not consider s. 3.1 of the Agreement

a rejeté l'appel et conclu que l'interprétation de l'entente proposée par l'arbitre était correcte.

[24] Le juge Armstrong estimait que, selon le sens ordinaire de l'entente, les honoraires de 1,5 million $US devaient être versés en actions, à raison de 0,15 $ l'unité. Il n'estimait pas une telle interprétation absurde du simple fait que le cours de l'action à la date du versement des honoraires était supérieur à celui déterminé suivant la définition du cours. Selon lui, avec le temps, la fluctuation des cours est inévitable, et dès lors qu'elles ont prévu la possibilité du versement des honoraires en actions, les parties, des entreprises averties, devaient raisonnablement s'attendre à la fluctuation du marché. De l'avis du juge Armstrong, c'est d'ailleurs à cause de cette fluctuation qu'il faut indiquer une date précise qui servira à déterminer la valeur de l'action avant le versement. Il est arrivé à la conclusion que pour ce faire, le « cours » était défini dans l'entente et que le montant des honoraires demeurait 1,5 million $US, à payer sous forme d'actions à raison de 0,15 $ l'unité, cette valeur étant établie suivant la définition du cours, sans égard à la valeur de l'action à la date du versement des honoraires.

[25] Selon le juge Armstrong, il était prévisible que le cours de l'action à la date du versement soit supérieur à celui établi conformément à la définition du cours et il s'agissait là d'une [TRADUCTION] « conséquence naturelle de l'entente relative aux honoraires d'intermédiation » (par. 62). Il était d'avis que le risque était assumé par Sattva, puisque le prix de l'action pouvait certes augmenter, mais il pouvait aussi diminuer, de sorte que Sattva aurait alors reçu un portefeuille d'actions d'une valeur inférieure au montant des honoraires (1,5 million $US) qui avait été convenu.

[26] Le juge Armstrong était d'avis que l'interprétation de l'arbitre, laquelle donnait effet à la définition du cours et à la stipulation relative au « plafond », était préférable à celle de Creston, qui faisait fi de la définition du cours.

[27] En réponse à l'argument de Creston selon lequel l'arbitre n'avait pas examiné l'art. 3.1 de

which contains the "maximum amount" proviso, Armstrong J. noted that the arbitrator explicitly addressed the "maximum amount" proviso at para. 23 of his decision.

D. *British Columbia Court of Appeal — Appeal Decision, 2012 BCCA 329*

[28] The CA Appeal Court allowed Creston's appeal, ordering that the payment of US$1.5 million that had been made by Creston to Sattva on account of the arbitrator's award constituted payment in full of the finder's fee. The court reviewed the arbitrator's decision on a standard of correctness.

[29] The CA Appeal Court found that both it and the SC Appeal Court were bound by the findings made by the CA Leave Court. There were two findings that were binding: (1) it would be anomalous if the Agreement allowed Sattva to receive US$1.5 million if it received its fee in cash, but shares valued at approximately $8 million if Sattva took its fee in shares; and (2) the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement.

[30] The Court of Appeal found that it was an absurd result to find that Sattva is entitled to an $8 million finder's fee in light of the fact that the "maximum amount" proviso in the Agreement limits the finder's fee to US$1.5 million. The court was of the view that the proviso limiting the fee to US$1.5 million "when paid" should be given paramount effect (para. 47). In its opinion, giving effect to the Market Price definition could not have been the intention of the parties, nor could it have been in accordance with good business sense.

IV. Issues

[31] The following issues arise in this appeal:

l'entente, qui contient la stipulation relative au « plafond », le juge Armstrong a souligné que l'arbitre avait fait expressément référence à cette stipulation au par. 23 de la sentence arbitrale.

D. *Cour d'appel de la Colombie-Britannique — décision sur l'appel, 2012 BCCA 329*

[28] La Cour d'appel a accueilli l'appel de Creston et a statué que la somme de 1,5 million $US versée par Creston en faveur de Sattva en exécution de la sentence arbitrale constituait le paiement intégral des honoraires d'intermédiation. La cour a contrôlé la sentence arbitrale suivant la norme de la décision correcte.

[29] La formation de la CA saisie de l'appel s'estimait liée, de même que la Cour suprême, par deux conclusions tirées par la formation de la CA saisie de la demande d'autorisation, à savoir : 1º il serait incongru que l'entente permette à Sattva, si elle opte pour le versement de ses honoraires en argent, de toucher 1,5 million $US alors que, si elle opte pour le versement sous forme d'actions, elle recevra un portefeuille valant environ 8 millions $ et 2º l'arbitre n'a pas tenu compte de cette anomalie et a fait fi de l'art. 3.1 de l'entente.

[30] Selon la Cour d'appel, conclure que Sattva avait droit à des honoraires d'intermédiation de 8 millions $ menait à un résultat absurde, étant donné la stipulation de l'entente relative au « plafond », qui limite le montant de tels honoraires à 1,5 million $US. La cour était d'avis qu'il faudrait donner l'effet prépondérant à cette stipulation qui limite à 1,5 million $US les honoraires [TRADUCTION] « à la date de leur versement » (par. 47). Elle était d'avis que donner effet à la définition du cours ne saurait avoir été l'intention des parties, et ce n'était pas non plus une décision sensée sur le plan commercial.

IV. Questions en litige

[31] Les questions suivantes sont soulevées dans le présent pourvoi :

(a) Is the issue of whether the CA Leave Court erred in granting leave under s. 31(2) of the *AA* properly before this Court?

(b) Did the CA Leave Court err in granting leave under s. 31(2) of the *AA*?

(c) If leave was properly granted, what is the appropriate standard of review to be applied to commercial arbitral decisions made under the *AA*?

(d) Did the arbitrator reasonably construe the Agreement as a whole?

(e) Did the CA Appeal Court err in holding that it was bound by comments regarding the merits of the appeal made by the CA Leave Court?

V. Analysis

A. *The Leave Issue Is Properly Before This Court*

[32] Sattva argues, in part, that the CA Leave Court erred in granting leave to appeal from the arbitrator's decision. In Sattva's view, the CA Leave Court did not identify a question of law, a requirement to obtain leave pursuant to s. 31(2) of the *AA*. Creston argues that this issue is not properly before this Court. Creston makes two arguments in support of this point.

[33] First, Creston argues that this issue was not advanced in Sattva's application for leave to appeal to this Court. This argument must fail. Unless this Court places restrictions in the order granting leave, the order granting leave is "at large". Accordingly, appellants may raise issues on appeal that were not set out in the leave application. However, the Court may exercise its discretion to refuse to deal with issues that were not addressed in the courts below, if there is prejudice to the respondent, or if for any other reason the Court considers it appropriate not to deal with a question.

a) La Cour a-t-elle été saisie à bon droit de la question de savoir si la Cour d'appel a commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'*AA*?

b) La Cour d'appel a-t-elle commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'*AA*?

c) Si l'autorisation a été accordée à bon droit, quelle norme de contrôle convient-il d'appliquer aux sentences arbitrales commerciales rendues sous le régime de l'*AA*?

d) L'arbitre a-t-il donné une interprétation raisonnable de l'entente dans son ensemble?

e) La Cour d'appel a-t-elle commis une erreur en s'estimant liée par les remarques formulées par la formation de la CA saisie de la demande d'autorisation au sujet du bien-fondé de l'appel?

V. Analyse

A. *Notre Cour est saisie à bon droit de la question de l'autorisation*

[32] Sattva prétend notamment que la Cour d'appel a commis une erreur en accordant l'autorisation d'interjeter appel de la sentence arbitrale. Selon elle, la Cour d'appel n'a cerné aucune question de droit, alors que l'autorisation est subordonnée à l'existence d'une telle question, aux termes du par. 31(2) de l'*AA*. Creston soutient que la Cour n'est pas saisie à bon droit de cette question et avance deux arguments à l'appui de sa position.

[33] Premièrement, Creston fait valoir que cette question n'était pas soulevée dans la demande d'autorisation d'appel que Sattva a présentée à la Cour. Cet argument ne saurait tenir. À moins que la Cour n'impose des restrictions dans l'ordonnance accordant l'autorisation, cette ordonnance est de « portée générale ». Par conséquent, l'appelant peut soulever en appel une question qui n'était pas énoncée dans la demande d'autorisation. La Cour peut toutefois exercer son pouvoir discrétionnaire et refuser de trancher une question qui n'a pas été abordée par les tribunaux d'instance inférieure, s'il en résulte un préjudice pour l'intimé, ou si, pour toute autre raison, elle juge opportun de ne pas la trancher.

[34] Here, this Court's order granting leave to appeal from both the CA Leave Court decision and the CA Appeal Court decision contained no restrictions (2013 CanLII 11315). The issue — whether the proposed appeal was on a question of law — was expressly argued before, and was dealt with in the judgments of, the SC Leave Court and the CA Leave Court. There is no reason Sattva should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to this Court.

[35] Second, Creston argues that the issue of whether the CA Leave Court identified a question of law is not properly before this Court because Sattva did not contest this decision before all of the lower courts. Specifically, Creston states that Sattva did not argue that the question on appeal was one of mixed fact and law before the SC Appeal Court and that it conceded the issue on appeal was a question of law before the CA Appeal Court. This argument must also fail. At the SC Appeal Court, it was not open to Sattva to reargue the question of whether leave should have been granted. The SC Appeal Court was bound by the CA Leave Court's finding that leave should have been granted, including the determination that a question of law had been identified. Accordingly, Sattva could hardly be expected to reargue before the SC Appeal Court a question that had been determined by the CA Leave Court. There is nothing in the *AA* to indicate that Sattva could have appealed the leave decision made by a panel of the Court of Appeal to another panel of the same court. The fact that Sattva did not reargue the issue before the SC Appeal Court or CA Appeal Court does not prevent it from raising the issue before this Court, particularly since Sattva was also granted leave to appeal the CA Leave Court decision by this Court.

[34] En l'espèce, l'ordonnance accordant l'autorisation d'interjeter appel des deux décisions de la Cour d'appel, sur la demande d'autorisation d'appel et sur l'appel, ne comportait aucune restriction (2013 CanLII 11315). La question — à savoir si l'appel proposé soulevait une question de droit — a été expressément débattue devant les formations de la CS et de la CA saisies de la demande d'autorisation, qui l'ont tranchée. Rien n'empêche Sattva de soulever cette question en appel, même si elle ne l'a pas mentionnée dans la demande d'autorisation d'appel qu'elle a présentée à la Cour.

[35] Deuxièmement, Creston soutient que la Cour n'a pas été saisie à bon droit de la question de savoir si la formation de la CA saisie de la demande d'autorisation a cerné une question de droit parce que Sattva n'a pas contesté la décision rendue à ce sujet devant tous les tribunaux d'instance inférieure. Plus précisément, aux dires de Creston, Sattva n'aurait pas fait valoir devant la formation de la CS saisie de l'appel que l'appel soulevait une question mixte de fait et de droit et aurait reconnu devant la Cour d'appel que l'appel soulevait une question de droit. Un tel argument ne tient pas. Devant la formation de la CS saisie de l'appel, il n'était pas possible pour Sattva de débattre à nouveau de la question de savoir si l'autorisation aurait dû être accordée. La formation de la CS saisie de l'appel était liée par les conclusions tirées par la formation de la CA saisie de la demande d'autorisation, à savoir que l'autorisation était opportune et qu'une question de droit avait été cernée. Ainsi, Sattva ne pouvait guère plaider devant la formation de la CS saisie de l'appel un point sur lequel la formation de la CA saisie de la demande d'autorisation s'était déjà prononcée. Rien dans l'*AA* n'habilite Sattva à interjeter appel de la décision sur la demande d'autorisation d'appel rendue par une formation de la Cour d'appel à une autre formation de la même cour. Ce n'est pas parce que Sattva n'a pas plaidé à nouveau le point devant la formation de la CS saisie de l'appel ou devant la formation de la CA saisie de l'appel qu'elle ne peut le soulever devant notre Cour, tout particulièrement étant donné que Sattva a obtenu de notre Cour l'autorisation d'appeler de la décision rendue par la formation de la CA saisie de la demande d'autorisation.

[36] While this Court may decline to grant leave where an issue sought to be argued before it was not argued in the courts appealed from, that is not this case. Here, whether leave from the arbitrator's decision had been sought by Creston on a question of law or a question of mixed fact and law had been argued in the lower leave courts.

[37] Accordingly, the issue of whether the CA Leave Court erred in finding a question of law for the purposes of granting leave to appeal is properly before this Court.

B. *The CA Leave Court Erred in Granting Leave Under Section 31(2) of the AA*

(1) Considerations Relevant to Granting or Denying Leave to Appeal Under the *AA*

[38] Appeals from commercial arbitration decisions are narrowly circumscribed under the *AA*. Under s. 31(1), appeals are limited to either questions of law where the parties consent to the appeal or to questions of law where the parties do not consent but where leave to appeal is granted. Section 31(2) of the *AA*, reproduced in its entirety in Appendix III, sets out the requirements for leave:

(2) In an application for leave under subsection (1)(b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

[36] Ainsi, la Cour peut certes refuser l'autorisation si la question que l'on cherche à soulever devant elle n'a pas été plaidée devant les tribunaux d'instance inférieure, mais ce n'est pas le cas en l'espèce. En l'occurrence, les arguments sur le fondement de la demande d'autorisation d'appel de la sentence arbitrale présentée par Creston — à savoir si elle soulevait une question de droit ou une question mixte de fait et de droit — avaient été plaidés devant les formations saisies des demandes d'autorisation.

[37] Par conséquent, la Cour est saisie à bon droit de la question de savoir si la formation de la CA qui a accueilli la demande d'autorisation a conclu à tort que l'appel soulevait une question de droit.

B. *La Cour d'appel a commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'AA*

(1) Facteurs qui entrent en ligne de compte dans l'analyse de la demande d'autorisation d'appel présentée au titre de l'*AA*

[38] L'appel d'une sentence arbitrale commerciale est étroitement circonscrit par l'*AA*. Aux termes du par. 31(1), il ne peut être interjeté appel que sur une question de droit dans le cas où les parties consentent à l'appel ou, en l'absence de consentement, dans les cas où l'autorisation d'appel est accordée. Le paragraphe 31(2) de l'*AA*, reproduit intégralement à l'annexe III, énonce les critères d'autorisation :

[TRADUCTION]

(2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :

(a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,

(b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,

(c) la question de droit est d'importance publique.

[39] The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* give the courts judicial discretion to deny leave even where the statutory requirements have been met (*British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 ("*BCIT*"), at paras. 25-26). Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) are met and where the leave court does not exercise its residual discretion to nonetheless deny leave.

[40] Although Creston's application to the SC Leave Court sought leave pursuant to s. 31(2)(a), (b) and (c), it appears the arguments before that court and throughout focused on s. 31(2)(a). The SC Leave Court's decision quotes a lengthy passage from *BCIT* that focuses on the requirements of s. 31(2)(a). The SC Leave Court judge noted that both parties conceded the first requirement of s. 31(2)(a): that the issue be of importance to the parties. The CA Leave Court decision expressed concern that denying leave might give rise to a miscarriage of justice — a criterion only found in s. 31(2)(a). Finally, neither the lower courts' leave decisions nor the arguments before this Court reflected arguments about the question of law being important to some class or body of persons of which the applicant is a member (s. 31(2)(b)) or being a point of law of general or public importance (s. 31(2)(c)). Accordingly, the following analysis will focus on s. 31(2)(a).

(2) The Result Is Important to the Parties

[41] In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. However, before dealing with that issue, it will be convenient to quickly address another requirement of s. 31(2)(a) on which the parties agree: whether

[39] De l'avis des tribunaux de la C.-B., l'expression [TRADUCTION] « peut accorder l'autorisation » qui figure au par. 31(2) de l'*AA* confère au tribunal un pouvoir discrétionnaire qui l'habilite à refuser l'autorisation même lorsque les critères légaux sont respectés (*British Columbia Institute of Technology (Student Assn.) c. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 (« *BCIT* »), par. 25-26). L'appel d'une sentence arbitrale n'est donc entendu que si les critères du par. 31(2) sont remplis et que le tribunal saisi de la demande d'autorisation ne refuse pas néanmoins l'autorisation en vertu de son pouvoir discrétionnaire résiduel.

[40] Bien que Creston ait présenté une demande d'autorisation à la Cour suprême sur le fondement des al. 31(2)(a), (b) et (c), il semble que les arguments invoqués devant elle et au cours des autres instances portaient sur l'al. 31(2)(a). La décision de la Cour suprême sur la demande d'autorisation reprend un long passage tiré de l'affaire *BCIT* axé sur les éléments de l'al. 31(2)(a). La Cour suprême y souligne que les deux parties reconnaissent qu'il est satisfait au premier élément de l'al. 31(2)(a), c'est-à-dire que la question est importante pour les parties. Dans sa décision sur la demande d'autorisation d'appel, la Cour d'appel a dit craindre que refuser l'autorisation ne donne lieu à une erreur judiciaire — un critère prévu seulement à l'al. 31(2)(a). Enfin, ni les décisions sur les demandes d'autorisation des tribunaux d'instance inférieure ni les arguments soulevés devant notre Cour ne traitent des autres critères, à savoir que la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie (al. 31(2)(b)) ou est d'importance publique (al. 31(2)(c)). Par conséquent, l'analyse qui suit porte principalement sur l'al. 31(2)(a).

(2) L'issue est importante pour les parties

[41] L'autorisation d'interjeter appel d'une sentence arbitrale commerciale est subordonnée au respect d'un critère minimal : l'appel doit porter sur une question de droit. Toutefois, avant d'aborder ce sujet, il convient d'examiner sommairement un autre élément requis par l'al. 31(2)(a) et sur lequel

the importance of the result of the arbitration to the parties justifies the intervention of the court. Justice Saunders explained this criterion in *BCIT* as requiring that the result of the arbitration be "sufficiently important", in terms of principle or money, to the parties to justify the expense and time of court proceedings (para. 27). The parties in this case have agreed that the result of the arbitration is of importance to each of them. In view of the relatively large monetary amount in dispute and in light of the fact that the parties have agreed that the result is important to them, I accept that the importance of the result of the arbitration to the parties justifies the intervention of the court. This requirement of s. 31(2)(a) is satisfied.

(3) The Question Under Appeal Is Not a Question of Law

(a) *When Is Contractual Interpretation a Question of Law?*

[42] Under s. 31 of the *AA*, the issue upon which leave is sought must be a question of law. For the purpose of identifying the appropriate standard of review or, as is the case here, determining whether the requirements for leave to appeal are met, reviewing courts are regularly required to determine whether an issue decided at first instance is a question of law, fact, or mixed fact and law.

[43] Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law (*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 20, *per* Steel J.A.; K. Lewison, *The Interpretation of Contracts* (5th ed. 2011 & Supp. 2013), at pp. 173-76; and G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 125-26). This rule originated in England at a time when there were frequent civil jury trials and widespread illiteracy. Under those circumstances, the interpretation of written documents had to be considered questions of law because only the judge could be

s'entendent les parties, à savoir que l'importance de l'issue de l'arbitrage pour les parties doit justifier l'intervention du tribunal. Selon l'explication donnée par la juge Saunders de ce critère dans *BCIT*, il faut que l'issue de l'arbitrage soit [TRADUCTION] « suffisamment importante » aux yeux des parties, pour le principe ou les sommes d'argent en jeu, pour justifier le coût et la longueur d'une instance (par. 27). Les parties en l'espèce ont convenu que l'issue de l'arbitrage revêt de l'importance pour chacune. Étant donné la somme relativement considérable en litige et compte tenu du fait que les parties s'entendent pour dire que l'issue est importante pour elles, je conviens que l'importance de l'issue de l'arbitrage pour les parties justifie l'intervention du tribunal. Cette condition prévue à l'al. 31(2)(a) est remplie.

