

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
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  
INDALEX LIMITED,  
INDALEX HOLDINGS (B.C.) LTD.,  
6326765 CANADA INC. and  
NOVAR INC.**

**Applicants**

**REPLY BOOK OF AUTHORITIES OF GEORGE L. MILLER,  
THE CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATES  
OF THE US INDALEX DEBTORS**  
(Monitor's motion for advice and directions returnable July 24, 2013)

**CHAITONS LLP**  
5000 Yonge Street, 10<sup>th</sup> Floor  
Toronto, Ontario M2N 7E9

**Harvey Chaiton**  
Tel: 416-218-1129  
Fax: 416-218-1849  
Email: harvey@chaitons.com

**George Benchetrit**  
Tel: 416-218-1141  
Fax: 416-218-1841  
Email: george@chaitons.com

**Lawyers for George L. Miller, the  
Chapter 7 Trustee of the Bankruptcy  
Estates of the US Indalex Debtors**

# INDEX

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**INDEX**

1. *Hogue v. Montreal Trust Co. of Canada*, 1997 CarswellNS 427 (C.A.)
2. *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 CarswellOnt 219 (S.C.C.)
3. *Devon Canada Corp. v. PE-Pittsfield LLC*, 2008 CarswellAlta 1765 (C.A.)
4. *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CarswellAlta 769 (S.C.C.)
5. *Technicore Underground Inc. v. Toronto (City)*, 2012 CarswellOnt 11173 (C.A.)

# TAB 1

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541



1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

Hoque v. Montreal Trust Co. of Canada

Montreal Trust Company of Canada and Gary Graham, Appellants and Khandker Shamsul Hoque, Respondent

Nova Scotia Court of Appeal

Freeman, Roscoe, Cromwell JJ.A.

Judgment: October 27, 1997

Heard: October 2, 1997

Docket: C.A. 137284

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Proceedings: reversing in part (January 20, 1997), Doc. S. H. 108806/94 (N.S.S.C.)

Counsel: *Alan V. Parish, Q.C.* and *Peter Doig*, for the Appellant.

*Raymond F. Wagner*, for the Respondent.

Subject: Contracts; Insolvency

Practice --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles

Respondent trust company foreclosed on mortgages after appellant declared bankruptcy — Bankrupt commenced action against trust company — Trust company unsuccessfully applied to dismiss action on ground of res judicata — Trust company appealed on ground that all issues raised in bankrupt's action could have been determined in foreclosure action and thus action was barred by res judicata — All issues which parties had opportunity to raise and should have raised in main action are barred from further litigation — Once matter has been finally decided, it is not open to reconsideration other than by appeal or other proceedings challenging initial finding — Special circumstances may require flexibility with respect to principles of res judicata in order to prevent injustice — There were several issues in bankrupt's statement of claim that were not related to final order of foreclosure but were distinct causes of action and thus were not barred — Remaining issues were barred because they related to final order of foreclosure — Trust company's appeal was allowed in part.

**Cases considered by *Cromwell, J.A.*:**

*ABN Bank Canada v. NsC Diesel Power Inc.* (1992), 112 N.S.R. (2d) 289, 307 A.P.R. 289 (N.S. C.A.) — considered

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

*Adams-Mood v. Toronto Dominion Bank* (1996), 159 N.S.R. (2d) 150, 468 A.P.R. 150 (N.S. S.C. [In Chambers]) — considered

*Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 74 D.T.C. 6278, 2 N.R. 397 (S.C.C.) — considered

*Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41, [1991] 2 A.C. 93 (U.K. H.L.) — considered

*Bank of British Columbia v. Singh* (1987), 17 B.C.L.R. (2d) 256 (B.C. S.C.) — considered

*Bank of British Columbia v. Singh* (1990), 47 C.P.C. (2d) 187, 51 B.C.L.R. (2d) 273 (B.C. C.A.) — referred to

*Bank of Montreal v. Prescott* (1994), 31 C.P.C. (3d) 373, 51 B.C.A.C. 157, 84 W.A.C. 157, 1 B.C.L.R. (3d) 304 (B.C. C.A.) — referred to

*Bayhold Financial Corp. v. Clarkson Co.* (1990), 99 N.S.R. (2d) 91, 270 A.P.R. 91 (N.S. T.D.) — considered

*Brown v. Marwiesh* (1995), 39 C.P.C. (3d) 372, 145 N.S.R. (2d) 220, 418 A.P.R. 220 (N.S. C.A.) — referred to

*Connelly v. Director of Public Prosecutions*, [1964] A.C. 1254, [1964] 2 All E.R. 401, 48 Cr. App. R. 183 (U.K. H.L.) — considered

*Doering v. Grandview (Town)* (1975), (sub nom. *Grandview (Town) v. Doering*) [1976] 2 S.C.R. 621, (sub nom. *Grandview (Town) v. Doering*) [1976] 1 W.W.R. 388, (sub nom. *Grandview (Town) v. Doering*) 61 D.L.R. (3d) 455, 7 N.R. 299 (S.C.C.) — considered

*Fenerty v. Halifax (City)* (1920), 53 N.S.R. 457, 50 D.L.R. 435 (N.S. C.A.) — considered

*Hall v. Hall* (1958), 15 D.L.R. (2d) 638 (Alta. C.A.) — considered

*Henderson v. Henderson*, [1843] All E.R. Rep. 378 (Eng. V.-C.) — considered

*Malik v. Principal Savings & Trust Co.* (1985), 63 A.R. 109 (Alta. Q.B.) — considered

*Miscouche Sales & Service Ltd. v. Massey Ferguson Industries Ltd.*, 12 C.P.C. (3d) 63, 105 Nfld. & P.E.I.R. 91, 331 A.P.R. 91, [1992] 2 P.E.I.R. D44 (P.E.I. T.D.) — considered

*Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C. C.A.) — considered

*New Brunswick Railway v. British & French Trust Corp.* (1938), [1939] A.C. 1, [1938] All E.R. 747 (U.K. H.L.) — considered

*Ranch des Prairies Ltée (Prairie Ranch Ltd.) v. Bank of Montreal* (February 3, 1987), Kroft J. (Man. Q.B.) — considered

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

*Ranch des Prairies Ltée (Prairie Ranch Ltd.) v. Bank of Montreal* (1988), 53 Man. R. (2d) 308, (sub nom. *Ranch des Prairies Ltée v. Bank of Montreal*) 69 C.B.R. (N.S.) 180 (Man. C.A.) — considered

*Yat Tung Investment Co. v. Dao Heng Bank Ltd.*, [1975] A.C. 581, [1975] 2 W.L.R. 690 (Hong Kong P.C.) — considered

*420093 B.C. Ltd. v. Bank of Montreal* (1995), 34 Alta. L.R. (3d) 269, [1996] 1 W.W.R. 561, 174 A.R. 214, 102 W.A.C. 214, 128 D.L.R. (4th) 488 (Alta. C.A.) — considered

#### **Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — referred to

s. 37 — referred to

s. 49 — referred to

#### **Rules considered:**

*Civil Procedure Rules*

R. 14.25(1) — referred to

R. 14.25(1)(b) — referred to

R. 14.25(1)(d) — referred to

R. 25.01 — referred to

R. 62.23(1)(b) — referred to

R. 62.26(2) — referred to

APPEAL by trust company from decision allowing bankrupt's action.

***Cromwell, J.A.:***

#### **I. Overview:**

1 Dr. Hoque and companies controlled by him granted mortgages and entered into related agreements with Montreal Trust. After Dr. Hoque made an assignment in bankruptcy, Montreal Trust commenced action on the mortgages. These actions were not defended and final orders of foreclosure were issued by the Supreme Court.

2 After his discharge from bankruptcy, Dr. Hoque commenced the present action against Montreal Trust and its employee Gary Graham (hereafter referred to collectively as "Montreal Trust") for breach of fiduciary duty, breach of contract, tortious interference with business relations, trespass and conversion. The allegations in this action concern Montreal Trust's dealings with Dr. Hoque in relation to the mortgages and related agreements. In response, Montreal Trust brought an application to dismiss Dr. Hoque's action on the basis that the issues raised

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

in it could have been dealt with in the foreclosure actions. Saunders, J. refused to dismiss Dr. Hoque's action.

3 Montreal Trust now applies for leave to appeal from that decision and, if leave is granted, seeks on appeal an order dismissing Dr. Hoque's action as *res judicata*. The issue in the appeal is whether the final orders of foreclosure bar Dr. Hoque's action.

## II. The Facts:

4 The main argument by Montreal Trust is that all of the issues raised in Dr. Hoque's action could have been determined in the foreclosure actions. It is therefore necessary to review the facts and allegations in detail.

5 Throughout the 1980's, Montreal Trust had various mortgage loans outstanding with Dr. Hoque and companies controlled by him including Nelson's Landing Developments Limited. In 1992, Dr. Hoque experienced difficulties in servicing the mortgages. An agreement was reached to capitalize outstanding arrears, reduce the interest rate under the mortgages and otherwise to vary the previous legal obligations of the parties. This amending agreement, (hereafter "the agreement") was executed on August 4, 1992. Dr. Hoque was represented in the negotiations leading up to this amending agreement by a major Toronto law firm.

6 The terms of this agreement are significant for the legal issues raised on appeal. The most relevant terms may be summarized as follows:

- a. The agreement recites a number of mortgages between Montreal Trust and Dr. Hoque or his companies, assignments of leases and rents as collateral security and personal guarantees by Dr. Hoque of the corporate mortgages. It further recites that the parties (including Dr. Hoque and Montreal Trust) have agreed to restructure the loans extended by the Mortgages and to amend the security held by the Montreal Trust.
- b. With respect to the several mortgages, the agreement provides for the capitalization of arrears and amendment of the interest rate, maturity date and amortization period.
- c. The agreement provides for 6 payments of \$150,000 on a series of dates beginning October 1, 1992 to be applied to outstanding loans.
- d. The agreement provides that "the properties subject to the mortgages shall continue to be maintained, leased and managed in a manner which in the sole opinion of the Mortgagee is consistent with good sound and proper maintenance and management standards..."
- e. Montreal Trust agrees to provide partial releases of the Nelson's Landing Mortgages on certain conditions, one of which is that 50% of the units were presold.

7 Clauses 31 and 32 provide as follows:

**31.** This Agreement may be cancelled by the Mortgagee without liability to the Mortgagee. This Agreement shall not be interpreted or construed in any manner so as to prejudice any of the rights, powers or remedies of the Mortgagee pursuant to the Mortgages and the Mortgagee reserves the right to cancel this Agreement without liability to the Mortgagee if at any time, in the sole discretion of the Mortgagee, there is any material change with respect to Hoque, Nelson's Landing, Properties, Hoque Management or any of the properties which are subject to the Mortgages, or in the event that any of the conditions set forth in this Agreement or the Commitment Letter have not been satisfied or adhered to or in the event of any default on the part of



1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

Hoque or Nelsons Landing under the Mortgages amended hereby.

32. The parties hereto specifically acknowledge and agree that if Hoque and/or Nelsons Landing default in the observance or performance of any of the covenants, terms, provisos or conditions contained in any of the Mortgages, then the full amount of the principal and interest secured by each of the Mortgages herein, with the exception of the Herring Cove Mortgage, shall, at the option of the Mortgagee, forthwith become due and payable and all of the powers of the Mortgagee under each and every one of the Mortgages in the event of default may be exercised. (Emphasis added)

8 In January 1993, Montreal Trust alleged default under this agreement. Dr. Hoque's then counsel responded at length on his behalf. Certain passages of his letter (dated January 12, 1993) are particularly pertinent:

..... Your letter indicates that there has been a default under the Amending Agreement, without providing particulars as to the nature of the default. Based upon our review of the matter with Dr.. Hoque, we think it unlikely that MT could establish a default entitling it to move under its security. ....

Boiling the overall situation down to basics, the issue is really in MT's court. Is MT prepared to allow the fracturing of the mortgage at twenty to twenty-five units sold, so that Dr. Hoque can achieve a paydown of MT and so that the issues with Imperial Oil can be resolved, or not? In the alternative, is MT prepared to waive the extraordinary principal repayment requirements? Obviously, our client requires a clear answer from MT.

9 There was further correspondence later in January and in February, with Montreal Trust specifying the alleged defaults, including failure to make the \$150,000 payment due under the amending agreement on October 1, 1992. Dr. Hoque's then counsel acknowledged at one point that "there may have been technical default" with respect to the October payment but asserted that there were "collateral agreements as to the fracturing of the mortgage on Nelson's Landing and that ... Montreal Trust was intending to forebear with respect to this amount..." In a subsequent letter, Dr. Hoque's then counsel stated that there had been no default and that Montreal Trust's "interference with [Dr. Hoque's] business ... has already and is continuing to cause very substantial damage not only to his reputation as a landlord and as a businessman but also to his ability to recover on his investments."

10 On February 11, 1993, Montreal Trust demanded payment of all outstanding amounts (roughly \$20,000,000) by March 15. In early March, Dr. Hoque made a voluntary assignment under s. 49 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and Coopers & Lybrand Limited was appointed trustee.

11 Montreal Trust commenced foreclosure proceedings in April, 1993. The following is an excerpt from one of the Statements of Claim (that relating to the Oak Street Mortgage) which is typical of the others:

(j) The Mortgagor, Dr. Khandker Shamsul Hoque, Nelson's Landing Developments Limited, the Mortgagee, Montreal Trust Company of Canada, and Nina Naseema Hoque executed an Amending Agreement dated August 4, 1992 and registered at the Registry on August 4, 1992 in Book 4270 at Page 1198 and re-registered at the Registry on September 3, 1992 in Book 5289 at Page 99 (hereinafter referred to as the "Amending Agreement"), under the terms of which the parties thereto agreed inter alia, as follows:

1. To pay to the Mortgagee a minimum of \$150,000.00 no later than on each of the following dates:

October 1, 1992

February 1, 1993

June 1, 1993

October 1, 1993

February 1, 1994

June 5, 1994

which payments would be applied by the Mortgagee against outstanding loans to the Mortgagor and Nelson's Landing Developments Limited;

2. That the principal amount outstanding on the Mortgage be increased to \$5,865,815.34, that the maturity date of the Mortgage be extended to June 5, 1994, that the interest rate be changed to 9.5% per annum calculated half-yearly not in advance, and that the mortgage loan be repaid by blended monthly payments of principal and interest in the sum of \$48,523.00 each commencing July 5, 1992;

3. That if the Mortgagor or Nelson's Landing Developments Limited defaulted in the observance or performance of any of the covenants, terms, provisos or conditions contained in any of the following Mortgages:

(a) a Mortgage from Dr. Khandker Shamsul Hoque in favour of the Plaintiff dated February 24, 1987 and registered at the Registry on February 25, 1987 in Book 4336 at Page 752 (the "Sylvia Avenue Mortgage"); .....

5. Default has been made in the payment of amounts due under the Mortgage .....

7. Default has also been made in the payments due under the terms of the Amending Agreement in that the payments of \$150,000.00 each due on October 1, 1992 and February 1, 1993 were not made when due and remain in arrears as of March 19, 1993.

8. Under the terms of the Mortgage payments being in arrears the whole principal and interest due under the Mortgage has become due and payable. Also, under the terms of the Amending Agreement, default having been made under the Regent Drive Mortgage, Sylvia Avenue Mortgage, 91 Nelson's Mortgage, 61 Nelson's Mortgage and Nelson's Landing Second Mortgage and default having been made in the payments required under the terms of the Amending Agreement the whole principal and interest due under the Mortgage has become due and payable. ....

10. The Plaintiff claims payment of the sum of \$5,914,975.43 with interest at the rate of 9.5% on the sum of \$5,914,975.43 together with interest on arrears at the said rate, from March 19, 1993, until payment together with costs to be taxed, or in default, foreclosure and sale and possession. The Plaintiff also claims all reasonable costs it has incurred or may incur in repairing, maintaining, managing, protecting, securing, appraising, inspecting, leasing and/or insuring the said property subject to the Mortgage from time to time up to and including the date of payment, or foreclosure

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

and sale and possession.

11. The Plaintiff further claims the right to prove its claim in the bankruptcy of Dr. Khandker Shamsul Hoque and to claim against the Defendant, Nelson's Landing Developments Limited under the covenants contained in the Mortgage and in the Amending Agreement for the deficiency in case the sum realized at the sale pursuant to a foreclosure order herein be not sufficient to satisfy the amount due and for such further and other relief as the nature of the case may require and also taxes and taxes costs herein.

12 The trustee was served with notice of these foreclosure actions but did not defend. On May 19, 1993, Goodfellow, J. granted an order for foreclosure, sale and possession in favour of Montreal Trust in each of the foreclosure actions. It is worth noting that Dr. Hoque's possible causes of action against Montreal Trust are not referred to in his statement of affairs as assets of the estate and that, so far as the record discloses, there was no detailed consideration given to them until after the final orders of foreclosure had issued.

13 The matter was discussed by creditors after the foreclosure orders were made. Advice was obtained to the effect that the estate could move to stay the sale under foreclosure or alternatively sue Montreal Trust independently. Advice was also given to the effect that the rights of parties to pursue actions independently continued to exist notwithstanding that an order of foreclosure had already been granted.

14 Subsequent to his discharge, Dr. Hoque sought and received from the inspectors an agreement to assign to Dr. Hoque the estate's rights to all causes of action against secured creditors, including the claim against Montreal Trust. Montreal Trust objected to this agreement and brought an application pursuant to s. 37 of the *Bankruptcy and Insolvency Act* for a declaration that there had been no valid assignment. MacDonald, J. dismissed the application, holding that there was a binding agreement to transfer the causes of action. His decision was upheld on appeal to this Court: (1996), 148 N.S.R. (2d) 142 (N.S. C.A.).