(3) La question soulevée n'est pas une question de droit

a) *Dans quelles circonstances l'interprétation contractuelle est-elle une question de droit?*

[42] Aux termes de l'art. 31 de l'*AA*, la demande d'autorisation d'appel doit porter sur une question de droit. Pour déterminer la norme de contrôle applicable ou, comme c'est le cas en l'espèce, pour déterminer si les critères d'autorisation sont respectés, le tribunal siégeant en révision est régulièrement appelé à décider si une question tranchée en première instance est une question de droit, une question de fait ou une question mixte de fait et de droit.

[43] Autrefois, la détermination des droits et obligations juridiques des parties à un contrat écrit ressortissait à une question de droit (*King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, par. 20, la juge Steel; K. Lewison, *The Interpretation of Contracts* (5e éd. 2011 et suppl. 2013), p. 173-176; G. R. Hall, *Canadian Contractual Interpretation Law* (2e éd. 2012), p. 125-126). Cette règle a pris naissance en Angleterre, à une époque où les procès civils devant jury étaient fréquents et l'analphabétisme courant. Dans de telles circonstances, l'interprétation des documents écrits devait être assimilée à une question de droit parce que le juge était le seul dont on

assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

[44] This historical rationale no longer applies. Nevertheless, courts in the United Kingdom continue to treat the interpretation of a written contract as always being a question of law (*Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945, at paras. 58 and 82-83; and Lewison, at pp. 173-77). They do this despite the fact that U.K. courts consider the surrounding circumstances, a concept addressed further below, when interpreting a written contract (*Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.); and *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

[45] In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, at paras. 11-12; and *Minister of National Revenue v. Costco Wholesale Canada Ltd.*, 2012 FCA 160, 431 N.R. 78, at para. 34. However, some Canadian courts have abandoned the historical approach and now treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law. See for example *WCI Waste Conversion Inc. v. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, at para. 11; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, at para. 44; *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, at paras. 22-23 (majority reasons, *per* Blair J.A.) and paras. 133-35 (*per* Gillese J.A., in dissent, but not on this point); and *King*, at paras. 20-23.

[46] The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract

pouvait être certain qu'il savait lire et écrire et, par conséquent, qu'il était en mesure de prendre connaissance du contrat (Hall, p. 126; Lewison, p. 173-174).

[44] Cette justification historique ne s'applique plus. Néanmoins, pour les tribunaux du Royaume-Uni, l'interprétation d'un contrat écrit ressortit toujours à une question de droit (*Thorner c. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945, par. 58 et 82-83; Lewison, p. 173-177), et ce, même s'ils tiennent compte des circonstances — un concept que nous aborderons — dans l'interprétation du contrat écrit (*Prenn c. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Reardon Smith Line Ltd. c. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

[45] Au Canada, l'approche historique n'a pas perdu tous ses adeptes. Voir par exemple *Jiro Enterprises Ltd. c. Spencer*, 2008 ABCA 87 (CanLII), par. 10; *QK Investments Inc. c. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, par. 26; *Dow Chemical Canada Inc. c. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, par. 11-12; *Canada c. Costco Wholesale Canada Ltd.*, 2012 CAF 160 (CanLII), par. 34. Or, des tribunaux canadiens ont délaissé l'approche historique au profit d'une nouvelle démarche qui conçoit l'interprétation des contrats écrits soit comme une question de droit soit comme une question mixte de fait et de droit. Voir par exemple *WCI Waste Conversion Inc. c. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, par. 11; *269893 Alberta Ltd. c. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, par. 13; *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, par. 44; *Bell Canada c. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, par. 22-23 (les juges majoritaires, sous la plume du juge Blair) et par. 133-135 (la juge Gillese, dissidente, mais pas sur ce point); *King*, par. 20-23.

[46] La tendance à délaisser l'approche historique au Canada semble s'expliquer par deux changements. Le premier est l'adoption d'une méthode d'interprétation contractuelle qui oblige le tribunal à tenir compte des circonstances — que l'on appelle

— often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26 and 31-36.

[47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc.*

souvent le fondement factuel — dans l'interprétation d'un contrat écrit (Hall, p. 13, 21-25 et 127; J. D. McCamus, *The Law of Contracts* (2e éd. 2012), p. 749-751). Le deuxième découle des explications formulées dans les arrêts *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35, et *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 26 et 31-36, sur ce qui distingue la question de droit de la question mixte de fait et de droit.

[47] Relativement au premier changement, l'interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d'interprétation. La question prédominante consiste à discerner « l'intention des parties et la portée de l'entente » (*Jesuit Fathers of Upper Canada c. Cie d'assurance Guardian du Canada*, 2006 CSC 21, [2006] 1 R.C.S. 744, par. 27, le juge LeBel; voir aussi *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69, par. 64-65, le juge Cromwell). Pour ce faire, le décideur doit interpréter le contrat dans son ensemble, en donnant aux mots y figurant le sens ordinaire et grammatical qui s'harmonise avec les circonstances dont les parties avaient connaissance au moment de la conclusion du contrat. Par l'examen des circonstances, on reconnaît qu'il peut être difficile de déterminer l'intention contractuelle à partir des seuls mots, car les mots en soi n'ont pas un sens immuable ou absolu :

> [TRADUCTION] Aucun contrat n'est conclu dans l'abstrait : les contrats s'inscrivent toujours dans un contexte. [. . .] Lorsqu'un contrat commercial est en cause, le tribunal devrait certes connaître son objet sur le plan commercial, ce qui présuppose d'autre part une connaissance de l'origine de l'opération, de l'historique, du contexte, du marché dans lequel les parties exercent leurs activités.

(*Reardon Smith Line*, p. 574, le lord Wilberforce)

[48] Le sens des mots est souvent déterminé par un certain nombre de facteurs contextuels, y compris l'objet de l'entente et la nature des rapports créés par celle-ci (voir *Moore Realty Inc. c. Manitoba*

v. Manitoba Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[49] As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam*. Questions of law "are questions about what the correct legal test is" (*Southam*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

[50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[51] The purpose of the distinction between questions of law and those of mixed fact and law further

Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, par. 15, la juge Hamilton; voir aussi Hall, p. 22; McCamus, p. 749-750). Pour reprendre les propos du lord Hoffmann dans *Investors Compensation Scheme Ltd. c. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.) :

> [TRADUCTION] Le sens d'un document (ou toute autre déclaration) qui est transmis à la personne raisonnable n'équivaut pas au sens des mots qui le composent. Le sens des mots fait intervenir les dictionnaires et les grammaires; le sens du document représente ce qu'il est raisonnable de croire que les parties, en employant ces mots compte tenu du contexte pertinent, ont voulu exprimer. [p. 115]

[49] Relativement au deuxième changement, l'approche historique de l'interprétation contractuelle ne cadre pas bien avec la définition de la pure question de droit formulée dans les arrêts *Housen* et *Southam*. Les questions de droit « concernent la détermination du critère juridique applicable » (*Southam*, par. 35). Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties — un but axé sur les faits — par l'application des principes juridiques d'interprétation. Il me semble que cela se rapproche plutôt de la question mixte de fait et de droit, définie dans l'arrêt *Housen* comme supposant « l'application d'une norme juridique à un ensemble de faits » (par. 26; voir aussi *Southam*, par. 35). Toutefois, certains tribunaux ont émis des doutes sur l'application directe de cette définition, qui avait été établie à l'égard d'une action intentée pour négligence, à des questions d'interprétation contractuelle et laissent entendre que cette dernière est d'abord et avant tout une affaire de droit (voir par exemple *Bell Canada*, par. 25).

[50] Avec tout le respect que je dois aux tenants de l'opinion contraire, à mon avis, il faut rompre avec l'approche historique. L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel.

[51] Cette conclusion est étayée par les raisons qui sous-tendent la distinction établie entre la

supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

> If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

[52] Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

question de droit et la question mixte de fait et de droit. En distinguant ces deux catégories, on visait principalement à restreindre l'intervention de la juridiction d'appel aux affaires qui entraîneraient probablement des répercussions qui ne seraient pas limitées aux parties au litige. Ainsi, le rôle des cours d'appel, qui consiste à assurer la cohérence du droit, et non à offrir aux parties une nouvelle tribune leur permettant de poursuivre leur litige privé, est préservé. C'est pourquoi la Cour dans l'arrêt *Southam* reconnaît le degré de généralité (ou « la valeur comme précédents ») comme la principale différence entre la question de droit et la question mixte de fait et de droit. Plus la règle est stricte, moins l'intervention de la cour d'appel sera utile :

> Si une cour décidait que le fait d'avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l'affaire prend le caractère d'une question d'application pure, et s'approche donc d'une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu'il n'est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n'est pas susceptible de présenter beaucoup d'intérêt pour les juges et les avocats dans l'avenir. [par. 37]

[52] De même, la Cour dans l'arrêt *Housen* conclut que la retenue à l'égard du juge des faits contribue à réduire le nombre, la durée et le coût des appels tout en favorisant l'autonomie du procès et son intégrité (par. 16-17). Ces principes militent également en faveur de la déférence à l'endroit des décideurs de première instance en matière d'interprétation contractuelle. Les obligations juridiques issues d'un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d'application limitée que notre système judiciaire confère aux tribunaux de première instance appuie la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

[53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[54] However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

> Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" . . . . [para. 36]

[55] Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of

[53] Néanmoins, il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit (*Housen*, par. 31 et 34-35). L'interprétation contractuelle peut occasionner des erreurs de droit, notamment [TRADUCTION] « appliquer le mauvais principe ou négliger un élément essentiel d'un critère juridique ou un facteur pertinent » (*King*, par. 21). En outre, il est indubitable que nombre d'autres questions se posant en droit des contrats mettent en jeu des règles de droit substantiel : les critères de formation du contrat, la capacité des parties, l'obligation que soient constatés par écrit certains types de contrat, etc.

[54] Le tribunal doit cependant faire preuve de prudence avant d'isoler une question de droit dans un litige portant sur l'interprétation contractuelle. Compte tenu de l'obligation, prévue au par. 31(2) de l'*AA*, que la demande d'autorisation soulève une question de droit, le demandeur et son représentant chercheront à qualifier de question de droit toute erreur qu'ils invoquent. Toutefois, le législateur a pris des mesures visant à limiter ce genre d'appels, et les tribunaux doivent examiner soigneusement le motif d'appel proposé pour déterminer s'il est bien caractérisé. La mise en garde exprimée dans *Housen* qui appelle à la prudence lorsqu'il s'agit d'isoler une question de droit s'applique dans le cas présent :

> Les cours d'appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu'il a conclu à la négligence, puisqu'il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n'est pas facilement isolable, il s'agit alors d'une « question mixte de fait et de droit » . . . [par. 36]

[55] Certes, cette mise en garde a été formulée dans le contexte d'une action pour négligence, mais elle s'applique également à mon avis à l'interprétation contractuelle. Comme je le mentionne précédemment, le but de l'interprétation contractuelle — déterminer l'intention objective des parties — est, de par sa nature même, axé sur les faits. Le rapport

contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les circonstances dans lesquelles il sera possible d'isoler une question de droit au cours de l'exercice d'interprétation. En l'absence d'une erreur de droit du genre de celles décrites plus haut, aucun droit d'appel de l'interprétation par un arbitre d'un contrat n'est prévu à l'*AA*.

(b) *The Role and Nature of the "Surrounding Circumstances"*

b) *Le rôle et la nature des « circonstances »*

[56] I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

[56] Abordons le rôle des circonstances dans l'interprétation du contrat et la nature des éléments admis à l'examen. La présente analyse ne traite que de la démarche d'interprétation contractuelle fondée sur la common law; elle ne se veut ni une application ni une modification du droit relatif à l'interprétation contractuelle régi par le *Code civil du Québec*.

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[57] Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (*Hayes Forest Services*, par. 14; Hall, p. 30). Le décideur examine cette preuve dans le but de mieux saisir les intentions réciproques et objectives des parties exprimées dans les mots du contrat. Une disposition contractuelle doit toujours être interprétée sur le fondement de son libellé et de l'ensemble du contrat (Hall, p. 15 et 30-32). Les circonstances sous-tendent l'interprétation du contrat, mais le tribunal ne saurait fonder sur elles une lecture du texte qui s'écarte de ce dernier au point de créer dans les faits une nouvelle entente (*Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc*. (1997), 101 B.C.A.C. 62).

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*,

[58] La nature de la preuve susceptible d'appartenir aux « circonstances » variera nécessairement d'une affaire à l'autre. Il y a toutefois certaines limites. Il doit s'agir d'une preuve objective du contexte factuel au moment de la signature du contrat (*King*, par. 66 et 70), c'est-à-dire, les renseignements qui

at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) *Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule*

[59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 341-42, *per* Sopinka J.).

[60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts

appartenaient ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci. Compte tenu de ces exigences et de la règle d'exclusion de la preuve extrinsèque que nous verrons, on entend par « circonstances », pour reprendre les propos du lord Hoffmann [TRADUCTION] « tout ce qui aurait eu une incidence sur la manière dont une personne raisonnable aurait compris les termes du document » (*Investors Compensation Scheme*, p. 114). La question de savoir si quelque chose appartenait ou aurait dû raisonnablement appartenir aux connaissances communes des parties au moment de la signature du contrat est une question de fait.

c) *Tenir compte des circonstances n'est pas contraire à la règle d'exclusion de la preuve extrinsèque*

[59] Quelques mots sur l'examen des circonstances et la règle d'exclusion de la preuve extrinsèque s'imposent. Cette règle empêche l'admission d'éléments de preuve autres que les termes du contrat écrit qui auraient pour effet de modifier ou de contredire un contrat qui a été entièrement consigné par écrit, ou d'y ajouter de nouvelles clauses ou d'en supprimer (*King*, par. 35; Hall, p. 53). À cette fin, la règle interdit notamment les éléments de preuve concernant les intentions subjectives des parties (Hall, p. 64-65; *Eli Lilly & Co. c. Novopharm Ltd.*, [1998] 2 R.C.S. 129, par. 54-59, le juge Iacobucci). La règle vise, premièrement, à donner un caractère définitif et certain aux obligations contractuelles et, deuxièmement, à empêcher qu'une partie puisse utiliser des éléments de preuve fabriqués ou douteux pour attaquer un contrat écrit (*Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 341-342, le juge Sopinka).

[60] La règle d'exclusion de la preuve extrinsèque n'interdit pas au tribunal de tenir compte des circonstances entourant le contrat. Cette preuve est compatible avec les objectifs relatifs au caractère définitif et certain puisqu'elle sert d'outil d'interprétation qui vient éclairer le sens des mots du contrat choisis par les parties, et non le changer ou s'y substituer. Les circonstances sont des faits connus

that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[61] Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

(d) *Application to the Present Case*

[62] In this case, the CA Leave Court granted leave on the following issue: "Whether the Arbitrator erred in law in failing to construe the whole of the Finder's Fee Agreement . . ." (A.R., vol. I, at p. 62).

[63] As will be explained below, while the requirement to construe a contract as a whole is a question of law that could — if extricable — satisfy the threshold requirement under s. 31 of the *AA*, I do not think this question was properly extricated in this case.

[64] I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15). If the arbitrator did not take the "maximum amount" proviso into account, as alleged by Creston, then he did not construe the Agreement as a whole because he ignored a specific and relevant provision of the Agreement. This is a question of law that would be extricable from a finding of mixed fact and law.

[65] However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed,

ou qui auraient raisonnablement dû l'être des deux parties à la date de signature du contrat ou avant celle-ci; par conséquent, le risque que des éléments d'une fiabilité douteuse soient invoqués ne se pose pas.

[61] Selon une certaine jurisprudence et des auteurs, la règle d'exclusion de la preuve extrinsèque serait un anachronisme ou, à tout le moins, d'application restreinte vu la myriade d'exceptions dont elle est assortie (voir par exemple *Gutierrez c. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), par. 19-20; Hall, p. 53-64). Dans le cadre du présent pourvoi, il suffit de dire que la règle d'exclusion de la preuve extrinsèque ne s'oppose pas à la présentation d'une preuve des circonstances entourant le contrat pour l'interprétation de ce dernier.

d) *Application au présent pourvoi*

[62] En l'espèce, la Cour d'appel a accordé l'autorisation d'appel relativement à la question suivante : [TRADUCTION] « L'arbitre a-t-il commis une erreur de droit en n'interprétant pas l'entente relative aux honoraires d'intermédiation dans son ensemble . . . ? » (d.a., vol. I, p. 62)

[63] Comme nous le verrons, l'obligation d'interpréter le contrat dans son ensemble est une question de droit susceptible, si on pouvait l'isoler, de satisfaire au critère minimal exigé à l'art. 31 de l'*AA*. À mon avis, cette question n'a pas été isolée comme il se doit en l'espèce.

[64] Je reconnais qu'il est un principe fondamental de l'interprétation contractuelle selon lequel le contrat doit être interprété dans son ensemble (McCamus, p. 761-762; Hall, p. 15). Si l'arbitre n'a pas tenu compte de la stipulation relative au « plafond », comme le prétend Creston, il n'a alors pas interprété l'entente dans son ensemble, car il en a négligé une clause précise et pertinente. Voilà une question de droit qui pourrait être isolée de la conclusion mixte de fait et de droit.

[65] Or, il semble que l'arbitre a effectivement tenu compte de la stipulation relative au « plafond ».

the CA Leave Court acknowledges that the arbitrator had considered that proviso, since it notes that he turned his mind to the US$1.5 million maximum amount, an amount that can only be calculated by referring to the TSXV policy referenced in the "maximum amount" proviso in s. 3.1 of the Agreement. As I read its reasons, rather than being concerned with whether the arbitrator ignored the maximum amount proviso, which is what Creston alleges in this Court, the CA Leave Court decision focused on how the arbitrator construed s. 3.1 of the Agreement, which included the maximum amount proviso (paras. 25-26). For example, the CA Leave Court expressed concern that the arbitrator did not address the "incongruity" in the fact that the value of the fee would vary "hugely" depending on whether it was taken in cash or shares (para. 25).

En effet, selon la formation de la CA saisie de la demande d'autorisation, l'arbitre a examiné la stipulation, puisqu'elle signale qu'il a envisagé le plafond de 1,5 million $US, un nombre auquel il ne peut être arrivé que s'il a consulté la politique de la Bourse à laquelle renvoie la stipulation relative au « plafond » à l'art. 3.1 de l'entente. À la lumière de ses motifs, j'estime que la formation de la CA saisie de la demande d'autorisation, au lieu de se demander si l'arbitre a négligé la stipulation relative au plafond — ce que Creston prétend devant la Cour —, a axé sa décision sur l'interprétation qu'a donnée l'arbitre de l'art. 3.1 de l'entente, qui contient cette stipulation (par. 25-26). Par exemple, la formation de la CA saisie de la demande d'autorisation s'est dite préoccupée que l'arbitre n'ait pas abordé l'[TRADUCTION] « absurdité » de la variation « considérable » dans la valeur des honoraires selon qu'ils étaient versés en argent ou en actions (par. 25).