15 In September of 1994, Dr. Hoque commenced action against Montreal Trust. His Statement of Claim was substantially amended in February of 1996 and that is the Statement of Claim before us. It alleges that:

a. "Montreal Trust and Gary Graham commenced in a malicious and calculating manner, a course of action designed to destroy Dr. Hoque and his business empire." (Para 6)

b. the refinancing arrangements set out in the amending agreement were unconscionable and they "radically altered the relationship between Montreal trust and Dr. Hoque from Mortgagee/Mortgagor or Lender/Borrower to a relationship that by its nature created a host of fiduciary relationships." (Paragraph 18) Alternatively, it is alleged that "Montreal Trust became a business partner with Dr. Hoque which raised similar fiduciary duties imposed upon Montreal Trust as a business owner." (Paragraph 18)

c. There were collateral agreements concerning the \$150,000 payments and the partial releases provided for under the Amending Agreement and that these collateral agreements were relied on by Dr. Hoque "such as to create a default when no default in law existed." (Paragraph 22-25)

d. The January 25, 1993 demand was "unconscionable" (paragraph 29-33) and that Montreal Trust's at-tornment of rent was "unlawful and unconscionable" and "for no lawful purpose or right": paragraph

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

(34-35)

e. Montreal Trust improperly disclosed confidential information to third party lenders "which was calculated to cause and did cause others to act precipitously (paragraph 36 and 39(j))

f. Montreal Trust acted in an abusive and disrespectful manner causing financial loss, embarrassment and mental distress. (Paragraphs 39(c) and 44)

g. Montreal Trust acted "in a calculating and conspicuous manner ... so as to intentionally and tortiously interfere with the economic and business relations of Dr. Hoque."(paragraph 42)

h. Montreal Trust's illegal acts caused Dr. Hoque's bankruptcy and loss of everything he had owned apart from a few personal effects (Paragraph 37) and further caused Dr. Hoque to suffer from depression and mental distress (paragraph 38)

i. Montreal Trust committed acts of trespass and conversion in relation to Dr. Hoque's property. (Paragraph 45)

16 Montreal Trust filed a defence and then brought an application before the Chambers judge pursuant to *Civil Procedure Rules 14.25(1)(b)* and *(d)* and *25.01* for an order dismissing the action on the grounds that it is barred by cause of action estoppel or, in the alternative, issue estoppel. The matter was heard over 3 days. The Chambers judge, in a reserved decision of 31 pages, dismissed Montreal Trust's application. Montreal Trust now seeks to appeal to this Court.

### III. The Decision of the Chambers Judge:

17 The Chambers judge had to resolve a number of procedural and evidentiary matters which are no longer in issue. On the question of whether Dr. Hoque's action is barred by *res judicata*, the Chambers judge held that the matters now raised by Dr. Hoque's action constitute defences or a basis for set-off and counterclaim against Montreal Trust in the foreclosure actions and could have been raised therein. However, the learned judge was of the view that the application of *res judicata* is grounded on principles of fairness and public policy and that in the circumstances of the present action, it would be unfair for Dr. Hoque to be denied the opportunity to have his allegations determined on their merits. The Chambers judge put it this way:

The carriage and control of the law suit in the hands of Dr. Hoque was interrupted by the bankruptcy. Mr. Parish emphasizes that the Trustee was very familiar with the matters now raised by Dr. Hoque in his present litigation. But this cuts both ways. Dr. Hoque fulfilled his obligation to be candid with the Trustee. He declared the intended action against his secured creditor(s). The minutes confirm that the Montreal Trust "situation" was reviewed at some length by the Trustee and inspectors. The estate's solicitor Mr. Victor Goldberg was engaged to search the law and prepare an opinion. Based on his assessment Mr. Goldberg opined that any cause of action against Montreal Trust would survive the foreclosure proceeding. ....

Whether Mr. Goldberg was right or wrong in arriving at that conclusion is not for me to decide. The fact is that such an opinion was sought, received and considered. Ultimately the Trustee determined, likely on the basis of simple economics, that it did not wish to become embroiled in litigation between Dr. Hoque and Montreal Trust and chose not to defend the foreclosure actions. However, I conclude that Dr. Hoque always intended to proceed against Montreal Trust insofar as the law and his circumstances would permit. He says

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

that his impecuniosity prevented him from doing anything about the defendants' actions until bringing his own litigation in September, 1994. .... A real question - which can only be decided after a full trial on the merits - is whether the conduct and actions attributed to Montreal Trust led to or aggravated Dr. Hoque's precarious financial situation which then in turn prevented or hampered his mounting a full defence of the applicants' suit against him. ....

It would seem to me to be grossly unfair and unjust if Dr. Hoque were barred from seeking to prove his allegations against Montreal Trust because - as it turned out - he did not have sufficient resources to fully defend the foreclosure actions launched against him, all of that a consequence of the conduct of the same financial institution whose actions he now seeks to challenge.

#### IV. Issue:

18 There is one fundamental issue on this appeal: whether the Chambers judge erred in law in refusing to dismiss Dr. Hoque's action as *res judicata*.

#### V. Analysis:

19 This appeal involves the interplay between two fundamental legal principles: first, that the courts should be reluctant to deprive a litigant of the opportunity to have his or her case adjudicated on the merits; and, second, that a party should not, to use the language of some of the older authorities, be twice vexed for the same cause. Distilled to its simplest form, the issue in this appeal is how these two important principles should be applied to the particular facts of this case.

20 *Res judicata* has two main branches: cause of action estoppel and issue estoppel. They were explained by Dickson, J. (as he then was) in *Angle v. Minister of National Revenue* (1974), 47 D.L.R. (3d) 544 (S.C.C.) at 555:

.... The first, "cause of action estoppel", precludes a person from bringing an action against another when that same cause of action has been determined in earlier proceedings by a Court of competent jurisdiction. .... The second species of estoppel *per rem judicatam* is known as "issue estoppel", a phrase coined by Higgins, J., of the High Court of Australia in *Hoysted et al. v. Federal Commissioner of Taxation* (1921), 29 C.L.R. 537 at pp. 560-1:

I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

bars all of the issues properly belonging to the earlier litigation.

22 It is the second aspect which is relied on by the appellants. Their principal submission is that all matters which *could* have been raised by way of set-off, defence or counterclaim in the foreclosure action cannot now be litigated in Dr. Hoque's present action.

23 *Res judicata* requires that the previous court decision be final and between the same parties or their privies. Both of these requirements are met here. The final orders of foreclosure were not appealed or otherwise challenged. As to privity, it is not argued that there was no privity as between Dr. Hoque and his trustee in bankruptcy who was the named defendant in the foreclosure actions. It is not disputed that all of the claims now asserted by Dr. Hoque vested in his trustee at the time of his assignment in bankruptcy.

24 There are some very wide statements about the scope of cause of action of estoppel. For example, in the seminal case of *Henderson v. Henderson* [1843-60] All E.R. Rep. 378 (Eng. V.-C.), Vice-Chancellor Wigram stated that the plea of *res judicata* ... "applies ... not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to *every point which properly belonged to the subject litigation and which the parties exercising reasonable diligence might have brought forward at the time* ." (at 381-2), (emphasis added). Similarly in *Fenerty v. Halifax (City)* (1920), 50 D.L.R. 435 (N.S. C.A.) Ritchie, J. for the Court said that the plea applies "... not only as to the matter dealt with, *but also as to questions which the parties had an opportunity of raising.*" (at 437), (emphasis added) There are several similarly broad statements in *420093 B.C. Ltd. v. Bank of Montreal* (1995), 128 D.L.R. (4th) 488 (Alta. C.A.) especially at 499-502.

25 The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.

26 I note, for example, that the very broad language of Vice-Chancellor Wigram in *Henderson, supra*, was considered by Lord Devlin in *Connelly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401 (U.K. H.L.). At 445:

*Res judicata* imposes a rigid bar and Wigram, V-C's, principle a flexible one. I prefer the modern development of this principle which justifies it by the power to stop vexatious process. This in my mind is the true principle ... and the one that I think should be applied in the criminal law as it is in the civil. (Emphasis added)

27 The relatively recent decision of the House of Lords in *Arnold v. National Westminster Bank plc*, [1991] 3 All E.R. 41 (U.K. H.L.) supports a more flexible approach. In that case, Lord Keith noted that the often quoted passage from *Henderson v. Henderson, supra*, specifically referred to exceptional "special circumstances" noting that this passage "... appears to have opened the door towards the possibility that cause of action estoppel may not apply in its full rigour where the earlier decision did not in terms decide, because they were not raised, points which might have been vital to the existence or non-existence of a cause of action" (at p. 46). The learned Law Lord also cited, with approval, the following passage from the speech of Lord Kilbrandon in *Yat Tung Investment Co. v. Dao Heng Bank Ltd.*, [1975] A.C. 581 (Hong Kong P.C.) at p. 590:

The shutting out of a "subject of litigation" - a power which no Court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule.

28 Moreover, Lord Keith indicated that cause of action estoppel and issue estoppel are both essentially concerned with preventing abuse of process: at 51-52.

29 I also note that the approach to cause of action estoppel referred to in *Arnold* was cited with apparent approval by this Court in *Brown v. Marwiah* (1995), 145 N.S.R. (2d) 220 (N.S. C.A.) per Bateman J.A. at p. 222.

30 The submission that all claims that *could* have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matters not actually raised and decided, the test appears to me to be that the party *should* have raised the matter and, in deciding whether the party *should* have done so, a number of factors are considered.

31 Some of the cases involve attempts to rely on new evidence to support a claim previously litigated. In such cases, the courts are concerned whether the new evidence could have been available in the first action with reasonable diligence. A leading example is *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621 (S.C.C.). The plaintiff sued unsuccessfully for damages resulting from flooding of his land and crops in the years 1967 and 1968. He then commenced a new action relating to the years 1969-72, alleging that the defendant town had acted to cause the water behind a dam to rise to such high levels that it saturated the plaintiff's land. The differences between the first unsuccessful action and the second were the years complained of and that the second action alleged saturation as a result of water entering an aquifer as opposed to the surface flooding alleged in the first action. Ritchie, J., for 5 members of the Court, held that the second action was barred by the principle of cause of action estoppel. He said: "Nothing had changed between the bringing of the first action and the second one except that the respondent had received advice from a soil expert who expounded the aquifer theory." (At 638) He went on:

It is obvious here that the question of whether or not the water entered the aquifer and thus saturated the respondent's soil was not determined in the 1969 action because it was not raised and it would therefore not be strictly accurate to classify the present case as one of issue estoppel, but I am of the view that it is certainly a case within the principle established in *Henderson v. Henderson, supra*, and the *Phosphate Sewage Co.* case, and it is to be noted that the respondent has not alleged either in his pleadings or his affidavit that he could not by reasonable diligence, have put himself in a position to advance the theory of soil saturation through the aquifer at the time of the first action, nor can it be said that his failure to raise that particular point did not arise "through negligence, inadvertence or even accident." (emphasis added)

32 Some of the cases are concerned with whether the second action alleges a cause of action which is distinct from that asserted in the first action. For example, in *Grandview, supra*, Ritchie J appears to have accepted the general proposition that the principle of cause of action estoppel applies only to matters that arise within one cause of action, but holds that the two actions before him did not give rise to causes of action that were separate and distinct.

33 Another group of cases holds that cause of action estoppel applies where the second action alleges a new legal basis for claims arising out of facts and relationships that have been the subject of the earlier litigation. This is the approach taken by the British Columbia Court of Appeal in *Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C. C.A.) in which the Court found that the dismissal

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

on consent of the first action for damages for breach of contract barred the subsequent action pleaded in breach of fiduciary duty arising out of the same relationship. Davey, CJBC for the Court said:

... it seems to me that the second action involves nothing more than a claim for the same sum of money and arising out of the same relationship and for the same services, but based upon a different legal conception of the relationship between the parties. (at 251) (emphasis added)

34 There are other cases which turn on that principle that all of the matters necessary to the making of a final order may not be challenged except by appeal or other direct review.

35 This principle was stated in *420093 B.C. Ltd. v. Bank of Montreal, supra* at p. 503:

A valid and subsisting order made by a competent court cannot be attacked collaterally. This well-established principle was restated by McIntyre J. In *R. v. Wilson* (1983), 4 D.L.R. (4th) 577, 9 C.C.C. (3d) 97, [1983] 2 S.C.R. 594. After reviewing a number of authorities, he said at p. 597:

It has long been a fundamental rule that a court order made by a court having jurisdiction to make it stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the high court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence. (emphasis added)

36 In the same case, Dickson, J.,(as he then was) said at p. 584:

I accept the general proposition that a court order, once made, cannot be impeached otherwise than by direct attack by appeal, by action to set aside, or by one of the prerogative writs.

37 Other cases turn on abuse of process, which Lord Keith in *Arnold* thought to be the true basis of the rule. These decisions are founded on the conclusion, in light of all the circumstances, that the subsequent litigation is an attempt to use the Court's process "to delay and frustrate the course of justice": *Bank of Montreal v. Prescott* (1994), 1 B.C.L.R. (3d) 304 (B.C. C.A.) .

38 Although many of these authorities cite with approval the broad language of *Henderson v. Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, *should* have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.



1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

39 In the present case, the foreclosure proceedings resulted in a default judgment. It is that default judgment which Montreal Trust submits bars Dr. Hoque's action. There is authority for the view that *res judicata* should be applied in a more limited way when the judgment giving rise to the plea was obtained on default.

40 As Cross and Tapper, *Evidence* (8th, 1995) put it:

Obviously it is desirable to protect defendants from plaintiffs who unnecessarily split up their claims against them; but a rigid application of the words of Wigram V-C [in **Henderson**] could work great hardship on defendants who let judgment go against them by default, and the statement has been held to have no application to those judgments, rules of cause of action estoppel being very narrowly applied in such cases. (At p. 84)

41 For example, in *New Brunswick Railway v. British & French Trust Corp.* (1938), [1939] A.C. 1 (U.K. H.L.), The Lord Chancellor said:

In my opinion we are at least justified in holding that an estoppel based on a default judgment must be very carefully limited. The true principle in such a case would seem to be that the defendant is estopped from setting up in a subsequent action a defence which was necessarily, and with complete precision, decided by the previous judgment; in other words, by the *res judicata* in the accurate sense. (emphasis added)

42 Although Mr. Parish submitted that this principle applies only to issue estoppel, I do not, with respect, think that it is limited in that way.

43 The appellants rely on several authorities which must be analyzed in detail. In my view, they do not support the broad statement in *Henderson, supra*. Neither do they require an inflexible approach to issues that could have been but were not raised.

44 In *Bayhold Financial Corp. v. Clarkson Co.* (1990), 99 N.S.R. (2d) 91 (N.S. T.D.), Bayhold brought a foreclosure action which was not defended by the receiver. Bayhold then brought an action against the receiver for, among other things, breach of fiduciary duty and negligent management, to the detriment of Bayhold's security. The receiver defended the second action, in part, by alleging that Bayhold's security was invalid. Kelly, J. held that the receiver was prevented by the default judgment from raising the issue of the validity of Bayhold's security. He noted at p. 121 that the receiver had been aware that it had a possible defence to the foreclosure action based on the validity of the security and made a deliberate decision not to raise it at that time.

45 This case deals with issue estoppel rather than the broad application of cause of action estoppel and, in any event, it is not inconsistent with the principle stated in the *New Brunswick Railway Company* case.

46 The default judgment obtained by Bayhold necessarily and with complete precision decided the issue of the validity of its security. It is also consistent with the principle barring collateral attack, given that the validity of the security was an essential element of the default judgment.

47 In *Malik v. Principal Savings & Trust Co.* (1985), 63 A.R. 109 (Alta. Q.B.), the mortgagee obtained an order of foreclosure by default. After sale of the property, the mortgagor commenced a new action alleging that the mortgagee, prior to the granting of the mortgage, had breached its fiduciary duty to the mortgagor causing the mortgagor's financial ruin. The Alberta Court of Queen's Bench struck out the mortgagor's action. In the course of her careful reasons, McFadyen, J. (as she then was), cites some of the broad statements as to the scope

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

of cause of action estoppel which have been referred to earlier, including *Henderson v. Henderson, supra.* and *Fenerty v. Halifax (City), supra.* However, the learned judge also cited, with approval, a statement of Ford C.J.A. in *Hall v. Hall* (1958), 15 D.L.R. (2d) 638 (Alta. C.A.) as follows:

This doctrine [res judicata] has not so wide an application as the broadness of the language might lead one to infer. It is limited to such matters as arise within one cause of action. It is, I think, clear that if there are facts which are common to several causes of action, an inquiry into these facts in one cause of action does not prevent an examination of the same facts where another cause of action is set up, provided that this cause of action is separate and distinct. (emphasis added)

48 McFadyen, J. then held that the final order for sale, vesting order and the final deficiency judgment in the foreclosure action could only have been granted upon a judicial determination that the mortgage and the guarantee were valid. She further held that the only issues raised by the mortgagor in the second action were inextricably related to the granting and execution of the mortgage and the guarantee and that they did not constitute a separate cause of action. The learned judge also noted that while the judgment was, in form, a default judgment, the mortgagor had fully participated in the foreclosure proceedings and did not, at any time, seek to raise the issues now raised in the action. There was, in the view of the learned judge, a decision not to raise those issues.

49 I conclude that while the broad statements of *Henderson* and *Fenerty* were cited with approval, the case in fact turns on the finding that the second action was a collateral attack on the earlier judgment and that it did not allege a new cause of action.