[66] With respect, the CA Leave Court erred in finding that the construction of s. 3.1 of the Agreement constituted a question of law. As explained by Justice Armstrong in the SC Appeal Court decision, construing s. 3.1 and taking account of the proviso required relying on the relevant surrounding circumstances, including the sophistication of the parties, the fluctuation in share prices, and the nature of the risk a party assumes when deciding to accept a fee in shares as opposed to cash. Such an exercise raises a question of mixed fact and law. There being no question of law extricable from the mixed fact and law question of how s. 3.1 and the proviso should be interpreted, the CA Leave Court erred in granting leave to appeal.

[66] Avec tout le respect que je lui dois, j'estime que la formation de la CA saisie de la demande d'autorisation a assimilé à tort l'interprétation de l'art. 3.1 de l'entente à une question de droit. Comme l'explique le juge Armstrong dans la décision de la CS sur l'appel, pour interpréter l'art. 3.1 et tenir compte de la stipulation, il fallait examiner les circonstances pertinentes, y compris le fait que les parties étaient des parties avisées, la fluctuation du cours de l'action et la nature du risque qu'une partie assume quand elle opte pour le versement de ses honoraires en actions plutôt qu'en argent. Un tel exercice soulève une question mixte de fait et de droit. Comme aucune question de droit ne peut être isolée de la question mixte de fait et de droit qui porte sur l'interprétation de l'art. 3.1 et de la stipulation, la Cour d'appel a commis une erreur en accueillant la demande d'autorisation d'appel.

[67] The conclusion that Creston's application for leave to appeal raised no question of law would be sufficient to dispose of this appeal. However, as this Court rarely has the opportunity to address appeals of arbitral awards, it is, in my view, useful to explain that, even had the CA Leave Court been correct in finding that construction of s. 3.1 of the Agreement constituted a question of law, it should have nonetheless denied leave to appeal as the

[67] Conclure que la demande d'autorisation d'appel présentée par Creston ne soulevait aucune question de droit suffirait à trancher le présent pourvoi. Toutefois, puisque la Cour a rarement l'occasion de se pencher sur l'appel d'une sentence arbitrale, il est à mon avis utile d'expliquer que même si la formation de la CA saisie de la demande d'autorisation avait conclu à bon droit que l'interprétation de l'art. 3.1 de l'entente constituait une question de

application also failed the miscarriage of justice and residual discretion stages of the leave analysis set out in s. 31(2)(a) of the *AA*.

droit, elle devait néanmoins rejeter la demande, car il n'était pas satisfait aux autres volets de l'analyse des demandes d'autorisation que requiert l'al. 31(2)(a) de l'*AA*, qui concernent l'erreur judiciaire et le pouvoir discrétionnaire résiduel.

(4) May Prevent a Miscarriage of Justice

(4) Le règlement de la question de droit peut permettre d'éviter une erreur judiciaire

(a) *Miscarriage of Justice for the Purposes of Section 31(2)(a) of the AA*

a) *L'erreur judiciaire pour l'application de l'al. 31(2)(a) de l'AA*

[68] Once a question of law has been identified, the court must be satisfied that the determination of that point of law on appeal "may prevent a miscarriage of justice" in order for it to grant leave to appeal pursuant to s. 31(2)(a) of the *AA*. The first step in this analysis is defining miscarriage of justice for the purposes of s. 31(2)(a).

[68] Une fois qu'il a cerné une question de droit, le tribunal doit être convaincu que le fait de statuer sur cette dernière [TRADUCTION] « peut permettre d'éviter une erreur judiciaire » avant d'accorder l'autorisation d'appel en vertu de l'al. 31(2)(a) de l'*AA*. La première étape de l'analyse consiste donc à définir l'erreur judiciaire pour l'application de cette disposition.

[69] In *BCIT*, Justice Saunders discussed the miscarriage of justice requirement under s. 31(2)(a). She affirmed the definition set out in *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (C.A.), which required the error of law in question to be a material issue that, if decided differently, would lead to a different result: ". . . if the point of law were decided differently, the arbitrator would have been led to a different result. In other words, was the alleged error of law material to the decision; does it go to its heart?" (*BCIT*, at para. 28). See also *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, which discusses the test of whether "some substantial wrong or miscarriage of justice has occurred" in the context of a civil jury trial (para. 43).

[69] Dans *BCIT*, la juge Saunders traite du critère concernant l'erreur judiciaire prévu à l'al. 31(2)(a). Elle confirme la définition énoncée dans l'affaire *Domtar Inc. c. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (C.A.), selon laquelle l'erreur de droit doit toucher une question importante de sorte qu'une conclusion différente aurait abouti à un résultat différent : [TRADUCTION] « . . . si le point de droit avait été tranché différemment, l'arbitre aurait rendu une décision différente. Autrement dit, l'erreur de droit invoquée a-t-elle eu un effet déterminant sur la décision; touche-t-elle au cœur de la décision? » (*BCIT*, par. 28). Voir également l'arrêt *Quan c. Cusson*, 2009 CSC 62, [2009] 3 R.C.S. 712, où la Cour analyse le critère qui sert à déterminer s'il y a « préjudice grave ou [. . .] erreur judiciaire » dans le contexte des procès civils avec jury (par. 43).

[70] Having regard to *BCIT* and *Quan*, I am of the opinion that in order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a) of the *AA*, an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case.

[70] Compte tenu des arrêts *BCIT* et *Quan*, je suis d'avis que, pour que l'erreur de droit reprochée soit une erreur judiciaire au sens où il faut l'entendre pour l'application de l'al. 31(2)(a) de l'*AA*, elle doit se rapporter à une question importante en litige qui, si elle était tranchée différemment, aurait une incidence sur le résultat.

[71] According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

[72] At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case.

[73] *BCIT* sets the threshold for this preliminary assessment of the appeal as "more than an arguable point" (para. 30). With respect, once an arguable point has been made out, it is not apparent what more is required to meet the "more than an arguable point" standard. Presumably, the leave judge would have to delve more deeply into the arguments around the question of law on appeal than would be appropriate at the leave stage to find *more* than an arguable point. Requiring this closer examination of the point of law, in my respectful view, blurs the line between the function of the court considering the leave application and the court hearing the appeal.

[74] In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (CanLII), at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174, at para. 11); and "credible

[71] Suivant cette norme, le règlement d'un point de droit « peut permettre d'éviter une erreur judiciaire » seulement lorsqu'il existe une certaine possibilité que l'appel soit accueilli. Un appel qui est voué à l'échec ne saurait « permettre d'éviter une erreur judiciaire » puisque les possibilités que l'issue d'un tel appel joue sur le résultat final du litige sont nulles.

[72] Ce n'est pas à l'étape de l'autorisation qu'il convient d'examiner exhaustivement le fond du litige et de se prononcer définitivement sur l'absence ou l'existence d'une erreur de droit. Cependant, il faut procéder à un examen préliminaire de la question de droit pour déterminer si l'appel a une chance d'être accueilli et, par conséquent, de modifier le résultat du litige.

[73] Selon l'arrêt *BCIT*, le demandeur doit établir [TRADUCTION] « plus qu'un argument défendable » (par. 30) lors de cet examen préliminaire de l'appel. Pourtant, une fois un argument défendable soulevé, que faudrait-il démontrer de plus pour qu'il soit satisfait à cette norme? Vraisemblablement, le juge saisi de la demande d'autorisation devrait alors examiner les arguments se rapportant à la question de droit soulevée en appel de plus près que ce qui serait indiqué à cette étape pour trouver *plus* qu'un argument défendable. À mon humble avis, exiger un examen plus approfondi du point de droit brouille les rôles respectifs de la formation saisie de la demande d'autorisation et de celle saisie de l'appel.

[74] Selon moi, ce qu'il faut démontrer, pour l'application du par. 31(2), c'est que la question de droit invoquée a un fondement défendable. Ce critère s'applique souvent à l'étape de l'autorisation, pour établir sommairement le bien-fondé de l'appel (voir par exemple *Quick Auto Lease Inc. c. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, par. 5; *R. c. Fedossenko*, 2013 ABCA 164 (CanLII), par. 7). Il est bien connu et a été exprimé de diverses façons : [TRADUCTION] « une possibilité raisonnable d'être accueilli » (*a reasonable prospect of success*) (*Quick Auto Lease*, par. 5; *Enns c. Hansey*, 2013 MBCA 23 (CanLII), par. 2); une « certaine chance de succès » (*some hope of success*) et un « fondement suffisant » (*sufficient merit*) (*R. c. Hubley*, 2009 PECA

argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270, at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

[75] Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the applicable standard of review. As I will later explain, reasonableness will almost always apply to commercial arbitrations conducted pursuant to the *AA*, except in the rare circumstances where the question is one that would attract a correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise. Therefore, the leave inquiry will ordinarily ask whether there is any arguable merit to the position that the arbitrator's decision on the question at issue is unreasonable, keeping in mind that the decision-maker is not required to refer to all the arguments, provisions or jurisprudence or to make specific findings on each constituent element, for the decision to be reasonable (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16). Of course, the leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal. As such, this should not be taken as an invitation to engage in extensive arguments or analysis about the standard of review at the leave stage.

21, 289 Nfld. & P.E.I.R. 174, par. 11); un « argument plausible » (*credible argument*) (*R. c. Will*, 2013 SKCA 4, 405 Sask. R. 270, par. 8). À mon avis, les diverses appellations qui désignent le fondement défendable présentent un élément commun : l'argument soulevé par le demandeur ne peut être rejeté à l'issue d'un examen préliminaire de la question de droit. Pour déterminer s'il faut annuler la sentence arbitrale, un examen approfondi est nécessaire, et c'est au tribunal saisi de l'appel qu'il incombe, une fois l'autorisation accordée.

[75] L'examen visant à décider si la question soulevée dans la demande d'autorisation d'appel a un fondement défendable doit se faire à la lumière de la norme de contrôle applicable à l'analyse du bien-fondé de l'appel. Il faut donc procéder à un examen préliminaire ayant pour objet la norme applicable. Comme nous le verrons, la norme de la décision raisonnable s'appliquera presque toujours aux arbitrages commerciaux régis par l'*AA*, sauf dans les rares circonstances où l'application de la norme de la décision correcte s'imposera, notamment lorsqu'il s'agit d'une question constitutionnelle ou d'une question de droit qui revêt une importance capitale pour le système juridique dans son ensemble et qui est étrangère au domaine d'expertise du décideur administratif. Par conséquent, dans le cadre de l'examen préalable à l'autorisation le tribunal s'interrogera ordinairement quant à savoir si la prétention — selon laquelle la sentence arbitrale sur la question en litige était déraisonnable — a un fondement défendable, compte tenu du fait que le décideur n'est pas tenu de faire référence à tous les arguments, dispositions ou précédents ni de tirer une conclusion précise sur chaque élément constitutif du raisonnement pour que sa décision soit raisonnable (*Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708, par. 16). Certes, le tribunal saisi de la demande d'autorisation ne procède qu'à un examen préliminaire ayant pour objet la norme de contrôle, qui ne lie pas celui qui se penchera sur le bien-fondé de l'appel. Ainsi, il ne faudrait pas considérer qu'il s'agit d'une invitation à se perdre en analyses ou en arguments poussés à propos de la norme de contrôle à l'étape de la demande d'autorisation.

[76] In *BCIT*, Saunders J.A. considered the stage of s. 31(2)(a) of the *AA* at which an examination of the merits of the appeal should occur. At the behest of one of the parties, she considered examining the merits under the miscarriage of justice criterion. However, she decided that a consideration of the merits was best done at the residual discretion stage. Her reasons indicate that this decision was motivated by the desire to take a consistent approach across s. 31(2)(a), (b) and (c):

> Where, then, if anywhere, does consideration of the merits of the appeal belong? Mr. Roberts for the Student Association contends that any consideration of the merits of the appeal belongs in the determination of whether a miscarriage of justice may occur; that is, under the second criterion. I do not agree. In my view, the apparent merit or lack of merit of an appeal is part of the exercise of the residual discretion, and applies equally to all three subsections, (*a*) through (*c*). Just as an appeal woefully lacking in merit should not attract leave under (*b*) (of importance to a class of people including the applicant) or (*c*) (of general or public importance), so too it should not attract leave under (*a*). Consideration of the merits, for consistency in the section as a whole, should be made as part of the exercise of residual discretion. [para. 29]

[77] I acknowledge the consistency rationale. However, in my respectful opinion, the desire for a consistent approach to s. 31(2)(a), (b) and (c) cannot override the text of the legislation. Unlike s. 31(2)(b) and (c), s. 31(2)(a) requires an assessment to determine whether allowing leave to appeal "may prevent a miscarriage of justice". It is my opinion that a preliminary assessment of the question of law is an implicit component in a determination of whether allowing leave "may prevent a miscarriage of justice".

[78] However, in an application for leave to appeal pursuant to s. 31(2)(b) or (c), neither of which contain a miscarriage of justice requirement, I agree with Justice Saunders in *BCIT* that a preliminary

[76] Dans *BCIT*, la juge Saunders s'interroge sur l'étape à laquelle il convient d'examiner le bien-fondé de l'appel dans le cadre de l'analyse requise par l'al. 31(2)(a) de l'*AA*. Contrairement à ce que prétendait une partie, soit que l'évaluation du bien-fondé se rapporte au critère de l'erreur judiciaire, la juge détermine que cet examen se rattache plutôt à l'exercice du pouvoir discrétionnaire. Ses motifs révèlent que sa décision découle de sa volonté d'adopter une approche uniforme à l'égard des al. 31(2)(a), (b) et (c) :

> [TRADUCTION] À quel moment, le cas échéant, faut-il alors examiner le bien-fondé de l'appel? M. Roberts, qui représente l'Association étudiante, prétend qu'il convient de procéder à cet examen lorsqu'on se demande si une erreur judiciaire risque d'être commise, c'est-à-dire, à la deuxième étape. Je ne suis pas d'accord. À mon avis, l'appréciation du bien-fondé ou de l'absence de fondement apparent de l'appel s'inscrit dans l'exercice du pouvoir discrétionnaire résiduel et s'applique également aux trois alinéas, de (*a*) à (*c*). Tout comme un appel manifestement dénué de fondement ne devrait pas être autorisé en vertu de l'al. (*b*) (revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie) ou de l'al. (*c*) (est d'importance publique), un tel appel ne devrait pas non plus être autorisé en vertu de l'al. (*a*). Dans un but d'uniformité à l'égard de l'article entier, l'appréciation du bien-fondé devrait être intégrée à l'exercice du pouvoir discrétionnaire résiduel. [par. 29]

[77] Je reconnais la validité du raisonnement axé sur l'uniformité. Cependant, à mon humble avis, cette volonté d'adopter une démarche semblable au regard des al. 31(2)(a), (b) et (c) ne saurait l'emporter sur le libellé de la disposition. Contrairement aux al. 31(2)(b) et (c), l'al. 31(2)(a) exige que le tribunal détermine si le fait d'autoriser l'appel « peut permettre d'éviter une erreur judiciaire ». J'estime qu'un examen préliminaire de la question de droit s'inscrit implicitement dans l'examen qui vise à déterminer si l'autorisation « peut permettre d'éviter une erreur judiciaire ».

[78] Cependant, lorsqu'il s'agit d'une demande d'autorisation d'appel présentée en vertu des al. 31(2)(b) ou (c) — puisque ces dispositions ne prévoient pas le risque d'erreur judiciaire comme

examination of the merits of the question of law should be assessed at the residual discretion stage of the analysis as considering the merits of the proposed appeal will always be relevant when deciding whether to grant leave to appeal under s. 31.

[79] In sum, in order to establish that "the intervention of the court and the determination of the point of law may prevent a miscarriage of justice" for the purposes of s. 31(2)(a) of the *AA*, an applicant must demonstrate that the point of law on appeal is material to the final result and has arguable merit.

(b) *Application to the Present Case*

[80] The CA Leave Court found that the arbitrator may have erred in law by not interpreting the Agreement as a whole, specifically in ignoring the "maximum amount" proviso. Accepting that this is a question of law for these purposes only, a determination of the question would be material because it could change the ultimate result arrived at by the arbitrator. The arbitrator awarded $4.14 million in damages on the basis that there was an 85 percent chance the TSXV would approve a finder's fee paid in $0.15 shares. If Creston's argument is correct and the $0.15 share price is foreclosed by the "maximum amount" proviso, damages would be reduced to US$1.5 million, a significant reduction from the arbitrator's award of damages.

[81] As s. 31(2)(a) of the *AA* is the relevant provision in this case, a preliminary assessment of the question of law will be conducted in order to determine if a miscarriage of justice could have occurred had Creston been denied leave to appeal. Creston argues that the fact that the arbitrator's conclusion results in Sattva receiving shares valued at considerably more than the US$1.5 million maximum dictated by the "maximum amount" proviso is

critère —, je souscris aux commentaires formulés par la juge Saunders dans *BCIT* selon lesquels l'examen préliminaire du bien-fondé de la question de droit devrait intervenir à l'étape de l'exercice du pouvoir discrétionnaire résiduel dans l'analyse, puisque l'examen du bien-fondé de l'appel proposé demeure pertinent dans la décision d'accorder ou non l'autorisation d'appel en vertu de l'art. 31.

[79] Bref, afin d'établir que l'intervention du tribunal est justifiée [TRADUCTION] « et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire » pour l'application de l'al. 31(2)(a) de l'*AA*, le demandeur doit prouver que le point de droit en appel aura une incidence sur le résultat final et qu'il est défendable.

b) *Application au présent pourvoi*

[80] La formation de la CA saisie de la demande d'autorisation a conclu à la possibilité d'une erreur de droit par l'arbitre qui n'aurait pas interprété l'entente dans son ensemble et, plus particulièrement, aurait fait fi de la stipulation relative au « plafond ». Admettons cette prétention comme question de droit uniquement pour les besoins de la cause. Le règlement de la question est déterminant parce qu'il pourrait avoir pour effet de modifier la sentence de l'arbitre, lequel a accordé 4,14 millions $ en dommages-intérêts au motif qu'il évaluait à 85 p. 100 la probabilité que la Bourse approuve des honoraires d'intermédiation payés en actions, à raison de 0,15 $ l'unité. Si l'argument invoqué par Creston est correct et que le cours de l'action ne peut s'établir à 0,15 $ en raison de la stipulation relative au « plafond », les dommages-intérêts seraient réduits à 1,5 million $US, une amputation considérable de la somme initiale accordée.

[81] Comme l'al. 31(2)(a) de l'*AA* est la disposition pertinente en l'espèce, il doit être procédé à un examen préliminaire de la question de droit pour déterminer le risque qu'une erreur judiciaire découle du rejet de la demande d'autorisation d'appel présentée par Creston. Cette dernière soutient que le fait que Sattva reçoive un portefeuille d'actions dont la valeur est très supérieure au plafond de 1,5 million $US en exécution de la sentence arbitrale

evidence of the arbitrator's failure to consider that proviso.

[82] However, the arbitrator did refer to s. 3.1, the "maximum amount" proviso, at two points in his decision: paras. 18 and 23(a). For example, at para. 23 he stated:

> In summary, then, as of March 27, 2007 it was clear and beyond argument that under the Agreement:
>
> (a) Sattva was entitled to a fee equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange – section 3.1. It is common ground that the quantum of this fee is US$1,500,000.
>
> (b) The fee was payable in shares based on the Market Price, as defined in the Agreement, unless Sattva elected to take it in cash or a combination of cash and shares.
>
> (c) The Market Price, as defined in the Agreement, was $0.15. [Emphasis added.]