50 In *Ranch des Prairies Ltée (Prairie Ranch Ltd.) v. Bank of Montreal* (February 3, 1987), Kroft J. (Man. Q.B.), (affirmed (1988), 69 C.B.R. (N.S.) 180 (Man. C.A.)), the issue was whether consent orders relating to the actions of a receiver/manager and a default judgment against guarantors barred an action by the debtors against the lender and the receiver. The second action was brought by shareholders of the bankrupt company, three of whom were guarantors and by the company itself. The action challenged the conduct of the receiver and lender throughout. The Court of Appeal held that to allow the action to proceed constituted an abuse of process. Huband J.A., with whom Monnin C.J.M. concurred, stated as follows:

..... It is contended that the issues are not res judicata, because the claim of the Bank of Montreal against the members of the Denis family was a claim for a sum certain, while their claim against the bank and the receiver is for unliquidated damages. Moreover, one of the plaintiffs, Marie-Claude Denis, was not involved in the litigation initiated by the Bank of Montreal.

But res judicata is not the only basis which can be raised to strike out the claims of the members of the Denis family against the Bank of Montreal and the receiver. The claims which they advance are of a kind which should have been raised on a timely basis when the receiver was appointed, when the sale of assets was approved, and when default judgment under the personal guarantees was obtained.

As against the receiver, MacGillivray and Co. Ltd., the plaintiffs claim damages for negligence in disposing of the assets in a manner contrary to professional advice and below market value. Damages are also claimed for breach of an alleged undertaking by the receiver to dispose of the assets as a going concern. While technically these matters might not fall within the category of res judicata, it is obvious that it was open to the members of the Denis family to raise these complaints at the time court approval was being sought for the disposition of assets. Instead of raising complaint, the court was led to believe that there was assent. The

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

trustee in bankruptcy of the company consented to the various orders disposing of the company assets. The same solicitor who was representing the bankrupt company was representing the members of the Denis family, but no complaint was raised on their behalf. In my view it would be an abuse of process to allow the claim by members of the Denis family as against the receiver at this stage.

51 This case turns on the finding that the action constituted an abuse of process.

52 The appellants also cite *Adams-Mood v. Toronto Dominion Bank* December 12, 1996, S.H. 126043 [reported (1996), 159 N.S.R. (2d) 150 (N.S. S.C.)]. In that case, the Bank commenced a foreclosure action and Ms. Adams-Mood and her husband filed a defence admitting indebtedness but seeking a delay in the foreclosure to enable them to pursue their accountant, whom they blamed for their financial troubles. An order for foreclosure and sale was made and Ms. Adams-Mood filed an assignment in bankruptcy. She then commenced an action in negligence against the Bank for not advising her to seek independent legal advice and other alleged breaches of duty. Goodfellow J. granted the Bank's application to strike the statement of claim. He held that the negligence alleged by the plaintiff directly attacked the validity of the mortgage which had been finally determined in the foreclosure action. While Justice Goodfellow repeats the wide language of Justice Ritchie in *Fenerty, supra*, the basis of his decision is that the negligence action brought by the plaintiff necessarily involves a challenge to the validity of the mortgage which was finally determined in the foreclosure proceedings; in other words, the principle barring collateral attack.

53 Also cited is the decision of MacDonald C.J.T.D. of the Prince Edward Island Supreme Court in *Miscouche Sales & Service Ltd. v. Massey Ferguson Industries Ltd.* (1992), 105 Nfld. & P.E.I.R. 91 (P.E.I. T.D.). Miscouche defaulted on a debt to its supplier. Its assets were seized and sold and an action was brought by the finance corporation against Miscouche, its directors and shareholders in relation to certain guarantees and agreements that they had signed. Default judgments were obtained with the exception of one shareholder who defended. With respect to him, summary judgment was granted.

54 The shareholders then brought an action against the supplier, the finance corporation and the receiver for damages arising out of the allegedly improper disposition of Miscouche's assets. MacDonald C.J.T.D. struck out the statement of claim. While quoting with approval some of the wide statements of the principle of *res judicata*, he appears to have rested his judgment on the *Malik, supra*, case and, in particular, its holding that the final order for sale finally determined the issue of the validity of the mortgage and that the second action did not raise a distinct cause of action. He stated:

The same can be said for the actions taken by the respondents. Insofar as Miscouche is concerned, the basis of its claim against Barclays is as a result of Barclays action in allegedly improvidently selling the assets of Miscouche without proper notice. This was a matter that should have been raised by Miscouche in the action taken against it by Barclays rather than permit default judgment to be taken. Everything is tied in together, the guarantee, the seizure, the notice, the sale and the deficiency. As to the individual respondents, it is much more difficult to see what areas their claims against Barclays might lie. However, assuming there might be liability, they are in no better position than Miscouche. Their claims also arise from the giving of the guarantees and what subsequently occurred.

.....

The respondents are correct when they say a litigant can raise a separate and distinct cause of action in a later action. But a separate and distinct cause of action is one which can stand on its own set of acts and can

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

be brought at any time without reference to the issues raised in the earlier action: **Greymac Properties Inc. v. Feldman** (1991), 46 C.P.C. (2d) 125, 1 O.R. (3d) 686 (Gen. Div.). Without reference to the action taken by Barclays on the guarantees, the respondents would have no cause of action.

55 In *Bank of British Columbia v. Singh* (1987), 17 B.C.L.R. (2d) 256 (B.C. S.C.); reversed on other grounds (1990), 51 B.C.L.R. (2d) 273 (B.C. C.A.), foreclosure orders had been obtained and the mortgagee sought approval of sale. The mortgagors opposed the application but the Court approved the sale over their objections. Subsequently, the property was resold at a higher price and the mortgagors defended the mortgagee's action against them on their personal covenant on the basis that the mortgagee and its agents had been negligent and in breach of fiduciary duty in submitting the first sale to the court for approval. The mortgagor also brought action against the mortgagee, one of its employers and the appraiser whose report had been relied upon in seeking court approval.

56 Hardinge L.J.S.C. granted the mortgagee's application to strike out the relevant parts of the mortgagor's statement of defence and dismissed the mortgagor's action, both on the grounds of *res judicata* and abuse of process. In essence the judge decided that the new cause of action could not be used to attack a final judgment that was fully argued, not appealed and never set aside. While relying on a number of the broader statements relating to cause of action estoppel, the learned judge based his decision on the proposition that the mortgagors were attacking the validity of the order for sale which had not been contested at the time, and which had never been set aside; in short, the mortgagors' action was a collateral attack on the earlier orders.

57 Then comes *420093 B.C. Ltd. v. Bank of Montreal* (1995), 128 D.L.R. (4th) 488 (Alta. C.A.). In the first action, the Bank sued its debtor First Canadian and Mr. and Mrs. Prescott as guarantors. Judgment was recovered against the Prescotts but not against First Canadian. The appellant obtained an assignment from the trustee in bankruptcy of First Canadian of any claim which First Canadian might have against the Bank. The appellant then commenced the second action. The Bank moved to strike out the action on the ground that the claims were *res judicata* or an abuse of process or constituted a collateral attack on valid and subsisting orders of the Court.

58 In the first action, First Canadian and the Prescotts were represented by the same solicitor. The Prescotts pleaded that the guarantees were invalid for technical reasons, that they were executed as a result of economic duress and that the Bank had represented to them that they would not be pursued on the guarantees except for the purpose of recovering any deficiency remaining after realization of the mortgage security. The Bank moved successfully for summary judgment based on the holding that the Prescotts had failed to establish that there was a triable issue.

59 In the second action, the plaintiff alleged that the Bank was in breach of its obligations to First Canadian by failing to make advances as required, by breaching a fiduciary duty owed to First Canadian, that it had induced First Canadian to enter into the loan agreement by fraudulent misrepresentations and, finally, that it had wrongfully enforced its security. Every sale or disposition of the Bank's mortgage security had been made pursuant to court order.

60 The Alberta Court of Appeal struck the action in its entirety on the basis of cause of action estoppel. In the Court's view, the matters raised in the second action were matters of equitable set-off which could have been raised in defence by First Canadian in the first action. As the court put it (at p. 502):

... the principle of issue estoppel bars the appellant from relitigating the issue of whether the bank was in

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

breach of the loan agreement. That issue is addressed directly in the debt action and decided contrary to the position now taken by the appellant.

Similarly, cause of action estoppel precludes the appellant from asserting in this action that the bank was in breach of a fiduciary duty owed to First Canadian and that the bank made fraudulent misrepresentations to First Canadian. Both of those claims could have been set up by the Prescotts in defence of the bank's claim against them in the debt action.

61 In conclusion, the Court found that the claims based on the Bank's alleged breach of the loan agreement, breach of fiduciary duty and fraudulent misrepresentations were barred by *res judicata* and that the remaining complaints involved an indirect attack on valid orders made in a debt action and, therefore, constituted an improper collateral attack on those orders. Finally, the Court held that the action in total was an abuse of process and was justifiably dismissed on that basis.