[83] Although the arbitrator provided no express indication that he considered how the "maximum amount" proviso interacted with the Market Price definition, such consideration is implicit in his decision. The only place in the contract that specifies that the amount of the fee is calculated as US$1.5 million is the "maximum amount" proviso's reference to s. 3.3 of the TSXV Policy 5.1. The arbitrator acknowledged that the quantum of the fee is US$1.5 million and awarded Sattva US$1.5 million in shares priced at $0.15. Contrary to Creston's argument that the arbitrator failed to consider the proviso in construing the Agreement, it is apparent on a preliminary examination of the question that the arbitrator did in fact consider the "maximum amount" proviso.

[84] Accordingly, even had the CA Leave Court properly identified a question of law, leave to appeal should have been denied. The requirement that there be arguable merit that the arbitrator's decision was unreasonable is not met and the miscarriage of justice threshold was not satisfied.

prouve que l'arbitre n'a pas tenu compte de la stipulation relative au « plafond ».

[82] Or, l'arbitre renvoie effectivement à l'art. 3.1, la stipulation relative au « plafond », à deux reprises dans sa décision, soit aux par. 18 et 23(a). Par exemple, il affirme ce qui suit au par. 23 :

> [TRADUCTION]
>
> Bref, à partir du 27 mars 2007, il était clair et incontestable qu'aux termes de l'entente :
>
> (a) Sattva avait le droit de recevoir des honoraires équivalant au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX – article 3.1. Les parties conviennent que le montant des honoraires s'établit à 1 500 000 $US.
>
> (b) La commission était payable en actions, en fonction du cours, tel qu'il est défini dans l'entente, à moins que Sattva n'opte pour le versement des honoraires en argent ou en argent et en actions.
>
> (c) Le cours de l'action, tel qu'il est défini dans l'entente, s'établissait à 0,15 $. [Je souligne.]

[83] Ainsi, même si l'arbitre n'indique pas expressément avoir examiné le jeu de la stipulation relative au « plafond » et de la définition du cours, cet examen ressort implicitement de sa sentence. La seule clause de l'entente qui prévoit le montant des honoraires, soit 1,5 million $US, est la stipulation relative au « plafond », qui renvoie au point 3.3 de la politique 5.1 de la Bourse. Reconnaissant que le montant des honoraires s'élève à 1,5 million $US, l'arbitre a accordé à Sattva pareille somme, payable en actions, à raison de 0,15 $ l'unité. Contrairement à l'argument avancé par Creston, selon qui l'arbitre aurait négligé la stipulation dans son interprétation de l'entente, il ressort de l'examen préliminaire de la question que l'arbitre a effectivement tenu compte de la stipulation relative au « plafond ».

[84] Par conséquent, même si la Cour d'appel avait cerné à juste titre une question de droit, elle aurait dû rejeter la demande d'autorisation. Il n'était pas satisfait au critère qui exige que le caractère déraisonnable de la sentence arbitrale ait un fondement défendable, ni à celui de l'erreur judiciaire.

(5) Residual Discretion to Deny Leave

(a) *Considerations in Exercising Residual Discretion in a Section 31(2)(a) Leave Application*

[85] The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met (*BCIT*, at paras. 9 and 26). In *BCIT*, Saunders J.A. sets out a non-exhaustive list of considerations that would be applicable to the exercise of discretion (para. 31):

1. "the apparent merits of the appeal";

2. "the degree of significance of the issue to the parties, to third parties and to the community at large";

3. "the circumstances surrounding the dispute and adjudication including the urgency of a final answer";

4. "other temporal considerations including the opportunity for either party to address the result through other avenues";

5. "the conduct of the parties";

6. "the stage of the process at which the appealed decision was made";

7. "respect for the forum of arbitration, chosen by the parties as their means of resolving disputes"; and

8. "recognition that arbitration is often intended to provide a speedy and final dispute mechanism, tailor-made for the issues which may face the parties to the arbitration agreement".

(5) Le pouvoir discrétionnaire résiduel qui habilite à refuser l'autorisation

a) *Éléments à examiner dans l'exercice du pouvoir discrétionnaire résiduel à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a)*

[85] Les tribunaux de la C.-B. ont conclu que les termes [TRADUCTION] « peut accorder l'autorisation » figurant au par. 31(2) de l'*AA* confèrent au tribunal un pouvoir discrétionnaire résiduel qui lui permet de refuser l'autorisation même quand les critères prévus par la disposition sont respectés (*BCIT*, par. 9 et 26). Dans *BCIT*, la juge Saunders énumère des facteurs à considérer dans l'exercice de ce pouvoir discrétionnaire (par. 31) :

1. [TRADUCTION] « le bien-fondé apparent de l'appel »;

2. « l'importance de la question pour les parties, les tiers et la société en général »;

3. « les circonstances qui sont à l'origine du différend et de l'arbitrage, y compris le besoin urgent d'obtenir un règlement définitif »;

4. « d'autres considérations temporelles, y compris la possibilité pour l'une ou l'autre des parties de remédier autrement aux conséquences »;

5. « la conduite des parties »;

6. « l'étape à laquelle la décision qui a été portée en appel avait été prise »;

7. « le respect du choix des parties d'avoir recours à l'arbitrage pour résoudre leurs différends »;

8. « la reconnaissance du fait que l'arbitrage constitue souvent un moyen expéditif et définitif de régler les différends, spécialement conçu pour traiter les enjeux susceptibles de toucher les parties à la convention d'arbitrage ».

[86] I agree with Justice Saunders that it is not appropriate to create what she refers to as an "immutable checklist" of factors to consider in exercising discretion under s. 31(2) (*BCIT*, at para. 32). However, I am unable to agree that all the listed considerations are applicable at this stage of the analysis.

[87] In exercising its statutorily conferred discretion to deny leave to appeal pursuant to s. 31(2)(a), a court should have regard to the traditional bases for refusing discretionary relief: the parties' conduct, the existence of alternative remedies, and any undue delay (*Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 52). This would include the urgent need for a final answer.

[88] With respect to the other listed considerations and addressed in turn below, it is my opinion that they have already been considered elsewhere in the s. 31(2)(a) analysis or are more appropriately considered elsewhere under s. 31(2). Once considered, these matters should not be assessed again under the court's residual discretion.

[89] As discussed above, in s. 31(2)(a), a preliminary assessment of the merits of the question of law at issue in the leave application is to be considered in determining the miscarriage of justice question. The degree of significance of the issue to the parties is covered by the "importance of the result of the arbitration to the parties" criterion in s. 31(2)(a). The degree of significance of the issue to third parties and to the community at large should not be considered under s. 31(2)(a) as the *AA* sets these out as separate grounds for granting leave to appeal under s. 31(2)(b) and (c). Furthermore, respect for the forum of arbitration chosen by the parties is a consideration that animates the legislation itself and

[86] Je conviens avec la juge Saunders pour dire qu'il n'est pas opportun de dresser ce qu'elle appelle une [TRADUCTION] « liste immuable » de facteurs à considérer dans l'exercice du pouvoir discrétionnaire prévu au par. 31(2) (*BCIT*, par. 32). Cependant, je ne peux convenir que tous les facteurs qui figurent sur la liste qu'elle a dressée sont applicables à cette étape de l'analyse.

[87] Dans l'exercice du pouvoir discrétionnaire que lui confère l'al. 31(2)(a) et qui l'habilite à rejeter la demande d'autorisation, le tribunal devrait examiner les motifs traditionnels justifiant le refus d'une réparation discrétionnaire : la conduite des parties, l'existence d'autres recours et tout retard indu (*Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326, p. 364-367). L'exercice du pouvoir discrétionnaire qui permet de refuser une réparation fait intervenir des considérations relatives à la prépondérance des inconvénients (*Mines Alerte Canada c. Canada (Pêches et Océans)*, 2010 CSC 2, [2010] 1 R.C.S. 6, par. 52). Parmi celles-ci se trouve le besoin urgent d'obtenir un règlement définitif.

[88] Quant aux autres facteurs mentionnés dans la liste et dont je traite successivement ci-après, j'estime qu'ils ont déjà été examinés dans le cadre de l'analyse fondée sur l'al. 31(2)(a) ou qu'il conviendrait mieux de les examiner à un autre volet du critère énoncé au par. 31(2). Une fois examinés, ces facteurs ne devraient pas être réexaminés par le tribunal au moment de l'exercice de son pouvoir discrétionnaire résiduel.

[89] Je le rappelle, dans l'analyse fondée sur l'al. 31(2)(a), il faut procéder à l'examen préliminaire du bien-fondé de la question de droit soulevée dans la demande d'autorisation pour déterminer s'il y a risque d'erreur judiciaire. La question de l'importance pour les parties se règle à l'al. 31(2)(a) : [TRADUCTION] « l'importance de l'issue de l'arbitrage pour les parties ». L'importance de la question pour les tiers et pour la société en général ne doit pas être examinée à l'al. 31(2)(a), car l'*AA* prévoit ces motifs à des dispositions distinctes, soit les al. 31(2)(b) et (c). En outre, le respect du choix des parties d'avoir recours à l'arbitrage sous-tend la loi elle-même, ce dont témoigne le seuil élevé auquel l'autorisation

can be seen in the high threshold to obtain leave under s. 31(2)(a). Recognition that arbitration is often chosen as a means to obtain a fast and final resolution tailor-made for the issues is already reflected in the urgent need for a final answer.

[90] As for the stage of the process at which the decision sought to be appealed was made, it is not a consideration relevant to the exercise of the court's residual discretion to deny leave under s. 31(2)(a). This factor seeks to address the concern that granting leave to appeal an interlocutory decision may be premature and result in unnecessary fragmentation and delay of the legal process (D. J. M. Brown and J. M. Evans, with the assistance of C. E. Deacon, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 3-67 to 3-76). However, any such concern will have been previously addressed by the leave court in its analysis of whether a miscarriage of justice may arise; more specifically, whether the interlocutory issue has the potential to affect the final result. As such, the above-mentioned concerns should not be considered anew.

[91] In sum, a non-exhaustive list of discretionary factors to consider in a leave application under s. 31(2)(a) of the *AA* would include:

- conduct of the parties;
- existence of alternative remedies;
- undue delay; and
- the urgent need for a final answer.

[92] These considerations could, where applicable, be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria of s. 31(2)(a) have been met. However, courts should

est subordonnée aux termes de l'al. 31(2)(a). La reconnaissance du fait que l'arbitrage constitue souvent un moyen expéditif et définitif de régler les différends et spécialement conçu pour traiter les enjeux susceptibles de toucher les parties à la convention d'arbitrage s'inscrit dans le besoin urgent d'obtenir un règlement définitif.

[90] Quant à l'étape du processus à laquelle la décision dont on veut faire appel a été rendue, ce n'est pas un facteur pertinent pour l'exercice par le tribunal du pouvoir discrétionnaire résiduel conféré par l'al. 31(2)(a) qui lui permet de refuser l'autorisation. Ce facteur a été défini en réponse à des préoccupations selon lesquelles l'autorisation d'appeler d'une décision interlocutoire risque d'être prématurée et d'entraîner des retards indus ainsi qu'une fragmentation inutile du processus judiciaire (D. J. M. Brown et J. M. Evans, avec la collaboration de C. E. Deacon, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), p. 3-67 à 3-76). Or, ces préoccupations auront été dissipées par la formation saisie de la demande d'autorisation lorsqu'elle se sera penchée sur le risque d'erreur judiciaire, et, plus précisément, sur la possibilité que la question interlocutoire ait une incidence sur le résultat final. Ainsi, les préoccupations mentionnées précédemment ne devraient donc pas être réexaminées.

[91] En résumé, une liste non exhaustive des facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a) de l'*AA* comprendrait :

- la conduite des parties;
- l'existence d'autres recours;
- un retard indu;
- le besoin urgent d'obtenir un règlement définitif.

[92] Ces facteurs pourraient, le cas échéant, justifier le rejet de la demande sollicitant l'autorisation d'interjeter appel d'une sentence arbitrale même dans le cas où il est satisfait aux critères prévus à

exercise such discretion with caution. Having found an error of law and, at least with respect to s. 31(2)(a), a potential miscarriage of justice, these discretionary factors must be weighed carefully before an otherwise eligible appeal is rejected on discretionary grounds.

(b) *Application to the Present Case*

[93] The SC Leave Court judge denied leave on the basis that there was no question of law. Even had he found a question of law, the SC Leave Court judge stated that he would have exercised his residual discretion to deny leave for two reasons: first, because of Creston's conduct in misrepresenting the status of the finder's fee issue to the TSXV and Sattva; and second, "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41). The CA Leave Court overruled the SC Leave Court on both of these discretionary grounds.

[94] For the reasons discussed above, fostering and preserving the integrity of the arbitral system should not be a discrete discretionary consideration under s. 31(2)(a). While the scheme of s. 31(2) recognizes this objective, the exercise of discretion must pertain to the facts and circumstances of a particular case. This general objective is not a discretionary matter for the purposes of denying leave.

[95] However, conduct of the parties is a valid consideration in the exercise of the court's residual discretion under s. 31(2)(a). A discretionary decision to deny leave is to be reviewed with deference by an appellate court. A discretionary decision should not be interfered with merely because an appellate court would have exercised the discretion differently (*R. v. Bellusci*, 2012 SCC 44, [2012]

l'al. 31(2)(a). Cependant, les tribunaux devraient faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire. Après avoir conclu à l'existence d'une erreur de droit et, au moins en ce qui concerne l'al. 31(2)(a), d'un risque d'erreur judiciaire, le tribunal doit soupeser ces facteurs avec soin avant de décider s'il va rejeter ou non pour des motifs discrétionnaires une demande par ailleurs admissible.

b) *Application au présent pourvoi*

[93] Le juge de la CS saisi de la demande d'autorisation a rejeté cette dernière au motif qu'elle ne soulevait aucune question de droit. Il a indiqué que, même s'il avait conclu à l'existence d'une telle question, il aurait refusé l'autorisation en vertu de son pouvoir discrétionnaire résiduel, et ce, pour deux raisons : premièrement, à cause de la conduite de Creston qui a présenté inexactement les faits relatifs aux honoraires d'intermédiation à la Bourse et à Sattva; deuxièmement, [TRADUCTION] « par égard pour le principe selon lequel l'[*AA*] a notamment pour objectif de favoriser et de préserver l'intégrité du système d'arbitrage » (par. 41). La formation de la CA saisie de la demande d'autorisation a écarté la décision de la CS pour ces deux raisons discrétionnaires.

[94] Pour les motifs énoncés précédemment, l'objectif qui vise à favoriser et à préserver l'intégrité du système d'arbitrage ne devrait pas constituer une considération distincte dans l'analyse que requiert l'al. 31(2)(a) préalable à l'exercice du pouvoir discrétionnaire. Bien que le régime instauré par le par. 31(2) reconnaît cet objectif, l'exercice du pouvoir discrétionnaire doit se rapporter aux faits et aux circonstances de l'affaire. Cet objectif général ne fait pas partie des considérations susceptibles de justifier le refus discrétionnaire de l'autorisation.

[95] Toutefois, la conduite des parties est un facteur que le tribunal peut prendre en considération dans l'exercice du pouvoir discrétionnaire résiduel que lui confère l'al. 31(2)(a). La cour d'appel doit faire preuve de déférence lorsqu'elle contrôle la décision discrétionnaire de refuser l'autorisation d'interjeter appel. Elle doit se garder d'intervenir seulement parce qu'elle aurait exercé son pouvoir

2 S.C.R. 509, at paras. 18 and 30). An appellate court is only justified in interfering with a lower court judge's exercise of discretion if that judge misdirected himself or if his decision is so clearly wrong as to amount to an injustice (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 15; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117).

[96] Here, the SC Leave Court relied upon a well-accepted consideration in deciding to deny discretionary relief: the misconduct of Creston. The CA Leave Court overturned this decision on the grounds that Creston's conduct was "not directly relevant to the question of law" advanced on appeal (at para. 27).

[97] The CA Leave Court did not explain why misconduct need be directly relevant to a question of law for the purpose of denying leave. I see nothing in s. 31(2) of the *AA* that would limit a leave judge's exercise of discretion in the manner suggested by the CA Leave Court. My reading of the jurisprudence does not support the view that misconduct must be directly relevant to the question to be decided by the court.

[98] In *Homex Realty and Development Co. v. Corporation of the Village of Wyoming*, [1980] 2 S.C.R. 1011, at pp. 1037-38, misconduct by a party not directly relevant to the question at issue before the court resulted in denial of a remedy. The litigation in *Homex* arose out of a disagreement regarding whether the purchaser of lots in a subdivision, Homex, had assumed the obligations of the vendor under a subdivision agreement to provide "all the requirements, financial and otherwise" for the installation of municipal services on a parcel of land that had been subdivided (pp. 1015-16). This Court determined that Homex had not been accorded procedural fairness when the municipality passed a by-law related to the dispute (p. 1032). Nevertheless, discretionary relief to quash the by-law was denied because, among other things, Homex had sought "throughout all these proceedings to

discrétionnaire différemment (*R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509, par. 18 et 30). La cour d'appel ne saurait intervenir à l'égard de l'exercice du pouvoir discrétionnaire par le juge de l'instance inférieure que si celui-ci s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice (*R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651, par. 15; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 117).

[96] En l'espèce, la formation de la CS saisie de la demande d'autorisation a fondé sur un facteur reconnu sa décision de refuser la réparation discrétionnaire : l'inconduite de Creston. La formation de la CA saisie de la demande d'autorisation a infirmé cette décision au motif que [TRADUCTION] « ces faits [la conduite de Creston] n'intéressent pas directement la question de droit » soulevée en appel (par. 27).

[97] La formation de la CA saisie de la demande d'autorisation n'a pas expliqué pourquoi l'inconduite doit se rapporter directement à une question de droit pour que l'autorisation soit refusée. Rien dans le par. 31(2) de l'*AA* ne limite l'exercice du pouvoir discrétionnaire du juge saisi de la demande d'autorisation de la façon avancée par la Cour d'appel. Mon interprétation de la jurisprudence ne cadre pas avec le point de vue selon lequel l'inconduite d'une partie doit se rapporter directement à la question devant être tranchée par la cour.

[98] Dans l'arrêt *Homex Realty and Development Co. c. Corporation of the Village of Wyoming*, [1980] 2 R.C.S. 1011, p. 1037-1038, l'inconduite d'une partie ne se rapportait pas directement à la question en cause devant la Cour, mais cette dernière a néanmoins refusé d'accorder la réparation. Le litige tirait son origine d'un désaccord sur la question de savoir si l'acheteur de lots sur un lotissement, Homex, avait assumé les obligations du vendeur prévues à la convention de lotissement, c'est-à-dire de satisfaire à « toutes les exigences, financières ou autres » relativement à l'installation des services d'utilité publique sur un lotissement (p. 1015-1016). La Cour décide qu'Homex n'a pas bénéficié de l'équité procédurale lorsque la municipalité avait adopté un règlement se rapportant au litige (p. 1032). Néanmoins, la demande visant à obtenir l'annulation discrétionnaire du règlement a été rejetée notamment

avoid the burden associated with the subdivision of the lands" that it owned (p. 1037), even though the Court held that Homex knew this obligation was its responsibility (pp. 1017-19). This conduct was related to the dispute that gave rise to the litigation, but not to the question of whether the by-law was enacted in a procedurally fair manner. Accordingly, I read *Homex* as authority for the proposition that misconduct related to the dispute that gave rise to the proceedings may justify the exercise of discretion to refuse the relief sought, in this case refusing to grant leave to appeal.