62 To the extent that this decision deals with cause of action estoppel, it proceeds on the grounds that the alleged breach of fiduciary duty and fraudulent misrepresentations relate to the formation and nature of the agreement and to performance of it by the Bank. As the Court stated at p. 501, these claims

... were directly related to the very substance of the bank's claim against First Canadian under the loan agreement. Had they been raised in defence in the same form as the appellant has pleaded them in this action, they would have gone to the root of the bank's claim and put in issue the full amount alleged to be owed.

63 Putting aside the aspects of this decision which turned on issue estoppel and abuse of process, the holding with respect to cause of action estoppel is consistent with the narrower view of *res judicata* set out above, i.e., that the allegations in the second action were inconsistent with and, therefore, constituted a collateral attack on the decision reached in the first action.

64 The appellants in this appeal rely principally on the broad formulation of cause of action estoppel. There is, of course, no suggestion that the issues of breach of fiduciary duty, breach of collateral contract, tortious interference with business relations or trespass and conversion were actually raised and adjudicated in the final orders of foreclosure which were issued by default. The appellants' submission is that all of these matters could have been raised by the trustee in bankruptcy and were not. Therefore, according to the appellants, Dr. Hoque is foreclosed from raising them in this action.

65 My review of these authorities shows that while there are some very broad statements that all matters which *could* have been raised are barred under the principle of cause of action estoppel, none of the cases actually demonstrates this broad principle. In each case, the issue was whether the party *should* have raised the point now asserted in the second action. That turns on a number of considerations, including whether the new allegations are inconsistent with matters actually decided in the earlier case, whether it relates to the same or a distinct cause of action, whether there is an attempt to rely on new facts which could have been discovered with reasonable diligence in the earlier case, whether the second action is simply an attempt to impose a new legal conception on the same facts or whether the present action constitutes an abuse of process.

66 In light of this understanding of the principle of cause of action estoppel, did the Chambers judge err in law in deciding that Dr. Hoque's action was not barred?

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

67 In my respectful view, the Chambers judge did err in law in this regard. However, I base my conclusion on a narrower ground than that argued by the appellants.

68 Finality of court orders is an important value. As Fleming James, Hazard and Leubsdorf put it:

... the purpose of a lawsuit is not only to do substantial justice but to bring an end to controversy. It is important that judgments of the court have stability and certainty. This is true not only so that the parties and others may rely on them in ordering their practical affairs (such as borrowing or lending money or buying property) and thus be protected from repetitive litigation, but also so that the moral force of court judgments will not be undermined.

Fleming James, Jr., Geoffrey C. Hayward, Jr. and John Leubsdorf, *Civil Procedure* (4th, 1992) at 581.

69 At the core of cause of action estoppel is the notion that final judgments are conclusive as to all of the essential findings necessary to support them. This is seen in the cases concerned with collateral attack, *supra*, and is reflected in the restrictive approach to *res judicata* founded on default judgments.

70 In my respectful view, Dr. Hoque cannot be permitted to allege in this action anything which is inconsistent with the final orders of foreclosure. In other words, all of the matters essential to the granting of the final orders of foreclosure are not now open to be relitigated in these proceedings. This is not a mere technical rule but an application of a fundamental principle of justice: once a matter has been finally decided, it is not open to reconsideration other than by appeal or other proceedings challenging the initial finding.

71 Dr. Hoque's action makes several claims that are inconsistent with the findings essential to the validity of the foreclosure orders.

72 Dr. Hoque alleges in his statement of claim (paragraph 18) that the refinancing arrangements in the amending agreement were unconscionable. However, the amending agreement was specifically pleaded in the foreclosure actions and the final orders of foreclosure were predicated on its validity and enforceability. Therefore, the allegation of unconscionability in Dr. Hoque's action is inconsistent with the final orders of foreclosure.

73 Dr. Hoque alleges that there were collateral agreements, in essence waiving or delaying Montreal Trust's right to the \$150,000 payments provided for in the amending agreement. In addition, there are alleged to be collateral agreements relating to the partial discharge provisions in the amending agreement to the effect that something less than the presale of 50% of the units would be sufficient (paragraphs 22-25). These allegations are inconsistent with the enforceability of the amending agreement. However, its enforceability is an essential basis of the final orders of foreclosure.

74 Dr. Hoque's statement of claim further alleges that the course of dealing by Montreal Trust in entering into the amending agreement and enforcing it according to its terms was "a course of action designed to destroy Dr. Hoque", and was conduct designed to "intentionally and tortiously interfere with [his] economic and business relations". Once again, these allegations go to the root of the legality and enforceability of the amending agreement and the mortgages.

75 Although the pleading is not specific with respect to the acts of trespass and conversion relied on, it appears that these allegations relate to the exercise by Montreal Trust of its remedies as mortgagee and under related agreements. They are, therefore, inconsistent with the validity and enforceability of the mortgages and the

1997 CarswellNS 427, (sub.nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

amending agreement.

76 I conclude, therefore, that Dr. Hoque is precluded from asserting any of these claims in this action and that the learned Chambers judge erred in law in failing to strike them out.

77 I would not go so far as to hold that the application of *res judicata* in a case like this one is completely inflexible. There may be, to use the words of Vice-Chancellor Wigram, special circumstances in which some flexibility may be required to prevent a serious injustice. To the extent that the learned Chambers judge relied on this flexibility in this case, I think, with great respect, that he erred in principle by failing to give sufficient weight to two considerations which, in this case, are of fundamental and overriding importance.

78 First, there is the strong policy in favour of the finality of court orders. As set out above, this is important not only for the certainty of transactions between the parties, but to the integrity of the judicial process. This consideration is fundamental to the administration of justice and I think, with respect, that it was not given sufficient weight by the Chambers judge.

79 Second, there are the underlying objectives of the *Bankruptcy and Insolvency Act*. These include the provision of a scheme for the orderly and fair distribution of the property of the bankrupt among his or her creditors while permitting the debtor to obtain a discharge from his or her debts on reasonable conditions: see L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada* (3d, revised) at 1-3. To permit Dr. Hoque, after his discharge and after the entry of final orders of foreclosure to assert that the mortgages and amending agreement were invalid or unenforceable seems to me to undercut these objectives very considerably. In short, having been discharged from unpaid personal debts arising from these transactions, Dr. Hoque now claims damages for alleged illegal conduct in relation to those very transactions. In considering what the interests of justice required in this case, I am respectfully of the view that the learned Chambers judge gave insufficient weight to the underlying scheme and objectives of the

#### **Bankruptcy and Insolvency Act.**

80 Dr. Hoque relies on Hallett, J.A.'s decision in *ABN Bank Canada v. NsC Diesel Power Inc.* (1992), 112 N.S.R. (2d) 289 (N.S. C.A.) in support of his position. In that proceeding a trial judge had set aside a foreclosure order granted by Goodfellow, J. The Bank appealed; this Court allowed the appeal and reinstated Goodfellow, J.'s order.

81 Subsequent to both the Sheriff's sale of the property and the confirmation of the sale by the Supreme Court, the Bank applied to a member of the panel that heard the appeal for an order:

specifying that the order of This Honourable Court dated March 12th, 1991, reinstating the foreclosure order granted by Goodfellow, J., dated October 23, 1990, issued upon the respondent's default in the filing of a defence sets aside any defences, counterclaims and amendments thereto which may be filed by the respondent subsequent to October 23, 1990, together with the costs of this application. (emphasis added)

82 Hallett, J.A. refused to grant the order on the ground that there were no errors or omission in the order of the Court dated March 12th, 1991. Nor did the order fail to express the intent of the Court. Therefore, there was no basis under *Rule 62.26(2)* to grant the order.

83 Hallett, J.A. went on to state that the order did not prevent NsC Diesel from making a claim against the

1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

Bank, but that it could not be asserted in the foreclosure proceedings. The issue of *res judicata* was not raised in the Bank's application and there certainly is no holding in that decision in relation to the *res judicata* issues argued in this case.

84 There is one, and possibly two elements, in Dr. Hoque's statement of claim which are not inconsistent with the final orders of foreclosure. These are, first, the allegation that Montreal Trust improperly disclosed confidential information to third party lenders in a way that was "calculated to cause and did cause others to act precipitously" and second, that Montreal Trust acted "in an abusive and disrespectful manner". This second allegation is not pleaded with particularity so it is difficult to assess it. If this refers to a cause of action separate from and not inconsistent with the validity and enforceability of the mortgages and the amending agreement, it is not barred by *res judicata*.

85 Neither of these allegations is inconsistent with the validity of the mortgages or amending agreement. Nor do they fall into any of the categories of claims that *should* have been advanced. They are not simply an attempt to put a new legal conception upon settled facts or to raise facts which, with reasonable diligence, ought to have been placed before the court in the foreclosure actions. They are separate and distinct causes of action. It is not argued that asserting them now, in all of the circumstances, constitutes an abuse of process.