[99] Here, the arbitrator found as a fact that Creston misled the TSXV and Sattva regarding "the nature of the obligation it had undertaken to Sattva by representing that the finder's fee was payable in cash" (para. 56(k)). While this conduct is not tied to the question of law found by the CA Leave Court, it is tied to the arbitration proceeding convened to determine which share price should be used to pay Sattva's finder's fee. The SC Leave Court was entitled to rely upon such conduct as a basis for denying leave pursuant to its residual discretion.

[100] In the result, in my respectful opinion, even if the CA Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the SC Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion.

[101] Although the CA Leave Court erred in granting leave, these protracted proceedings have nonetheless now reached this Court. In light of the fact that the true concern between the parties is the merits of the appeal — that is, how much the Agreement requires Creston to pay Sattva — and that the courts below differed significantly in their interpretation of the Agreement, it would be

parce que « [t]out au long de ces procédures, Homex a cherché à éviter les obligations qui se rattachent au lotissement des terrains » qu'elle détenait (p. 1037), même si Homex savait, de l'avis de la Cour, qu'elle devait assumer cette obligation (p. 1017-1019). Cette conduite se rapportait, non pas à la question de savoir si le règlement avait été adopté d'une manière équitable sur le plan de la procédure, mais au désaccord à l'origine dulitige. Par conséquent, je crois que l'arrêt *Homex* étaye la proposition selon laquelle une conduite répréhensible se rapportant au différend à l'origine du litige peut justifier le refus de la réparation discrétionnaire sollicitée, en l'occurrence l'autorisation d'interjeter appel.

[99] En l'espèce, l'arbitre a tiré la conclusion de fait suivante : Creston a induit la Bourse et Sattva en erreur en ce qui concerne [TRADUCTION] « la nature de l'obligation qu'elle avait contractée envers Sattva en affirmant que les honoraires d'intermédiation étaient payables en argent » (par. 56(k)). Bien que cette conduite ne soit pas reliée à la question de droit énoncée par la formation de la CA saisie de la demande d'autorisation, elle est reliée à l'arbitrage visant à déterminer le cours de l'action applicable aux fins du versement des honoraires d'intermédiation de Sattva. La Cour suprême pouvait à bon droit fonder sur une telle conduite sa décision de refuser l'autorisation, en vertu de son pouvoir discrétionnaire.

[100] Par conséquent, à mon humble avis, même si la formation de la CA saisie de la demande d'autorisation avait défini une question de droit et qu'il avait été satisfait au critère du risque d'erreur judiciaire, elle aurait dû confirmer la décision de la formation de la CS saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour.

[101] S'il est vrai que la formation de la CA saisie de la demande d'autorisation a commis une erreur en autorisant l'appel, ces interminables procédures ne s'en trouvent pas moins à l'heure actuelle devant nous. Puisque, par ailleurs, c'est la question de fond de l'appel — soit celle de savoir combien l'entente exige que Creston paie à Sattva — qui intéresse réellement les parties, et que les tribunaux d'instance

unsatisfactory not to address the very dispute that has given rise to these proceedings. I will therefore proceed to consider the three remaining questions on appeal as if leave to appeal had been properly granted.

C. *Standard of Review Under the AA*

[102] I now turn to consideration of the decisions of the appeal courts. It is first necessary to determine the standard of review of the arbitrator's decision in respect of the question on which the CA Leave Court granted leave: whether the arbitrator construed the finder's fee provision in light of the Agreement as a whole, particularly, whether the finder's fee provision was interpreted having regard for the "maximum amount" proviso.

[103] At the outset, it is important to note that the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which sets out standards of review of the decisions of many statutory tribunals in British Columbia (see ss. 58 and 59), does not apply in the case of arbitrations under the *AA*.

[104] Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it, is not entirely applicable to the commercial arbitration context. For example, the *AA* forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the

inférieure ont considérablement divergé d'opinion quant à l'interprétation qu'il faut donner à l'entente, il serait bien peu satisfaisant que le véritable litige à l'origine de cette instance ne soit pas réglé. Je vais donc examiner les trois autres questions soulevées en appel comme si l'autorisation d'interjeter appel avait été accordée à bon droit.

C. *Norme de contrôle applicable aux affaires régies par l'AA*

[102] Abordons les décisions des tribunaux siégeant en appel. Tout d'abord, il est nécessaire de déterminer la norme applicable au contrôle de la sentence arbitrale en fonction de la question à l'égard de laquelle la formation de la CA saisie de la demande d'autorisation a accordé cette dernière : l'arbitre a-t-il interprété la disposition sur les honoraires d'intermédiation à la lumière de l'entente dans son ensemble? Plus particulièrement, l'a-t-il interprétée en tenant compte de la stipulation relative au « plafond »?

[103] D'entrée de jeu, il convient de souligner que l'*Administrative Tribunals Act*, S.B.C. 2004, ch. 45, laquelle prévoit les normes de contrôle applicables aux décisions rendues par de nombreux tribunaux administratifs de la Colombie-Britannique (art. 58 et 59), ne s'applique pas aux arbitrages régis par l'*AA*.

[104] L'examen en appel des sentences arbitrales commerciales s'inscrit dans un régime, strictement défini et adapté aux objectifs de l'arbitrage commercial, qui diffère du contrôle judiciaire d'une décision rendue par un tribunal administratif. Par exemple, la plupart du temps, les parties décident d'un commun accord de soumettre leur différend à l'arbitrage. Il ne s'agit pas d'un processus imposé par la loi. De plus, contrairement à la procédure devant un tribunal administratif, dans le cas d'un arbitrage les parties à la convention choisissent le nombre d'arbitres et l'identité de chacun. Ces différences révèlent que le cadre relatif au contrôle judiciaire établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts rendus depuis, ne peut être tout à fait transposé dans le contexte de l'arbitrage commercial. Par exemple, l'*AA* interdit

Dunsmuir judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).

[105] Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

[106] *Dunsmuir* and the post-*Dunsmuir* jurisprudence confirm that it will often be possible to determine the standard of review by focusing on the nature of the question at issue (see for example *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 44). In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*Alberta Teachers' Association*, at para. 30). The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case.

le contrôle des conclusions de fait tirées par l'arbitre. En matière d'arbitrage commercial, une telle disposition est absolue. Suivant le cadre établi dans *Dunsmuir*, l'existence d'une disposition d'inattaquabilité (aussi appelée clause privative) n'empêche pas le tribunal judiciaire de procéder au contrôle d'une décision administrative, elle signale simplement que la déférence est de mise (*Dunsmuir*, par. 31).

[105] Il demeure que le contrôle judiciaire d'une décision rendue par un tribunal administratif et l'appel d'une sentence arbitrale se ressemblent dans une certaine mesure. Dans les deux cas, le tribunal examine la décision rendue par un décideur administratif. En outre, l'expertise constitue un facteur tant en matière de contrôle judiciaire qu'en matière d'arbitrage commercial : quand les parties choisissent leur propre décideur, on peut présumer qu'elles fondent leur choix sur l'expertise de l'arbitre dans le domaine faisant l'objet du litige ou jugent sa compétence acceptable. Pour ces raisons, j'estime que certains éléments du cadre établi dans l'arrêt *Dunsmuir* aident à déterminer le degré de déférence qu'il convient d'accorder aux sentences rendues en matière d'arbitrage commercial.

[106] La jurisprudence depuis l'arrêt *Dunsmuir* vient confirmer qu'il est souvent possible de déterminer la norme de contrôle applicable suivant la nature de la question en litige (voir par exemple *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 44). En matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte, comme les questions constitutionnelles ou les questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur (*Alberta Teachers' Association*, par. 30). La question dont nous sommes saisis, à savoir si l'arbitre a interprété l'entente dans son ensemble, n'appartient pas à l'une ou l'autre de ces catégories. Compte tenu des éléments pertinents de l'analyse établie dans l'arrêt *Dunsmuir*, la norme de la décision raisonnable s'applique en l'espèce.

D. *The Arbitrator Reasonably Construed the Agreement as a Whole*

[107] For largely the reasons outlined by Justice Armstrong in paras. 57-75 of the SC Appeal Court decision, in my respectful opinion, in determining that Sattva is entitled to be paid its finder's fee in shares priced at $0.15 per share, the arbitrator reasonably construed the Agreement as a whole. Although Justice Armstrong conducted a correctness review of the arbitrator's decision, his reasons amply demonstrate the reasonableness of that decision. The following analysis is largely based upon his reasoning.

[108] The question that the arbitrator had to decide was which date should be used to determine the price of the shares used to pay the finder's fee: the date specified in the Market Price definition in the Agreement or the date the finder's fee was to be paid?

[109] The arbitrator concluded that the price determined by the Market Price definition prevailed, i.e. $0.15 per share. In his view, this conclusion followed from the words of the Agreement and was "clear and beyond argument" (para. 23). Apparently, because he considered this issue clear, he did not offer extensive reasons in support of his conclusion.

[110] In *Newfoundland and Labrador Nurses' Union*, Abella J. cites Professor David Dyzenhaus to explain that, when conducting a reasonableness review, it is permissible for reviewing courts to supplement the reasons of the original decision-maker as part of the reasonableness analysis:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc., then it is also the case that its decision should be presumed to be correct even if its reasons are in

D. *L'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble*

[107] Essentiellement pour les mêmes motifs que ceux exprimés par le juge Armstrong aux par. 57-75 de la décision de la CS sur l'appel, je suis d'avis que l'arbitre, en déterminant que Sattva était en droit de recevoir ses honoraires d'intermédiation en actions, à raison de 0,15 $ l'action, a donné une interprétation raisonnable de l'entente considérée dans son ensemble. Le juge Armstrong a contrôlé la décision de l'arbitre selon la norme de la décision correcte, mais ses motifs démontrent amplement le caractère raisonnable de cette décision. L'analyse qui suit est largement fondée sur son raisonnement.

[108] La question que devait trancher l'arbitre portait sur la date qui doit être retenue pour évaluer le cours de l'action aux fins du versement des honoraires d'intermédiation : la date établie selon la définition du cours qui figure dans l'entente ou la date du versement des honoraires d'intermédiation.

[109] L'arbitre a conclu que la valeur calculée selon la définition du cours l'emportait, soit 0,15 $ l'action. Selon lui, tel constat découlait des termes de l'entente et était [TRADUCTION] « clair et incontestable » (par. 23). Apparemment, comme il estimait que ce point était clair, il ne l'a pas motivé abondamment.

[110] Dans l'arrêt *Newfoundland and Labrador Nurses' Union*, la juge Abella cite le professeur David Dyzenhaus pour expliquer que les tribunaux siégeant en révision peuvent compléter les motifs du décideur de première ligne dans le cadre de l'analyse du caractère raisonnable :

> [TRADUCTION] Le « caractère raisonnable » s'entend ici du fait que les motifs étayent, effectivement ou en principe, la conclusion. Autrement dit, même si les motifs qui ont en fait été donnés ne semblent pas tout à fait convenables pour étayer la décision, la cour de justice doit d'abord chercher à les compléter avant de tenter de les contrecarrer. Car s'il est vrai que parmi les motifs pour lesquels il y a lieu de faire preuve de retenue on compte le fait que c'est le tribunal, et non la cour de justice, qui a été désigné comme décideur de

some respects defective. [Emphasis added by Abella J.; para. 12.]

(Quotation from D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

Accordingly, Justice Armstrong's explanation of the interaction between the Market Price definition and the "maximum amount" proviso can be considered a supplement to the arbitrator's reasons.

[111] The two provisions at issue here are the Market Price definition and the "maximum amount" proviso:

2. DEFINITIONS

"Market Price" for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

And:

3. FINDER'S FEE

3.1 . . . the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations. [Emphasis added.]

première ligne, la connaissance directe qu'a le tribunal du différend, son expertise, etc., il est aussi vrai qu'on doit présumer du bien-fondé de sa décision même si ses motifs sont lacunaires à certains égards. [Soulignement ajouté par la juge Abella; par. 12.]

(Citation de D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 304)

Par conséquent, on peut supposer que l'explication donnée par le juge Armstrong du jeu de la définition du cours et de la stipulation relative au « plafond » complète les motifs de l'arbitre.

[111] Les deux clauses en cause sont la définition du cours et la stipulation relative au « plafond » :

[TRADUCTION]

2. DÉFINITIONS

« cours », pour les sociétés dont les titres sont inscrits à la cote de la Bourse de croissance TSX, a le sens qui lui est attribué dans le Guide du financement des sociétés de la Bourse de croissance TSX, c'est-à-dire qu'il s'entend du cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition. Pour les sociétés cotées à la Bourse TSX, le cours s'entend du cours de clôture moyen des actions de la société à une bourse reconnue cinq jours de bourse avant la publication du communiqué de presse annonçant l'acquisition.

Et :

3. HONORAIRES D'INTERMÉDIATION

3.1 . . . la société convient qu'à la conclusion d'une acquisition qui lui a été présentée par l'intermédiaire, elle verse à l'intermédiaire des honoraires (des « honoraires d'intermédiation »), calculés en fonction de la contrepartie versée au vendeur, dont le montant est égal au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX. Ces honoraires d'intermédiation sont versés en actions de la société en fonction du cours ou, au choix de l'intermédiaire, en actions et en argent, dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation. [Je souligne.]

[112] Section 3.1 entitles Sattva to be paid a finder's fee in shares based on the "Market Price". Section 2 of the Agreement states that Market Price for companies listed on the TSXV should be "calculated on close of business day before the issuance of the press release announcing the Acquisition". In this case, shares priced on the basis of the Market Price definition would be $0.15 per share. The words "provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations" in s. 3.1 of the Agreement constitute the "maximum amount" proviso. This proviso limits the amount of the finder's fee. The maximum finder's fee in this case is US$1.5 million (see s. 3.3 of the TSXV Policy 5.1 in Appendix II).

[113] While the "maximum amount" proviso limits the amount of the finder's fee, it does not affect the Market Price definition. As Justice Armstrong explained, the Market Price definition acts to fix the date at which one medium of payment (US$) is transferred into another (shares):

> The medium for payment of the finder's fee is clearly established by the fee agreement. The market value of those shares at the time that the parties entered into the fee agreement was unknown. The respondent analogizes between payment of the $1.5 million US finder's fee in shares and a hypothetical agreement permitting payment of $1.5 million US in Canadian dollars. Both agreements would contemplate a fee paid in different currencies. The exchange rate of the US and Canadian dollar would be fixed to a particulate date, as is the value of the shares by way of the Market Price in the fee agreement. That exchange rate would determine the number of Canadian dollars paid in order to satisfy the $1.5 million US fee, as the Market Price does for the number of shares paid in relation to the fee. The Canadian dollar is the form of the fee payment, as are the shares. Whether the Canadian dollar increased or decreased in value after the date on which the exchange rate is based is irrelevant. The amount of the fee paid remains $1.5 million US, payable in the number of Canadian dollars (or shares) equal to the

[112] L'article 3.1 de l'entente permet à Sattva de recevoir ses honoraires d'intermédiation en actions en fonction du « cours ». Aux termes de l'art. 2 de l'entente, le cours des titres des sociétés cotées à la Bourse de croissance TSX est égal au « cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition ». En l'espèce, compte tenu de la définition du cours, l'action vaudrait 0,15 $. Le passage « dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation » tiré de l'art. 3.1 de l'entente constitue la stipulation relative au « plafond ». Cette stipulation limite le montant des honoraires d'intermédiation. Le plafond correspond dans le cas qui nous occupe à 1,5 million $US (voir le point 3.3 de la politique 5.1 de la Bourse à l'annexe II).

[113] La stipulation relative au « plafond » limite le montant des honoraires d'intermédiation, mais elle ne change rien à la définition du cours. Comme l'explique le juge Armstrong, la définition du cours fixe la date à laquelle un moyen de paiement (dollars américains) est converti en un autre (actions) :

> [TRADUCTION] Le moyen de paiement des honoraires d'intermédiation est clairement établi par l'entente conclue en ce sens. La valeur marchande de ces actions au moment où les parties ont conclu cette entente était inconnue. L'intimée établit une analogie entre le paiement en actions des honoraires d'intermédiation de 1,5 million $US et une entente hypothétique en vertu de laquelle la somme de 1,5 million $US serait convertie en dollars canadiens. Dans les deux cas, les honoraires seraient payés en devises différentes. Le taux de change d'une à l'autre serait fixé à une date précise, tout comme l'est le cours de l'action dans l'entente relative aux honoraires. Ce taux de change permettrait de calculer la somme à verser en dollars canadiens en règlement des honoraires de 1,5 million $US, tout comme le cours permet de déterminer le nombre d'actions cédées en règlement des honoraires. Le dollar canadien est une forme de paiement, au même titre que l'action. Il importe peu que la valeur du dollar canadien augmente ou diminue après la date fixée pour établir le taux de change. Le

amount of the fee based on the value of that currency on the date that the value is determined.

(SC Appeal Court decision, at para. 71)

[114] Justice Armstrong explained that Creston's position requires the Market Price definition to be ignored and for the shares to be priced based on the valuation done in anticipation of a private placement.

[115] However, nothing in the Agreement expresses or implies that compliance with the "maximum amount" proviso should be reassessed at a date closer to the payment of the finder's fee. Nor is the basis for the new valuation, in this case a private placement, mentioned or implied in the Agreement. To accept Creston's interpretation would be to ignore the words of the Agreement which provide that the "finder's fee is to be paid in shares of the Company based on Market Price".

[116] The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both the Market Price definition and the "maximum amount" proviso. The arbitrator's interpretation of the Agreement, as explained by Justice Armstrong, achieves this goal by reconciling the Market Price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

[117] As Justice Armstrong explained, setting the share price in advance creates a risk that makes selecting payment in shares qualitatively different from choosing payment in cash. There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient

montant des honoraires payé est toujours égal à 1,5 million $US. Il est converti en un certain nombre de dollars canadiens (ou d'actions) équivalant au montant des honoraires en fonction de la valeur de la devise à la date à laquelle cette valeur est déterminée.

(Décision de la CS sur l'appel, par. 71)

[114] Comme l'explique le juge Armstrong, accepter la position de Creston revient à ne pas tenir compte de la définition du cours et à fixer le cours de l'action en fonction de l'évaluation faite en prévision d'un placement privé.

[115] Cependant, rien dans l'entente n'indique, expressément ou implicitement, qu'il faille réévaluer avant la date du versement des honoraires d'intermédiation la conformité à la stipulation relative au « plafond ». L'entente ne précise pas non plus — ni expressément, ni implicitement — la base sur laquelle il faudrait procéder à une telle réévaluation — en l'occurrence un placement privé. Accepter l'interprétation de Creston reviendrait à faire fi du libellé de l'entente selon lequel les « honoraires d'intermédiation sont versés en actions de la société en fonction du cours ».

[116] La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donne effet à cette dernière et à la stipulation relative au « plafond ». Comme l'explique le juge Armstrong, l'interprétation par l'arbitre de l'entente atteint cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne peut être considérée comme déraisonnable.