86 It was conceded by the appellants in argument that the allegations relating to breach of duty to maintain confidential information was not barred by issue estoppel. I am also of the view, for the reasons which I have given, that it is not barred by cause of action estoppel. Although there was no concession by the appellants in respect of the allegation relating to abusive and disrespectful treatment, this was clearly not a matter covered by issue estoppel and, for the reasons I have given above, I am of the view that it is not barred by cause of action estoppel.

87 In summary, I am of the view that all of the allegations in Dr. Hoque's statement of claim are barred by the principle of cause of action estoppel with the exception of the claim relating to the breach of duty to keep information confidential and the allegation that Montreal Trust acted in an abusive and disrespectful manner. The Chambers judge, with great respect, erred in law in failing to so decide. To the extent that there may exist some measure of judicial discretion to apply *res judicata* with some flexibility, I think, with respect, that the learned Chambers judge erred in principle in exercising it in this case.

88 I would, therefore, grant leave to appeal, allow the appeal, set aside the order of the learned Chambers judge and strike out Dr. Hoque's statement of claim. However, in light of my finding that two aspects of the statement of claim are not barred by *res judicata* or issue estoppel, I would not dismiss the action, but grant leave to Dr. Hoque to amend his statement of claim, if so advised, in accordance with these reasons. This is an order which was open to the Chambers judge to make under *Rule 14.25(1)* and is, therefore, open to the Court of Appeal pursuant to *Rule 62.23(1)(b)*. The amended allegations, if any, must not be inconsistent with the validity or enforceability of the mortgages or the amending agreement. Given that this action is now more than three years old and relates to events considerably older than that, I would also order that any amended pleading must be filed within 30 days of the release of these reasons and in default thereof Dr. Hoque's action will stand dismissed.

89 Montreal Trust has been substantially successful and should receive its costs here and before the Chambers judge. Costs before the Chambers judge were fixed at \$1,500.00. I would, therefore, order Dr. Hoque to pay the appellants' costs both here and below, fixed at \$1,500.00 before the Chambers judge and at \$1,000.00 in this



1997 CarswellNS 427, (sub nom. Hoque v. Montreal Trust Co.) 162 N.S.R. (2d) 321, (sub nom. Hoque v. Montreal Trust Co.) 485 A.P.R. 321, [1997] N.S.J. No. 430, 75 A.C.W.S. (3d) 541

Court.

***Freeman, J.A., Roscoe, J.A.:***

90 Concluded in.

*Appeal allowed in part.*

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# **TAB 2**

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513



2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

Crystalline Investments Ltd. v. Domgroup Ltd.

Domgroup Ltd., Appellant v. Crystalline Investments Ltd. and Burnac Leaseholds Ltd., Respondents

Supreme Court of Canada

McLachlin C.J.C., Iacobucci, Major, Binnie, LeBel, Deschamps, Fish JJ.

Heard: November 7, 2003

Judgment: January 29, 2004

Docket: 29196

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Proceedings: affirming (2002), 2002 CarswellOnt 705, 31 C.B.R. (4th) 225, 210 D.L.R. (4th) 659, 156 O.A.C. 392, 58 O.R. (3d) 549, 49 R.P.R. (3d) 171, 27 B.L.R. (3d) 102, [2002] O.J. No. 883 (Ont. C.A.); reversing (2001), 2001 CarswellOnt 601, 39 R.P.R. (3d) 49, 31 C.B.R. (4th) 216 (Ont. S.C.J.)

Counsel: Fred D. Cass, Lawrence J. Crozier, David Stevens, for Appellant

Peter-Paul E. DuVernet, for Respondents

Subject: Insolvency; Property; Civil Practice and Procedure

Bankruptcy and insolvency --- Priorities of claims — Claims by landlord — Assignment of lease

Repudiation of leases by assignee under s. 65.2 of Bankruptcy and Insolvency Act does not relieve original tenant of its obligations under leases as original lessee — Post-disclaimer, assignors and guarantors should be treated in same manner with respect to liability.

Landlord and tenant --- Assignment of lease — Nature and effect of assignment

Rights as between landlord and original tenant unaffected by proceedings taken by insolvent sub-lessee under s. 65.2 of Bankruptcy and Insolvency Act — Post-disclaimer, assignors and guarantors should be treated in same manner with respect to liability.

Faillite et insolvabilité --- Priorités des réclamations — Réclamations du locateur — Cession de bail

Résiliation d'un bail par le cessionnaire en vertu de l'art. 65.2 de la Loi sur la faillite et l'insolvabilité ne libère pas le locataire initial de ses obligations en vertu du bail à titre de locataire initial — Après la résiliation d'un

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

bail, les cédants et les garants devraient être assujettis à la même responsabilité.

Locateur et locataire --- Cession de bail — Nature et effet de la cession

Procédures engagées en vertu de l'art. 65.2 par un sous-locataire insolvable n'ont aucune incidence sur les droits du locateur et du locataire initial — Après la résiliation d'un bail, les cédants et les garants devraient être assujettis à la même responsabilité.

Landlords and tenant entered into long-term lease agreements. The tenant later assigned the leases to a sub-lessee which subsequently became insolvent, made a proposal under the Bankruptcy and Insolvency Act, and repudiated the leases under s. 65.2 of the Act. The landlords were paid compensation equal to six months' rent as set out in the Act, and they then brought actions against the tenant for the amounts owing under the leases. The tenant's motion for summary judgment dismissing the landlords' actions was granted, the motions judge holding that the court-approved termination of the leases ended all obligations of all parties under the leases.

The landlords' appeal was allowed, the appeal court determining that the rights as between the landlords and the original tenant were unaffected by the proceedings taken by the insolvent sub-lessee under s. 65.2 of the Act.

The tenant appealed to the Supreme Court of Canada.

**Held:** The appeal was dismissed.

Section 65.2 of the Act should be read narrowly. The plain purposes of the section are to free an insolvent from the obligations under a commercial lease that have become too onerous, to compensate the landlord for the early termination of the lease, and to allow the insolvent to resume viable operations as best it can. Nothing in s. 65.2, or any part of the Act, protects third parties such as assignors from the consequences of an insolvent's repudiation of a commercial lease.

The tenant as principal undertook towards the landlords the obligations of the lease for the whole term and there was nothing in the process of assignment which replaced this liability by the mere collateral liability of a surety who had to pay the rent only if the assignee did not. The bankruptcy of the assignee destroyed for the time being the tenant's right against the assignee to require it to discharge the obligations of the lease, and also impaired the tenant's right of indemnity against the assignee when the tenant had to discharge the obligations itself. However, it did not affect the tenant's primary liability towards the landlords, which continued unaffected. At no time did the tenant become a mere guarantor to the landlords of the liability of the assignee of the lease.

The mere possibility that the tenant might have a right of indemnity against its insolvent assignee and be able to make a claim to participate in the proposal proceedings as an unsecured creditor was not inconsistent with the Act. On the contrary, it was consistent with the circumstances applicable to other alternative convenantors and did not affect or alter the nature of the tenant's contractual relationship and obligations. More importantly, it did not require that the tenant be discharged from liability.

The distinction between guarantors as having secondary obligations that disappear when a lease is disclaimed by a trustee in bankruptcy, and assignors as having primary obligations that survive a disclaimer, thrives in Canadian case law, but the cases so holding should be overruled. Post-disclaimer, assignors and guarantors ought to be treated the same with respect to liability. The disclaimer alone should not relieve either from their contractual obligations.

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

Les locatrices ont conclu des baux à long terme avec la locataire. Celle-ci a cédé ultérieurement ses baux à une sous-locataire qui, par la suite, est devenue insolvable, a fait une proposition en vertu de la Loi sur la faillite et l'insolvabilité et a résilié les baux en vertu de l'art. 65.2 de la Loi. À titre de compensation, les locatrices ont reçu six mois de loyer, comme le prévoit la Loi; elles ont ensuite intenté des procédures contre la locataire afin d'obtenir les montants dus en vertu des baux. La requête pour jugement sommaire présentée par la locataire a été accueillie par le juge au motif que les obligations de toutes les parties en vertu des baux avaient été complètement éteintes par la décision du tribunal approuvant la résiliation des baux.

Le pourvoi des locatrices a été accueilli par la Cour d'appel, qui a conclu que les droits des locatrices et de la locataire initiale n'étaient pas touchés par les procédures engagées par la sous-locataire en vertu de l'art. 65.2 de la Loi.

La locataire a interjeté appel à la Cour suprême du Canada.

**Arrêt:** Le pourvoi a été rejeté.

L'article 65.2 de la Loi devrait recevoir une interprétation restrictive. Les objectifs manifestes de cet article sont de libérer une personne insolvable des obligations découlant d'un bail commercial qui sont devenues trop lourdes, d'indemniser le locateur pour la fin prématurée du bail et de permettre à la personne insolvable de reprendre autant que possible des activités viables. Ni l'article 65.2 ni quelque autre partie de la Loi ne protègent les tiers, dont les cédants, des conséquences de la résiliation d'un bail commercial par une personne insolvable.