[117] Comme l'explique le juge Armstrong, fixer le cours de l'action en avance engendre un risque qui rend le paiement en actions qualitativement différent du paiement en argent. Le versement des honoraires sous forme d'actions présente un risque inhérent, qui ne se pose pas dans le cas du versement en argent. Les honoraires payés en argent ont une valeur prédéterminée. Par contre, quand les honoraires sont versés en actions, le cours de l'action (ou le mécanisme permettant de le déterminer) est fixé à l'avance. Cependant, le cours de l'action

of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both Creston and Sattva would have been aware of this as sophisticated business parties.

[118] By accepting payment in shares, Sattva was accepting that it was subject to the volatility of the market. If Creston's share price had fallen, Sattva would still have been bound by the share price determined according to the Market Price definition resulting in it receiving a fee paid in shares with a market value of less than the maximum amount of US$1.5 million. It would make little sense to accept the risk of the share price decreasing without the possibility of benefitting from the share price increasing. As Justice Armstrong stated:

> It would be inconsistent with sound commercial principles to insulate the appellant from a rise in share prices that benefitted the respondent at the date that the fee became payable, when such a rise was foreseeable and ought to have been addressed by the appellant, just as it would be inconsistent with sound commercial principles, and the terms of the fee agreement, to increase the number of shares allocated to the respondent had their value decreased relative to the Market Price by the date that the fee became payable. Both parties accepted the possibility of a change in the value of the shares after the Market Price was determined when entering into the fee agreement.

(SC Appeal Court decision, at para. 70)

[119] For these reasons, the arbitrator did not ignore the "maximum amount" proviso. The arbitrator's reasoning, as explained by Justice Armstrong, meets the reasonableness threshold of justifiability, transparency and intelligibility (*Dunsmuir*, at para. 47).

fluctue avec le temps. La personne qui reçoit des honoraires payés en actions espère une augmentation du cours, de sorte que ses actions auront une valeur marchande supérieure à celle qui est établie selon le cours prédéterminé. En revanche, si le cours chute, cette personne reçoit des actions dont la valeur est inférieure à celle des actions selon le cours prédéterminé. Ce risque est bien connu de ceux qui évoluent dans ce milieu, et Creston et Sattva, des parties avisées, en auraient eu connaissance.

[118] En acceptant un paiement en actions, Sattva acceptait de se soumettre à la volatilité du marché. Si l'action de Creston avait chuté, Sattva aurait tout de même été liée par la valeur déterminée en application de la définition du cours, de sorte qu'elle aurait reçu des actions d'une valeur marchande inférieure au plafond de 1,5 million $US. Il ne serait guère logique d'accepter le risque d'une baisse du cours de l'action sans avoir la possibilité de bénéficier d'une hausse. Pour reprendre les propos du juge Armstrong :

> [TRADUCTION] Il serait contraire aux principes commerciaux reconnus de protéger l'appelante de la hausse du cours de l'action dont bénéficiait l'intimée à la date de versement des honoraires, alors qu'une telle augmentation était prévisible et aurait dû être soulevée par l'appelante, tout comme il serait contraire aux principes commerciaux reconnus, et aux termes de l'entente relative aux honoraires, d'augmenter le nombre d'actions cédées à l'intimée dans le cas où leur valeur aurait baissé par rapport au cours en vigueur à la date du versement des honoraires. Les deux parties ont reconnu, quand elles ont conclu l'entente relative aux honoraires, la possibilité de fluctuation de la valeur de l'action après la définition du cours.

(Décision de la CS sur l'appel, par. 70)

[119] Pour ces raisons, on ne peut prétendre que l'arbitre n'a pas tenu compte de la stipulation de l'entente relative au « plafond ». Le raisonnement de l'arbitre, que le juge Armstrong explique, satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité (*Dunsmuir*, par. 47).

E. *Appeal Courts Are Not Bound by Comments on the Merits of the Appeal Made by Leave Courts*

[120] The CA Appeal Court held that it and the SC Appeal Court were bound by the findings made by the CA Leave Court regarding not simply the decision to grant leave to appeal, but also the merits of the appeal. In other words, it found that the SC Appeal Court erred in law by ignoring the findings of the CA Leave Court regarding the merits of the appeal.

[121] The CA Appeal Court noted two specific findings regarding the merits of the appeal that it held were binding on it and the SC Appeal Court: (1) it would be anomalous if the Agreement allowed Sattva to receive US$1.5 million if it received its fee in cash, but allowed it to receive shares valued at approximately $8 million if Sattva received its fee in shares; and (2) that the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement:

> The [SC Appeal Court] judge found the arbitrator had expressly addressed the maximum amount payable under paragraph 3.1 of the Agreement and that he was correct.
>
> This finding is contrary to the remarks of Madam Justice Newbury in the earlier appeal that, if Sattva took its fee in shares valued at $0.15, it would receive a fee having a value at the time the fee became payable of over $8 million. If the fee were taken in cash, the amount payable would be $1.5 million US. Newbury J.A. specifically held that the arbitrator did not note this anomaly and did not address the meaning of paragraph 3.1 of the Agreement.
>
> The [SC Appeal Court] judge was bound to accept those findings. Similarly, absent a five-judge division in this appeal, we must also accept those findings. [paras. 42-44]

E. *La formation saisie de l'appel n'est pas liée par les observations formulées par la formation saisie de la demande d'autorisation sur le bien-fondé de l'appel*

[120] La Cour d'appel a conclu qu'elle-même et la formation de la CS saisie de l'appel étaient liées par les conclusions tirées par la formation de la CA saisie de la demande d'autorisation en ce qui a trait non seulement à la décision d'autoriser l'appel, mais aussi au bien-fondé de l'appel. Autrement dit, elle a conclu que la formation de la CS saisie de l'appel avait commis une erreur de droit en faisant fi des conclusions de la formation de la CA saisie de la demande d'autorisation quant au bien-fondé de l'appel.

[121] La formation de la CA saisie de l'appel a mis en relief deux conclusions précises quant au bien-fondé de l'appel qui, à son avis, la liaient elle, et aussi la formation de la CS saisie de l'appel : 1º il serait incongru que l'entente permette à Sattva, si elle opte pour le versement de ses honoraires en argent, de toucher 1,5 million $US alors que, si elle opte pour le versement sous forme d'actions, elle recevra un portefeuille valant environ 8 millions $ et 2º l'arbitre n'a pas tenu compte de cette anomalie et a fait fi de l'art. 3.1 de l'entente :

> [TRADUCTION] Le juge [de la CS saisi de l'appel] a conclu que l'arbitre avait expressément tenu compte du plafond des honoraires payables conformément au paragraphe 3.1 de l'entente et que sa sentence était correcte.
>
> Cette conclusion est contraire aux remarques formulées par la juge Newbury dans l'appel antérieur selon lesquelles, si ses honoraires étaient versés en actions, à raison de 0,15 $ l'unité, Sattva obtiendrait des honoraires d'une valeur, à la date du versement des honoraires, de plus de 8 millions $. Si elle optait pour le versement en argent, elle recevrait un montant de 1,5 million $US. La juge Newbury a statué expressément que l'arbitre n'avait pas soulevé cette anomalie et qu'il n'avait pas tenu compte du sens du paragraphe 3.1 de l'entente.
>
> Le juge [de la CS saisi de l'appel] était tenu d'accepter ces conclusions. De même, à défaut d'une décision d'une formation de cinq juges en l'espèce, nous devons aussi accepter ces conclusions. [par. 42-44]

[122] With respect, the CA Appeal Court erred in holding that the CA Leave Court's comments on the merits of the appeal were binding on it and on the SC Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 88). A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful (*Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, at para. 27, leave to appeal refused, [2013] 3 S.C.R. viii). This is true even where the determination of whether to grant leave involves, as in this case, a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal (*Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), at para. 32).

[123] Creston concedes this point but argues that the CA Appeal Court's finding that it was bound by the CA Leave Court was inconsequential because the CA Appeal Court came to the same conclusion on the merits as the CA Leave Court based on separate and independent reasoning.

[124] The fact that the CA Appeal Court provided its own reasoning as to why it came to the same conclusion as the CA Leave Court does not vitiate the error. Once the CA Appeal Court treated the CA Leave Court's reasons on the merits as binding, it could hardly have come to any other decision. As counsel for Sattva pointed out, treating the leave decision as binding would render an appeal futile.

[122] Avec tout le respect que je lui dois, j'estime que la formation de la CA saisie de l'appel a commis une erreur en concluant que les commentaires sur le bien-fondé de l'appel formulés par la formation de la CA saisie de la demande d'autorisation la liaient elle, de même que la formation de la CS saisie de l'appel. Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 88). Il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli (*Pacifica Mortgage Investment Corp. c. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, par. 27, autorisation d'appel refusée, [2013] 3 R.C.S. viii). Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause, comme c'est le cas en l'espèce. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs (*Tamil Co-operative Homes Inc. c. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), par. 32).

[123] Creston concède ce point, mais prétend que la conclusion tirée par la formation de la CA saisie de l'appel selon laquelle elle était liée par les conclusions de celle saisie de la demande d'autorisation était sans conséquence parce que la première est arrivée à la même conclusion que la seconde sur le bien-fondé, à l'issue d'un raisonnement distinct et indépendant.

[124] Le fait que la formation de la CA saisie de l'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur. Dès lors que la formation de la CA saisie de l'appel a accordé un caractère obligatoire aux motifs concernant le bien-fondé de l'appel énoncés par celle saisie de la demande d'autorisation, elle ne pouvait guère arriver à une autre décision. Comme le souligne l'avocat de Sattva, considérer comme impérative la décision relative à la demande d'autorisation rendrait l'appel futile.

VI. Conclusion

[125] The CA Leave Court erred in granting leave to appeal in this case. In any event, the arbitrator's decision was reasonable. The appeal from the judgments of the Court of Appeal for British Columbia dated May 14, 2010 and August 7, 2012 is allowed with costs throughout and the arbitrator's award is reinstated.

APPENDIX I

Relevant Provisions of the Sattva-Creston Finder's Fee Agreement

(a) "Market Price" definition:

2. DEFINITIONS

"Market Price" for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

(b) Finder's fee provision (which contains the "maximum amount" proviso):

3. FINDER'S FEE

3.1 . . . the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee

VI. Conclusion

[125] La formation de la CA saisie de la demande d'autorisation a commis une erreur en accordant l'autorisation d'interjeter appel en l'espèce. Quoi qu'il en soit, la sentence arbitrale était raisonnable. L'appel interjeté à l'encontre des décisions de la Cour d'appel de la Colombie-Britannique datées du 14 mai 2010 et du 7 août 2012 est accueilli avec dépens devant toutes les cours. La sentence arbitrale est rétablie.

ANNEXE I

Dispositions pertinentes de l'entente relative aux honoraires d'intermédiation conclue entre Sattva et Creston

a) Définition du « cours » :

[TRADUCTION]

2. DÉFINITIONS

« cours », pour les sociétés dont les titres sont inscrits à la cote de la Bourse de croissance TSX, a le sens qui lui est attribué dans le Guide du financement des sociétés de la Bourse de croissance TSX, c'est-à-dire qu'il s'entend du cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition. Pour les sociétés cotées à la Bourse TSX, le cours s'entend du cours de clôture moyen des actions de la société à une bourse reconnue cinq jours de bourse avant la publication du communiqué de presse annonçant l'acquisition.

b) Disposition relative aux honoraires d'intermédiation (laquelle contient la stipulation relative au « plafond ») :

[TRADUCTION]

3. HONORAIRES D'INTERMÉDIATION

3.1 . . . la société convient qu'à la conclusion d'une acquisition qui lui a été présentée par l'intermédiaire, elle verse à l'intermédiaire des honoraires (des « honoraires d'intermédiation »), calculés en fonction de la contrepartie versée au vendeur, dont le montant est égal au plafond payable conformément aux règles et politiques

is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.

APPENDIX II

Section 3.3 of TSX Venture Exchange Policy 5.1: Loans, Bonuses, Finder's Fees and Commissions

3.3 Finder's Fee Limitations

The finder's fee limitations apply if the benefit to the Issuer is an asset purchase or sale, joint venture agreement, or if the benefit to the Issuer is not a specific financing. The consideration should be stated both in dollars and as a percentage of the value of the benefit received. Unless there are unusual circumstances, the finder's fee should not exceed the following percentages:

Benefit	Finder's Fee
On the first $300,000	Up to 10%
From $300,000 to $1,000,000	Up to 7.5%
From $1,000,000 and over	Up to 5%

As the dollar value of the benefit increases, the fee or commission, as a percentage of that dollar value should generally decrease.

APPENDIX III

Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (as it read on January 12, 2007) (now the *Arbitration Act*)

Appeal to the court

31 (1) A party to an arbitration may appeal to the court on any question of law arising out of the award if

de la Bourse de croissance TSX. Ces honoraires d'intermédiation sont versés en actions de la société en fonction du cours ou, au choix de l'intermédiaire, en actions et en argent, dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation.

ANNEXE II

Point 3.3 de la politique 5.1 de la Bourse de croissance TSX : Emprunts, primes, honoraires d'intermédiation et commissions

3.3 Plafond des honoraires d'intermédiation

Les honoraires d'intermédiation sont assujettis à un plafond si l'avantage que retire l'émetteur prend la forme d'un achat ou d'une vente d'actifs ou d'une convention de coentreprise, ou si son avantage n'est pas lié à un financement précis. La contrepartie devrait être exprimée à la fois en valeur monétaire et en pourcentage de la valeur de l'avantage reçu. Sauf dans des circonstances exceptionnelles, les honoraires d'intermédiation ne doivent pas dépasser les pourcentages suivants :

Avantage	Honoraires d'intermédiation
300 000 $ et moins	Jusqu'à 10 %
Entre 300 000 $ et 1 000 000 $	Jusqu'à 7,5 %
1 000 000 $ et plus	Jusqu'à 5 %

De façon générale, les honoraires ou la commission, exprimés en pourcentage de la valeur monétaire de l'avantage, devraient être inversement proportionnels à cette valeur.

ANNEXE III

Commercial Arbitration Act, R.S.B.C. 1996, ch. 55 (dans sa version du 12 janvier 2007) (maintenant l'*Arbitration Act*)

[TRADUCTION]

Appel devant le tribunal

31 (1) Une partie à l'arbitrage peut interjeter appel au tribunal sur toute question de droit découlant de la sentence si, selon le cas :

(a) all of the parties to the arbitration consent, or

(b) the court grants leave to appeal.

(2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

(3) If the court grants leave to appeal under this section, it may attach conditions to the order granting leave that it considers just.

(4) On an appeal to the court, the court may

(a) confirm, amend or set aside the award, or

(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

Appeal allowed with costs throughout.

Solicitors for the appellant: McCarthy Tétrault, Vancouver.

Solicitors for the respondent: Miller Thomson, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener the BCICAC Foundation: Fasken Martineau DuMoulin, Vancouver.

(a) toutes les parties à l'arbitrage y consentent,

(b) le tribunal accorde l'autorisation.

(2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :

(a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,

(b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,

(c) la question de droit est d'importance publique.

(3) Si le tribunal accorde l'autorisation en vertu du présent article, il peut assortir des conditions qu'il estime équitables l'ordonnance accordant l'autorisation.

(4) En appel, le tribunal peut, selon le cas :

(a) confirmer, modifier ou annuler la sentence,

(b) renvoyer la sentence à l'arbitre avec l'opinion du tribunal sur la question de droit qui a fait l'objet de l'appel.

Pourvoi accueilli avec dépens devant toutes les cours.

Procureurs de l'appelante : McCarthy Tétrault, Vancouver.

Procureurs de l'intimée : Miller Thomson, Vancouver.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intervenante BCICAC Foundation : Fasken Martineau DuMoulin, Vancouver.

TAB 16

CITATION: SkyLink Aviation Inc. (Re), 2013 ONSC 2519
COURT FILE NO.: CV-13-1003300CL
DATE: 20130430

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **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 AND ARRANGEMENT OF SKYLINK AVIATION INC., Applicant

BEFORE: **MORAWETZ J.**

COUNSEL: **Robert J. Chadwick and Logan Willis, for SkyLink Aviation Inc.**

Harvey Chaiton, for Arbib, Babrar and Sunbeam Helicopters

Emily Stock, for Certain Former and Current Directors for Insured Claims

S. R. Orzy and Sean Zweig, for the Noteholders

Shayne Kukulowicz, for Certain Directors and Officers

M. P. Gottlieb and A. Winton, for the Monitor, Duff & Phelps

HEARD : **APRIL 23, 2013**

DECIDED: **APRIL 23, 2013**

REASONS: **APRIL 30, 2013**

ENDORSEMENT

[1] SkyLink Aviation Inc. ("SkyLink Aviation", the "Company" or the "Applicant"), seeks an Order (the "Sanction Order"), among other things:

(a) sanctioning SkyLink Aviation's Plan of Compromise and Arrangement dated April 18, 2013 (as it may be amended in accordance with its terms, the "Plan") pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA");

(b) declaring that the New Shareholders Agreement is effective and binding on all holders of New Common Shares and any Persons entitled to receive New Common Shares pursuant to the Plan; and

(c) extending the Stay Period, as defined in the Initial Order of this Court granted March 8, 2013 (the "Initial Order").

[2] No party opposed the requested relief.

[3] Counsel to the Company submits that the Plan has strong support from the creditors and achieves the Company's goal of a going-concern recapitalization transaction (the "Recapitalization") that minimizes any impact on operations and maximizes value for the Company's stakeholders.

[4] Counsel further submits that the Plan is fair and reasonable and offers a greater benefit to the Company's stakeholders than other restructuring or sale alternatives. The Plan has been approved by the Affected Creditors with 95.3% in number representing 93.6% in value of the Affected Unsecured Creditors Class and 97.1% in number representing 99.99% in value of the Secured Noteholders Class voting in favour of the Plan (inclusive of Voting Claims and Disputed Voting Claims).

[5] The request for court approval is supported by the Initial Consenting Noteholders, the First Lien Lenders and the Monitor.

THE FACTS

[6] SkyLink Aviation, together with the SkyLink Subsidiaries (as defined in the Affidavit of Jan Ottens sworn April 21, 2013) (collectively, "SkyLink"), is a leading provider of global aviation transportation and logistics services, primarily fixed-wing and rotary-wing air transport and related activities (the "SkyLink Business").

[7] SkyLink is responsible for providing non-combat life-supporting functions to both its own personnel and those of its suppliers and clients in high-risk conflict zones.

[8] SkyLink Aviation experienced financial challenges that necessitated a recapitalization of the Company under the CCAA. On March 8, 2013, the Company sought protection from its creditors under the CCAA and obtained the Initial Order which appointed Duff & Phelps Canada Restructuring Inc. as the monitor of the Applicant in this CCAA Proceeding (the "Monitor").

[9] The primary purpose of the CCAA Proceeding is to expeditiously implement the Recapitalization. The Recapitalization involves: (i) the refinancing of the Company's first lien debt; (ii) the cancellation of the Secured Notes in exchange for the issuance by the Company of consideration that includes new common shares and new debt; and (iii) the compromise of certain unsecured liabilities, including the portion of the Noteholders' claim that is treated as unsecured under the Plan.

[10] On March 8, 2013, I granted the Claims Procedure Order approving the Claims Procedure to ascertain all of the claims against the Company and its directors and officers.

SkyLink Aviation, with the assistance of the Monitor, carried out the Claims Procedure in accordance with the terms of the Claims Procedure Order.

[11] Pursuant to the Claims Procedure Order, the Secured Noteholders Allowed Claim, was determined by the Applicant, with the consent of the Monitor and the Majority Initial Consenting Noteholders, to be approximately $123.4 million.

[12] The Secured Noteholders Allowed Claim was allowed for both voting and distribution purposes against the Applicant as follows:

(a) $28.5 million, as agreed among the Applicant, the Monitor and the Majority Initial Consenting Noteholders, was allowed as secured Claims against the Applicant (collectively the "Secured Noteholders Allowed Secured Claim"); and

(b) $94.9 million, the balance of the Secured Noteholders Allowed Claim, was allowed as an unsecured Claim against the Applicant (collectively the "Secured Noteholders Allowed Unsecured Claim").

[13] The value of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range set out in the valuation dated March 7, 2013 (the "Valuation") prepared by Duff & Phelps Canada Limited.

[14] The Claims Procedure resulted in $133.7 million in Affected Unsecured Claims, consisting of the Secured Noteholders Allowed Unsecured Claim of $94.9 million and other unsecured Claims of $38.8 million, being filed against the Company.

[15] In addition, ten claims were filed against the Directors and Officers totalling approximately $21 million. Approximately $13 million of these claims were also filed against the Company.

[16] Following the commencement of these proceedings, SkyLink Aviation entered into discussions with certain creditors in an effort to consensually resolve the Affected Unsecured Claims and Director/Officer Claims asserted by them. These negotiations, and the settlement agreements ultimately reached with these creditors, resulted in amendments to the original version of the Plan filed on March 8, 2013 (the "Original Plan").

PURPOSE AND EFFECT OF THE PLAN

[17] In developing the Plan, counsel submits that the Company sought to, among other things: (i) ensure a going-concern result for the SkyLink Business; (ii) minimize any impact on operations; (iii) maximize value for the Company's stakeholders; and (iv) achieve a fair and reasonable balance among its Affected Creditors.

[18] The Plan provides for a full and final release and discharge of the Affected Claims and Released Claims, a settlement of, and consideration for, all Allowed Affected Claims and a recapitalization of the Applicant.

[19] Unaffected Creditors will not be affected by the Plan (subject to recovery in respect of Insured Claims being limited to the proceeds of applicable Insurance Policies) and will not receive any consideration or distributions under the Plan in respect of their Unaffected Claims (except to the extent their Unaffected Claims are paid in full on the Plan Implementation Date in accordance with the express terms of the Plan).

[20] Equity Claims and Equity Interests will be extinguished under the Plan and any Equity Claimants will not receive any consideration or distributions under the Plan.

[21] The Plan provides for the release of a number of parties (the "Released Parties"), including SkyLink Aviation, the Released Directors/Officers, the Released Shareholders, the SkyLink Subsidiaries and the directors and officers of the SkyLink Subsidiaries in respect of Claims relating to SkyLink Aviation, Director/Officer Claims and any claims arising from or connected to the Plan, the Recapitalization, the CCAA proceedings or other related matters. These releases were negotiated as part of the overall framework of compromises in the Plan, and such releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization.

[22] The Plan does not release: (i) the right to enforce SkyLink Aviation's obligations under the Plan; (ii) any Released Party from fraud or wilful misconduct; (iii) SkyLink Aviation from any Claim that is not permitted to be released pursuant to Section 19(2) of the CCAA; or (iv) any Director or Officer from any Director/Officer Claim that is not permitted to be released pursuant to Section 5.1(2) of the CCAA. Further, as noted above, the Plan does not release Director/Officer Wages Claims or Insured Claims, provided that any recourse in respect of such claims is limited to proceeds, if any, of the applicable Insurance Policies.

MEETINGS OF CREDITORS

[23] At the Meetings, the resolution to approve the Plan was passed by the required majorities in both classes of creditors. Specifically, the Affected Creditors approved the Plan by the following majorities:

(a) Affected Unsecured Creditors Class:

95.3% in number and 93.6% in value (inclusive of Voting Claims and Disputed Voting Claims);

97.4% in number and 99.9% in value (Voting Claims only); and

(b) Secured Noteholders Class:

97.1% in number and 99.99% in value.

[24] Counsel to the Company submits that the results of the vote taken in the Affected Unsecured Creditors Class would not change materially based on the inclusion or exclusion of the Disputed Voting Claims as the required majorities for approval of the Plan under the CCAA

would be achieved regardless of whether the Disputed Voting Claims are included in the voting results.

[25] Counsel for the Company submits that the Plan provides that the shareholders agreement among the existing shareholders of SkyLink Aviation will be terminated on the Plan Implementation Date. A new shareholders agreement (the "New Shareholders' Agreement"), which is to apply in respect of the holders of the New Common Shares as of the Plan Implementation Date, has been negotiated between and among: (i) the Initial Consenting Noteholders (and each of their independent counsel), who will collectively hold more than 90% of the New Common Shares; and (ii) counsel to the Note Indenture Trustee, who acted as a representative for the interests of the post-Recapitalization minority shareholders.

REQUIREMENTS FOR APPROVAL

[26] The general requirements for court approval of a CCAA plan are well established:

(a) there must be strict compliance with all statutory requirements;

(b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA; and

(c) the plan must be fair and reasonable.

Olympia & York Developments Ltd. v Royal Trust Co., 17 C.B.R. (3d) 1 (Ont. Sup. Ct. J. (Gen Div)).

Canadian Airlines Corp., Re, 2000 ABQB 442, at para 60, leave to appeal refused 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal refused [2001] SCCA No 60.

[27] Since the commencement of the CCAA Proceeding, I am satisfied that SkyLink Aviation has complied with the procedural requirements of the CCAA, the Initial Order and all other Orders granted by the Court during the CCAA Proceeding.

[28] With respect to the second part of the test I am satisfied that throughout the course of the CCAA Proceeding, SkyLink Aviation has acted in good faith and with due diligence and has complied with the requirements of the CCAA and the Orders of this Honourable Court.

[29] Counsel to SkyLink submits that the Plan is fair and reasonable for a number of reasons including:

(a) the Plan represents a compromise among the Applicant and the Affected Creditors resulting from dialogue and negotiations among the Company and its creditors, with the support of the Monitor and its counsel;

(b) the classification of the Company's creditors into two Voting Classes, the Secured Noteholders Class and the Affected Unsecured Creditors Class, was approved by this Court pursuant to the Meetings Order. This classification was not opposed at the hearing to approve the Meetings Order or thereafter at the comeback hearing;

(c) the amount of the Secured Noteholders Allowed Secured Claim is consistent with the enterprise value range provided for in the Valuation and is supported by the Monitor;

(d) the Affected Creditors voted to approve the Plan at the Meetings;

(e) the Plan is economically feasible;

(f) the Plan provides for the continued operation of the world-wide business of SkyLink with no disruption to customers and provides for an expedient recapitalization of the Company's balance sheet, thereby preserving the going-concern value of the SkyLink Business;

I accept these submissions and conclude that the Plan is fair and reasonable.

[30] In considering the appropriateness of the terms and scope of third party releases, the courts will take into account the particular circumstances of a case and the purpose of the CCAA:

> The concept that has been accepted is that the Court does have jurisdiction, taking into account the nature and purpose of the CCAA, to sanction the release of third parties where the factual circumstances are deemed appropriate for the success of a Plan.
>
> *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*. (2008), 43 CBR (5th) 269, (Ont. Sup. Ct. J. [Commercial List]); affirmed 2008 ONCA 587 leave to appeal refused (2008), 257 OAC 400 (SCC).

[31] Counsel to the Company submits that the third party releases provided under the Plan protect the Released Parties from potential claims relating to the Applicant based on conduct taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan. The Plan does not release any Released Party for fraud or wilful misconduct.

[32] Counsel to the Company submits the releases provided in the Plan were negotiated as part of the overall framework of compromises in the Plan, and these releases are necessary to and facilitate the successful completion of the Plan and the Recapitalization and that there is a reasonable connection between the releases contemplated by the Plan and the restructuring to be achieved by the Plan to warrant inclusion of such releases in the Plan.

[33] I am satisfied that the releases of the Released Directors/Officers and the Released Shareholders contained in the Plan are appropriate in the circumstances for a number of reasons including:

(a) the releases of the Released Directors/Officers and the Released Shareholders were negotiated as part of the overall framework of compromises in the Plan;

(b) the Released Directors/Officers consist of parties who, in the absence of the Plan releases, would have Claims for indemnification against SkyLink Aviation;

(c) the inclusion of certain parties among the Released Directors/Officers and the Released Shareholders was an essential component of the settlement of several Claims and Director/Officer Claims;

(d) full disclosure of the releases was made to creditors in the Initial Affidavit, the Plan, the Information Statement, the Monitor's Second Report and the Ottens' Affidavit;

(e) the Monitor considers the scope of the releases contained in the Plan to be reasonable in the circumstances.

[34] I am satisfied that the Plan represents a compromise that balances the rights and interests of the Company's stakeholders and the releases provided for in the Plan are integral to the framework of compromises in the Plan.

SEALING THE CONFIDENTIAL APPENDIX

[35] The Applicant also requests that an order to seal the confidential appendix to the Monitor's Third Report (the "Confidential Appendix"), which outlines the Monitor's analysis and conclusions with respect to the amount of the Secured Noteholders Allowed Secured Claim.

[36] The Confidential Appendix contains sensitive commercial information, the disclosure of which could be harmful to stakeholders. Accordingly, I am satisfied that the test set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, 2 SCR 522 (WL Can) at para. 53 has been met and the Confidential Appendix should be sealed.

EXTENSION OF STAY PERIOD

[37] The Applicant also requests an extension of the Stay Period until May 31, 2013.

[38] I am satisfied that the Company has acted and, is acting, in good faith and with due diligence such that the extension request is justified and is granted.

MORAWETZ J.

Date: April 30, 2013

TAB 17

In the Court of Appeal of Alberta

Citation: Third Eye Capital v B.E.S.T. Active 365 Fund, 2020 ABCA 160

Date: 20200427
Docket: 2001-0077-AC
and 2001-0078-AC
Registry: Calgary

Between:

Action No. 2001-0077-AC

Third Eye Capital Corporation

Applicant

- and -

**B.E.S.T. Active 365 Fund LP, B.E.S.T. Total Return Fund Inc.
and Tier One Capital Limited Partnership**

Respondents

- and -

**ACCEL Energy Canada Limited
and ACCEL Canada Holdings Limited**

Respondents

And:

Action No. 2001-0078-AC

**B.E.S.T. Active 365 Fund LP, B.E.S.T. Total Return Fund Inc.
and Tier One Capital Limited Partnership**

Applicant

- and -

Third Eye Capital Corporation

Respondent

- and –

ACCEL Energy Canada Limited
and ACCEL Canada Holdings Limited

Respondents

Reasons for Decision of
The Honourable Madam Justice Elizabeth Hughes

Application for Permission to Appeal

Reasons for Decision of
The Honourable Madam Justice Elizabeth Hughes

The Court:

[1] The applicants, Third Eye Capital Corporation (TEC) and B.E.S.T. Active 365 Fund LP, B.E.S.T. Total Return Fund Inc. and Tier One Capital Limited Partnership (collectively, BEST), each apply pursuant to s 13 of the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA*), for leave to appeal parts of the decision reported at *Accel Canada Holdings Limited (Re),* 2020 ABQB 182. ACCEL Canada Holdings Limited and ACCEL Energy Canada Limited (collectively, the ACCEL Entities) had applied in November, 2019 for an order in the proceedings they had commenced under Part III of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 to continue under the *CCAA.*

[2] The chambers judge had applications from four different stakeholders, referred to as the Gross Overriding Royalty (GOR) applications. The issues included whether the GORs held by BEST were interests in land or contractual security for payment and the priority of the interests held by TEC, BEST, and another party (ARC Resources Ltd., not a party to these applications). Determining these priorities required interpretation of the *Law of Property Act*, RSA 2000, c L-7 (*LPA*), which governs registrations through the Personal Property Registry; and the *Mines and Minerals Act*, RSA 2000, c M-17 (*MMA*), which governs registration of security interests in Crown mineral leases through the registry operated by Alberta Energy.

[3] The facts are well-canvassed in the chambers judge's decision. I summarize only the facts required for the applications for leave to appeal.

[4] TEC is the largest secured creditor of the ACCEL Entities, having loaned them over $300 million. TEC was granted, and has registered, security interests against the ACCEL Entities' personal and real property in the Personal Property Registry. TEC also registered security notices against the ACCEL Entities' interests in Crown mineral leases with Alberta Energy.

[5] In 2018 BEST entered into Gross Overriding Royalty Agreements (the BEST GORs) with the ACCEL Entities and registered security notices against those entities' working interests in certain Crown mineral leases with Alberta Energy. The total purchase price of the BEST GORs was $8 million. Prior to these transactions, BEST had obtained a Personal Property Registry search disclosing TEC's pre-existing security interests.

[6] The chambers judge found TEC and BEST each hold multiple first in time registrations at Alberta Energy regarding the ACCEL Entities' Crown mineral leases, while TEC has first in time registrations at the Personal Property Registry against the ACCEL Entities for land charges relative to BEST and ARC Resources Ltd.

[7] The chambers judge made two findings that are the subject matter of the applications for leave to appeal. The first finding is that the BEST GORs were security interests and not interests in land. That finding is the subject of BEST's leave to appeal application. The second finding is that knowledge is irrelevant to a determination of priority under s 95 of the *MMA*. That finding is the subject of TEC's leave to appeal application.

Test for Leave to Appeal

[8] The test for granting leave under s 13 of the *CCAA* involves a single criterion subsuming four factors. "The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties": *Re Liberty Oil & Gas Ltd*, 2003 ABCA 158 at para 15 and the cases cited therein. The four factors subsumed in that criterion are set out in *Liberty* at para 16:

1. Whether the point on appeal is of significance to the practice;

2. Whether the point raised is of significance to the action itself;

3. Whether the appeal is *prima facie* meritorious, or on the other hand, whether it is frivolous; and

4. Whether the appeal will unduly hinder the progress of the action.

[9] Assessment of these factors requires consideration of the standard of review that would govern the appeal, if leave were granted: *Liberty* at para 20.

[10] In considering the merits of the appeal, a full examination is not necessary – the applicant must only establish they have an arguable case, which is one that is not frivolous: *Kenroc Building Materials Co Ltd v Kerr Interior Systems Ltd*, 2008 ABCA 291 at para 11; *Mudrick Capital Management LP v Lightstream Resources Ltd*, 2016 ABCA 401 at paras 51-52.

[11] In oral argument, the parties focussed their submissions on the first and third factors of *Liberty*. All parties concede the fourth factor is not an issue in that TEC is currently the only bidder for the ACCEL Entities' assets in the *CCAA* proceedings. Thus, any delay that would impact the sale of those assets would prejudice only TEC.

BEST Application for Leave to Appeal

Background

[12] The Monitor and the ACCEL Entities asked the chambers judge to accelerate her determination of these applications to assist in providing certainty to potential purchasers and/or investors respecting the nature of the assets offered for sale.

[13] The ACCEL Entities sought a finding that the BEST GORs are not interests in land but rather security for payment or performance and, therefore, do not run with the land. TEC supported ACCEL's application. The chambers judge granted ACCEL's application, holding that the BEST

GORs are security interests and not interests in land. The significance of this finding is that BEST's interest under the GORs are now capable of being extinguished under a vesting order – that is, a purchaser of the lands subject to the GORs could purchase the lands free and clear of the interests created by the GORs.

[14] At paras 13-14, the chambers judge set out the applicable two-part test for determining whether a royalty interest is an interest in land:

> The current leading decision in this area in Canada remains the Supreme Court decision in *Bank of Montreal v Dynex Petroleum Ltd*., 2002 SCC 7. That decision has more recently been the subject of application in similar circumstances to these by the Court of Appeal in Ontario in *Third Eye Capital Corporation v Resources Dianor Inc/Dianor Resources Inc*, 2018 ONCA 253 [*Dianor 2018*]. The *Dianor 2018* decision was itself the subject of discussion and application by this court in *Manitok Energy Inc (Re)*, 2018 ABQB 488.
>
> These cases make it clear and the parties agree the test for determining whether a royalty is an interest in land is whether:
>
> > 1. the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
> >
> > 2. the interest, out of which the royalty is carved, is itself an interest in land.

[15] The parties agreed that part two of the test was met. Thus, the only issue was the application of the first part of the test, which engages the principles of contractual interpretation from *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 and *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157, leave to appeal to SCC refused, 37712 (5 April 2018). The chambers judge gave the following reasons for finding that the BEST GORs were security interests, at paras 86-91:

> As previously stated, in considering the BEST GORs, the real question is whether the transactions granted to BEST an interest in land or a contractual right to a portion of the Petroleum Substances recovered from the land by way of security for the payment to it of a stated amount.
>
> BEST submits that in addition to the clear grant of land language, a take in kind provision in each GOR signifies an interest in land. BEST also indicates other factors that support the creation of an interest in land, including that the BEST GORs provide a right to payment to BEST that is tied to production of the substances; create an interest capable of lasting for the duration of Accel's estate; and prevent Accel from an assignment without BEST's consent, for example.

However, other factors indicate the intention of the parties to create a security interest. The overall aim and essence of the transaction support the creation of a security interest. In fact, BEST acknowledges the intention of the parties to create a security interest by also making the conflicting argument that the BEST GORs are registerable security interests capable of achieving priority over TECs interests.

Further, the BEST GORs create limited, revisionary interests that terminate upon repayment of the Aggregate Proceeds. While Accel requires BEST's permission to assign its interests and obligations under the BEST GORs, Accel is entitled to pool or unitize the lands without express consent of BEST and is not generally limited in its decisions with respect to the substances, including its use of the substances as required for its operations. Finally, no further consideration was provided by BEST to attain an interest in the land beyond the funds provided to Accel which the BEST GORs function to provide repayment for from Accel. There is no further nexus between BEST and Accel's interest in the land.

With respect to BEST's submissions, it is clear that when both sets of agreements and the surrounding circumstances of each transaction are considered, the agreements document a short-term financing agreement secured by a time-limited and extinguishable GOR. This conclusion is supported by the extremely high rate of interest, the demand nature of the repayment terms, and the repurchase amounts being the loan amounts rather than a calculation of the real value of the royalty, which would be tied to the underlying reserves of the land it is granted over.

The BEST GORs are therefore determined to be security interests and not interests in land.

Position of the Parties

[16] BEST asks for leave to appeal on the question of whether the chambers judge erred in finding that the BEST GORs are security interests. BEST alleges that the chambers judge made the following two errors:

1. placing undue emphasis on purported surrounding circumstances and on matters other than the clear wording of the GORs; and

2. implying terms of Royalty Purchase Agreements, entered into at the same time as the BEST GORs, into the GORs.

[17] Both TEC and the ACCEL Entities oppose the application. The ACCEL Entities generally support the arguments made by TEC.

Analysis of BEST Application

1. Whether the point on appeal is of significance to the practice?

[18] BEST argues that this appeal is of significance to the practice because it is the first reported case, of which they are aware, in which a gross overriding royalty agreement was found not to have created an interest in land. They also note that there is limited appellate authority on the topic, as it has been twenty years since the Supreme Court issued its guidance in *Dynex*. In reply, TEC argues that this appeal is not of broader significance to the practice because it concerns a simple exercise of contractual interpretation. TEC argues that the test in *Dynex* is not in dispute, and the principles from *Sattva* are well established.

[19] The BEST GORs are not industry standard contracts – they are unique to the transactions between BEST and the ACCEL Entities. As a result, their interpretation can be of little interest or assistance to other parties, or the oil and gas industry and practice, or insolvency practice in general. BEST does not dispute the principles of contractual interpretation in its proposed appeal. The fact the chambers judge reached her conclusion after applying these established principles to a unique set of facts does not establish broader significance. Her findings are grounded in and limited to the unique factual matrix of the case.

2. Whether the point raised is of significance to the action itself?

[20] BEST argues that if the chambers judge's finding is overturned on appeal, the interests created by the BEST GORs *may* not be capable of being extinguished. TEC argues the same point in support of its argument, that even if this finding is overturned BEST's interests could still be extinguished on other grounds.

[21] There are large sums of money in dispute in this action. However, it is unclear whether success on this issue will provide BEST with the certainty they desire. As a result, this factor does not weigh one way or the other in the test for leave.

3. Whether the appeal is *prima facie* meritorious, or on the other hand, whether it is frivolous?

[22] BEST contends that the chambers judge erred when she allowed the surrounding circumstances to overwhelm the words of the GORs, and also erred when she failed to consider other surrounding circumstances which it says support a finding that the parties intended to create an interest in land. BEST also argues that the chambers judge erred by conflating terms of the Royalty Purchase Agreements with the terms of the BEST GORs.

[23] In reply, TEC argues that BEST merely seeks to reargue the issues that were before the chambers judge without articulating reviewable errors. TEC and the ACCEL Entities also argue the standard of review on appeal – they assert both proposed grounds of appeal are questions of fact or mixed fact and law and therefore the applicable standard is palpable and overriding error, which means that the findings of the chambers judge would be accorded deference on appeal.

[24] I agree with TEC and the ACCEL Entities that the standard of palpable and overriding error would be applicable to both of BEST's proposed grounds of appeal. Both grounds ask this court to review the chambers judge's findings of fact or application of well articulated legal tests to the facts. These acts of contractual interpretation involve issues of mixed fact and law: *Sattva* at para 50. BEST has not pointed to any misstatement of the applicable principles of contractual

interpretation or any misstatement of the test from *Dynex*. In such a situation, the standard of review is stringent: *Housen v Nikolaisen*, 2002 SCC 33 at para 36.

[25] Given the applicable standard, BEST's proposed appeal is not *prima facie* meritorious. The principles the chambers judge applied are well settled, and the factual findings by the chambers judge demonstrate no palpable error. At paras 86-91, the chambers judge considered the facts now argued by BEST: the language of the agreement itself, the surrounding factual circumstances, and the language of related agreements. BEST seeks to reargue the chambers judge's findings on each of these points and therefore BEST fails to meet this part of the test.

[26] Moreover, in *CCAA* proceedings, the court should use its power to grant leave sparingly: *Liberty* at para 20. Chambers judges supervising *CCAA* proceedings are engaged in ongoing management processes "similar to that of a judge making orders during a trial" and so are due considerable deference: *Liberty* at para 20. Deference should be granted to the chambers judge's factual findings and application of the law to those findings.

Conclusion on BEST Application

[27] After weighing the factors, I am not convinced that BEST has established serious and arguable grounds that are of real and significant interest to the parties. Accordingly, BEST's application for leave to appeal is dismissed.

TEC Application for Leave to Appeal

Background

[28] At the chambers hearing the parties agreed on 'the state of registration regarding the Crown mineral leases' but disagreed as to the effect of those registrations in light of when a party acquires knowledge of a pre-existing interest. TEC argued that the *MMA* has a gap in its priority scheme: it is silent on the effect of actual or constructive knowledge of a pre-existing interest on a secured party's right to rely on the priority rules set out in the *MMA* or as to the effect of the principles of the common law or equity regarding notice. BEST argued that there is no legislative gap: since the *MMA* does not mention knowledge, knowledge is irrelevant. BEST's first in time registration is thus determinative of priority.

[29] Section 95(4) deals with the priority of a security notice registered under the *MMA* and provides:

> (4) A security interest in respect of which a security notice is registered has priority
>
> > (a) over any other security interest acquired before the registration of that security notice unless a security notice in respect of that other security interest is registered before the registration of the first‑mentioned security notice,

> (b) over any transfer acquired before the registration of that security notice unless that transfer is registered before the registration of that security notice,
>
> (c) over any builder's lien acquired before the registration of that security notice unless that builder's lien is registered before the registration of that security notice, and
>
> (d) over any interest, right or charge acquired after the registration of that security notice.

[30] The chambers judge rejected TEC's argument and concluded that knowledge was irrelevant when determining priority under the *MMA*, at paras 135-136:

> Registration systems provide commercial certainty. The registration schemes in the *LPA* and *MMA* establish priority for security interests based on registration. It is neither necessary nor would it provide certainty to commercial parties to create additional obligations beyond those contemplated within the statutory regimes, such as by limiting that priority system based on knowledge or preventing a party from providing funding in exchange for a security interest based on *nemo dat*.
>
> Accordingly, the statutory registration schemes, as established in the *LPA* with regard to the freehold leases and the *MMA* with regard to the Crown mineral leases, apply to determine which interests are first in time as between TEC and the BEST GORs. Therefore, priority with respect to the BEST and TEC interests is also governed by date of registration for the security interests at issue. The Crown mineral leases have priority based on date of registration under the *MMA*, and any remaining leases have priority based on registration under the *PPR*.

Position of the Parties

[31] TEC asks for leave to appeal on two questions:

> 1. whether the chambers judge erred in law in concluding that knowledge of pre-existing security interests is irrelevant to priorities under s 95 of the *Mines and Minerals Act*; and
>
> 2. whether the chambers judge erred in failing to address the evidence or make a finding on BEST's knowledge of TEC's pre-existing interests in ACCEL's property?

[32] BEST opposes TEC's application on the grounds that the point on appeal is of no significance to the practice and that the appeal is frivolous. The ACCEL Entities take no position.

Analysis

1. Whether the point on appeal is of significance to the practice?

[33] TEC argues that there is no appellate authority on the point in issue. TEC argues that a determination of this point will have a significant impact on the insolvency practice in Alberta as well as on the oil and gas industry and practice. In reply, BEST argues that the law is clear on the issue of priorities filed under the *MMA* and thus there is nothing of significance to be decided. BEST argues that there is no appellate authority on the issue because there is no controversy: s 95 of the *MMA* has been in force for decades and the law is clear that priority is determined by first in time registration. BEST also argues that this is a unique factual situation that is unlikely to arise again in the future.

[34] A clear understanding of the priority scheme under the *MMA* is important for commercial certainty in the oil and gas industry and practice, and insolvency practice. The lack of appellate authority on the role of knowledge in this priority scheme is, in my view, important. A judgment from this Court on the topic would be of assistance to more than just the parties to the proposed appeal. This factor therefore weighs in favour of granting TEC's application for leave.

2. Whether the point raised is of significance to the action itself?

[35] TEC's proposed appeal is significant to the action itself. TEC argues that the chambers judge's alleged errors determined the relative priority of two major creditors of the ACCEL Entities and put $8 million, with interest still accruing, in dispute. BEST made no submissions on this point.

3. Whether the appeal is *prima facie* meritorious, or on the other hand, whether it is frivolous?

[36] TEC argues that the meaning of s 95 of the *MMA* is an issue of statutory interpretation reviewed for correctness. This issue does not engage the chambers judge's exercise of discretion or findings of fact and therefore this factor weighs in favour of granting leave. TEC concedes that the second issue raised on appeal (whether the chambers judge erred in failing to address the evidence or make a finding on BEST's knowledge of TEC's pre-existing interests) is a question of fact, but argues that this Court will have all of the evidence before it and can make a finding of fact rather than send the matter back to the chambers judge.

[37] The real question is whether the *MMA* is a complete code. TEC argues that it is not. BEST argues that it is. Both parties rely on principles of statutory interpretation to advance their argument. Neither party points to any case authority that is directly on point.

[38] TEC's first proposed ground of appeal is a question of statutory interpretation, which is a question of law reviewable on the correctness standard: *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 33; *Housen* at paras 8-9. On that standard, the ground is *prima facie* meritorious or not frivolous. TEC proposes an interpretation of s 95 of the *MMA* that is arguable. Given that interpretation, TEC "is able to identify a pathway to success," which weighs in favour of granting leave to appeal: *Kerr Interior* at para 11.

[39] TEC's second proposed ground of appeal is a question of fact and would be subject to a standard of palpable and overriding error. However, it follows from the first ground. If a panel of this Court were to find the chambers judge did not err in her interpretation of the *MMA*, the panel may not need to consider the second ground. Conversely, if this court were to find that the chambers judge did err in statutory interpretation, it will be open to the panel to determine the appropriate remedy on the second ground.

Conclusion on TEC Application

[40] Given the significance of the priority scheme in the *MMA* and that TEC's arguments on the interpretation of that scheme are not frivolous, TEC's question of statutory interpretation is serious and arguable and of real and significant interest to the parties. Its second proposed ground of appeal follows from the first. TEC's application for leave to appeal is therefore granted.

Conclusion

[41] In summary, BEST's application for leave to appeal is denied. TEC is granted leave to appeal on the following two questions:

1. whether the chambers judge erred in law in concluding that knowledge of pre-existing security interests is irrelevant to priorities under s 95 of the *Mines and Minerals Act*; and

2. whether the chambers judge erred in failing to address the evidence or make a finding on BEST's knowledge of TEC's pre-existing interests in ACCEL's property?

Application heard on April 16, 2020

Reasons filed at Calgary, Alberta
this 27th day of April, 2020

Hughes J.A.

Appearances:

A.E.Teasdale/ I. Rosu

for Third Eye Capital Corporation the Applicant on 2001-0077AC and Respondent on 2001-0078 AC (via Webex)

J.L. Oliver

for B.E.S.T. Active 365 Fund LP and others the Respondent on 2001-0077AC and Applicant on 2001-0078-AC (via Webex)

T.J. Coates, QC/J.H. Selnes

for ACCEL Canada Holding Limited and others the Respondent on 2001-0077AC and on 2001-0078AC (via Webex)

TAB 18

COURT OF APPEAL FOR ONTARIO

CITATION: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508
DATE: 20190619
DOCKET: C62925

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

Peter L. Roy and Sean Grayson, for the appellant 2350614 Ontario Inc.

Shara Roy and Nilou Nezhat, for the respondent Third Eye Capital Corporation

Stuart Brotman and Dylan Chochla, for the receiver of the respondent Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for the monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Steven J. Weisz, for the intervener Insolvency Institute of Canada

Heard: September 17, 2018

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated October 5, 2016, with reasons reported at 2016 ONSC 6086, 41 C.B.R. (6th) 320.

Pepall J.A.:

Introduction

[1] There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

[2] These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc*., 2018 ONCA 253, 141 O.R. (3d) 192 ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

[3] The facts underlying this appeal may be briefly outlined.

[4] On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

[5] Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter.[1] The

[1] The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. (“Algoma”). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

[6] Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. (“177 Co.”), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in

addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.[2]

[7] Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

[8] On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

[9] The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement

[2] The ownership of the surface rights is not in issue in this appeal.

contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[10] On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

[11] The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

[12] On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic … why the jurisdiction would not be the

same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value.[3]

[13] Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

[14] For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the

[3] Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

[15] On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that “an appeal is under consideration” and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.’s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period “is what it is” but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same

day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

[16] On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

[17] Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

[18] On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

> (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;

(2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and

(3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

[19] The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

[20] The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109, at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189. It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish

the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

[21] In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

[22] The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

[23] The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

[24] The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

[25] To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4

Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

[26] A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

[27] The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement …
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations ... The vesting order is the holy grail sought by every

> purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

[28] The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious

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[4] To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L§21, said:

> A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

[29] In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

[30] As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

[31] Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Century Services Inc. v. Canada (Attorney General)***,** 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters"' in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-

> inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

[32] Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141,

at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

[33] This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

[34] The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property.[5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), at para. 281, leave

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[5] Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

to appeal refused, [2001] S.C.C.A. No. 63, the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

[35] Blair J.A. elaborated on the nature of vesting orders in *Re Regal Constellation Hotel Ltd.* (2004), 71 O.R. (3d) 355 (C.A.), at para. 33:

> A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

[36] Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 388, involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a

maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

[37] The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

[38] It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

[39] Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

[40] In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

[41] This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

[42] This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

[43] The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand

the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

[44] Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

[45] Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable.

[46] "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> > (a) is appointed under subsection (1); or
> >
> > (b) is appointed to take or takes possession or control – of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt – under
> >
> > > (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
> > >
> > > (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver – manager. [Emphasis in original.]

[47] *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a

regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

[48] The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

[49] In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

> 47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.

[50] The language of this subsection is similar to that now found in s. 243(1).

[51] Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

[52] Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh***,** *Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Ct. (Gen. Div.)), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver … to … take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of

> insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Re Loewen Group Inc.* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.)[6].

[53] Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

[54] In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and

[6] This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Re Big Sky Living Inc.*, 2002 ABQB 659, 318 A.R. 165, at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report").[7]

[55] Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009.[8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

[56] Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament

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[7] This 10 day notice period was introduced following the Supreme Court's decision in *R.E. Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

[8] *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act*, *the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable. [Emphasis added.]

[57] When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140: "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

[58] Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

[59] However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

[60] In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[61] The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

[62] Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language “take any other action that the court considers advisable”.

[63] This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

[64] In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est*

exclusio alterius) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

[65] However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis … is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47, at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R*., 2011 SCC 63, [2011] 3 S.C.R. 721, at paras. 110-111.

[66] The Supreme Court noted in *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt … has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader

> than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the … provisions without regard to their underlying rationale.

[67] Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

[68] In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

[69] Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

[70] These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

[71] In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do

not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 – Jurisdiction to Grant a Sales Approval and Vesting Order

[72] This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

[73] The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, "the essence of a

receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

[74] This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), aff'd (2000), 47 O.R. (3d) 234 (C.A.).

[75] Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that has not yet been sold or realized" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

[76] It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

[77] Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

[78] I should first indicate that the case law on vesting orders in the insolvency context is limited. In *Re New Skeena Forest Products Inc*., 2005 BCCA 154, 9 C.B.R. (5th) 267, the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Re Loewen Group Inc.,* Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the

basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.,* 2014 NSSC 420, 353 N.S.R. (2d) 194 stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

[79] In *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323, the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: “It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge.” Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or ‘real rights’, it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

[80] The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does

not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver – which did not hold the title – is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

[81] The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets

do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

[82] As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

[83] The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

[84] If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

[85] In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an

agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

[86] Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency – it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

[87] In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

[88] This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of

encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

[89] G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at §34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

[90] The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

[91] That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

[92] This takes me to the next issue – the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

[93] Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Ct. (Gen. Div.)), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

[94] In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

[95] As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

[96] In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

[97] Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union v. 984 Bay Street Inc*., [2005] O.J. No. 3707 (S.C.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was

appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc*., [2006] O.J. No. 1726 (C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union v. 984 Bay Street Inc*., [2006] O.J. No. 3169 (S.C.).

[98] An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

[99] The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and

sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

[100] He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.[9]

[101] As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have

[9] This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corporation v. Woods Property Development Inc*., 2011 ONCA 817, 286 O.A.C. 189.

considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

[102] In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

[103] First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

[104] For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

[105] Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an

ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

[106] Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: "Vesting Orders Part 2", at pp. 60, 65.

[107] The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Funds Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067*

Ontario Ltd. (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

[108] The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

[109] Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

[110] If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the

proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

[111] Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

[112] While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, at para. 2 is instructive:

> … [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest.

> A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

[113] Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

[114] The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

[115] Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

[116] Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

[117] 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

[118] Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

[119] Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-

appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

[120] There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

[121] The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

[122] Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

[123] In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

[124] Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

[125] The 10 days runs from the day the order or decision was rendered: *Moss (Bankrupt), Re* (1999), 138 Man. R. (2d) 318 (C.A., in Chambers), at para. 2; *Re Koska*, 2002 ABCA 138, 303 A.R. 230, at para. 16; *CWB Maxium Financial Inc. v. 6934235 Manitoba Ltd. (c.o.b. White Cross Pharmacy Wolseley)*, 2019 MBCA 28 (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order or decision" (emphasis added). If an

entered and issued order were required, there would be no need for this distinction.[10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Re Koska*, at para. 16.

[126] Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. SICA Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers), at para. 36 and *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 1), until recently, no Ontario case had directly addressed this point.

[127] Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Re Solloway Mills & Co. Ltd., In Liquidation, Ex Parte I.W.C. Solloway*

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[10] *Ontario Wealth Managements Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Re Smoke* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

(1934), [1935] O.R. 37 (C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 16.

[128] In *Business Development Bank of Canada v. Astoria Organic Matters Ltd*., 2019 ONCA 269, Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

[129] Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order.

The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

[130] Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

[131] Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

[132] The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

[133] Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

[134] 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

[135] Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the

Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

[136] The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

[137] Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic … why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5,

2016 and did nothing that suggested any intention to appeal until about three weeks later.

[138] As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

[139] For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

[140] Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

[141] As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

[142] The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time …
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:

> (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
>
> (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
>
> (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
>
> (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed…;
>
> (5) The respondent will not be prejudiced by extending the time;
>
> (6) There is an arguable ground or grounds of appeal;
>
> (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

[143] These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distributions Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (in Chambers), at para. 15.

[144] There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it

was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a

bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

[145] I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

[146] While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not

exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

[147] In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

[148] For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the

release of these reasons and the other parties to reply if necessary within 10 days thereafter.

Released: “SEP” JUN 19, 2019

“S.E. Pepall J.A.”
“I agree. P. Lauwers J.A.”
“I agree. Grant Huscroft J.A.”

TAB 19

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to September 22, 2021

Last amended on November 1, 2019

À jour au 22 septembre 2021

Dernière modification le 1 novembre 2019

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to September 22, 2021. The last amendments came into force on November 1, 2019. Any amendments that were not in force as of September 22, 2021 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 22 septembre 2021. Les dernières modifications sont entrées en vigueur le 1 novembre 2019. Toutes modifications qui n'étaient pas en vigueur au 22 septembre 2021 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

Restriction on disposition of business assets

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other

Restriction à la disposition d'actifs

36 (1) Il est interdit à la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Avis aux créanciers

(2) La compagnie qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Facteurs à prendre en considération

(3) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du contrôleur au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Autres facteurs

(4) Si la compagnie projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la compagnie;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de

offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Restriction — intellectual property

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269.

toute autre offre reçue dans le cadre du projet de disposition.

Personnes liées

(5) Pour l'application du paragraphe (4), les personnes ci-après sont considérées comme liées à la compagnie :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

Autorisation de disposer des actifs en les libérant de restrictions

(6) Le tribunal peut autoriser la disposition d'actifs de la compagnie, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

Restriction à l'égard des employeurs

(7) Il ne peut autoriser la disposition que s'il est convaincu que la compagnie est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 6(5)a) et (6)a) s'il avait homologué la transaction ou l'arrangement.

Restriction à l'égard de la propriété intellectuelle

(8) Si, à la date à laquelle une ordonnance est rendue à son égard sous le régime de la présente loi, la compagnie est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (6), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 131; 2007, ch. 36, art. 78; 2017, ch. 26, art. 14; 2018, ch. 27, art. 269.