À titre de débitrice principale, la locataire s'est engagée envers les locatrices à assumer les obligations du bail pour toute la durée de celui-ci; le processus de cession n'a pas pour effet de substituer à cette obligation la simple obligation subsidiaire qu'a la caution de payer le loyer uniquement en cas de défaut du cessionnaire. La faillite de la cessionnaire a éteint pour le moment le droit de la locataire d'exiger de la cessionnaire l'exécution des obligations prévues par le bail et a affaibli le droit de la locataire d'être indemnisée par cette dernière lorsqu'elle doit les exécuter elle-même. La faillite n'a cependant pas eu d'incidence sur l'obligation fondamentale de la locataire envers la locatrice, obligation qui, elle, reste intacte. La locataire n'est devenue, en aucune circonstance, simple garante envers les locatrices des obligations de la cessionnaire du bail.

La simple possibilité que la locataire dispose d'un droit d'indemnisation opposable à sa cessionnaire insolvable et qu'elle puisse présenter une réclamation afin de participer aux procédures de proposition en tant que créancière non garantie n'était pas incompatible avec la Loi. Au contraire, cette possibilité demeurait pertinente dans les circonstances applicables aux autres contractants subsidiaires et ne modifiait en rien la nature des obligations et relations contractuelles de la locataire. Facteur plus important, cette possibilité ne commandait pas que la locataire soit libérée de ses obligations.

La distinction voulant que les garants soient tenus à une obligation secondaire qui disparaît en cas de résiliation du bail par le syndic de faillite et que les cédants soient tenus à une obligation principale qui survit à cette résiliation demeure bien vivante dans la jurisprudence canadienne; les décisions qui arrivent à une telle conclusion devraient être infirmées. Après la résiliation d'un bail, cédants et garants devraient être assujettis à la même responsabilité. Le seul fait de la résiliation ne devrait libérer ni les uns ni les autres de leurs obligations contractuelles.

#### Annotation

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

At the risk of hyperbole, these annotators submit that the decision of the Supreme Court of Canada in *Crystalline Investments Limited v. Domgroup Ltd.* is, bar none, the single most important Canadian landlord and tenant law decision since *Highway Properties Ltd. v. Kelly Douglas & Co. Ltd.*, [1971] S.C.R. 562.

While landlord and tenant law has always generally favoured commercial landlords by providing them with substantial remedial powers as of right, landlords have nonetheless always obsessed about the financial strength and enforceability of tenant covenants. While commercial landlords had traditionally sought third party guarantees to enhance the credit-worthiness of their tenants, the Ontario High Court decision in *Cummer-Yonge Investments Ltd. v. Fagot* (1965), 2 O.R. 152 (Ont. H.C.), aff'd (1965), 2 O.R. 157 (Ont. C.A.) effected a total sea change in the way landlords went about protecting their covenant recourse in times of tenant bankruptcy.

In *Cummer-Yonge*, a tenant made a voluntary assignment in bankruptcy and the trustee-in-bankruptcy subsequently disclaimed the lease, leaving the landlord with up to six months' worth of rent as its preferred claim in the bankruptcy. Although it has been nearly forty years since *Cummer-Yonge*, the general scheme of bankruptcy recovery for landlords has remained largely unchanged to date. The landlord in *Cummer-Yonge*, not fully compensated by the preferred claim in bankruptcy, turned to a third party surety under guarantee that it had procured to secure "the due performance by the lessee of all of its covenants . . . including the covenant to pay rent". The guarantee proved to be of little practical value to the landlord in *Cummer-Yonge*. According to the High Court (with affirmation from the Court of Appeal but without reasons), since the lease had been validly disclaimed in the bankruptcy proceeding, and since the tenant no longer had any obligations under the lease as a result of such disclaimer, there could be no obligations for the guarantor to guarantee. As a result of this simple analysis, the guarantor in *Cummer-Yonge* was fully released from its covenant under the guarantee.

A significant body of jurisprudence has developed over the past four decades dealing with *Cummer-Yonge*-based defences (for an excellent cataloguing of the jurisprudence to date, see, D. Rogers, "Revisiting Letters of Credit, Guarantees and Indemnities in a Fragile Economy", *The Six Minute Commercial Leasing Lawyer*, The Law Society of Upper Canada, October 1, 2001). These cases, which hail from jurisdictions across Canada, have, for the most part, ebbed and flowed in their support of the rule in *Cummer-Yonge*, with some cases wholeheartedly supporting the rule, and others distinguishing the facts then at bar sufficient to avoid the operation of the rule (but, curiously, without a single court ever purporting to actually overrule *Cummer-Yonge* itself). Recently, the jurisprudence has seen an unusually high rate of successful *Cummer-Yonge* defences against landlord recoveries. In the past decade alone, as a result of the application of the rule in *Cummer-Yonge*, commercial leasing practice has seen the emasculation of general security agreements (*Peat Marwick Thorne Inc. v. Natco Trading Corp.* (1995), 44 R.P.R. (2d) 207), letters of credit (*West Shore Ventures Limited v. K.P.N. Holding Ltd.*, [2001] B.C.C.A. 279 (C.A.)), but see also *Lava Systems Inc. (Receiver & Manager of) v. Clarica Life Insurance Co.* (2002), 1 R.P.R. (4th) 50 (Ont. C.A.) for a slightly different take on letters of credit) and, most recently, even indemnities (*KKBL No. 297 Ventures Ltd. v. Ikon Office Solutions, Inc.*, (2003), 16 R.P.R. (4th) 29 (B.C. S.C.)).

The *Crystalline* case was on the forefront of this wave of recent destabilizing *Cummer-Yonge* cases, and was perhaps the most conceptually extreme example of the rule. In *Crystalline*, a grocery store tenant assigned its lease to an assignee who subsequently became insolvent and filed a proposal under Section 65.2 of the pre-1995 version of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. As part of the proposal, the assigned lease was repudiated. As a result of such repudiation, the landlord received compensation approximately equivalent to the six months' worth of rent that the landlord would have received had the tenant gone bankrupt and the lease had been disclaimed by the trustee in bankruptcy. Since the six months' worth of rent did not fully compensate the landlord for its losses on the repudiation, the landlord then sued the original tenant *cum* assignor under the

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

lease for the balance of the landlord's damages. The lease did not provide that, as a matter of contract, the assignor would be released upon the assignment. Indeed, quite the opposite was in fact the case: the lease expressly confirmed that the original tenant would remain fully liable under the lease notwithstanding any assignment.

The original tenant in *Crystalline*, now faced with a significant damage award arising as a consequence of the repudiation of the lease by its assignee, argued that it actually fell within the rule in *Cummer-Yonge*. That is, since it was no longer in possession of the leased premises, it became, in effect, analogous with any third party surety of the assignee. Significantly paraphrased, the assignor's argument was simply that, upon the insolvency of the tenant-in-possession (i.e. the assignee) and the resulting termination of the lease in that assignee's insolvency process, there simply was no more lease to covenant in respect of, so the original tenant *cum* assignor should also be released from all liability under the now repudiated lease: in effect, just like the guarantor in *Cummer-Yonge*. According to the argument, the landlord, having recovered the equivalent of the preferred claim in bankruptcy, had received all that the legislature ever intended that it should receive.

At trial ((2001), 39 R.P.R. (3d) 49), Mr. Justice Trafford of the Ontario Superior Court of Justice accepted the assignor's *Cummer-Yonge* gambit, fully releasing the original tenant *cum* assignor from any further obligations relating to the then repudiated lease. On appeal ((2002) 49 R.P.R. (3d) 171), the Ontario Court of Appeal reversed the trial court decision, restoring the general rule that an assignor, unless contractually released by the landlord, remains liable on the covenant, and adding that this regime should govern notwithstanding the insolvency of the assignee and notwithstanding any end to the lease by repudiation or disclaimer as a result of insolvency proceedings. The Court of Appeal reasons gave rise to a multitude of fascinating issues, a number of which were canvassed in a case annotation in the *Real Property Reports* version of the appeal reasons (see, J. Lem, "Annotation", at 49 R.P.R. (3d) 171). The original tenant *cum* assignor then appealed the case to the Supreme Court of Canada, where a good number of the "interesting" issues set forth in the aforesaid annotation were addressed by the Supreme Court of Canada, in reasons delivered by Mr. Justice Major.

What has been greatly unappreciated by the practising bar is that, had the assignor's arguments in *Crystalline* carried the day at the Supreme Court of Canada, there would have been a profound impact on the day-to-day activities of Canadian landlords and tenants, far more so than with any of the other *Cummer-Yonge* cases. Indeed, given the unique status of the leasehold assignor in landlord and tenant law, we submit that any extension of the *Cummer-Yonge* doctrine to assignors might have opened up a veritable Pandora's Box of issues not present in other *Cummer-Yonge* situations.

For instance, as the law stood immediately before *Crystalline* (and now after *Crystalline* as well), a landlord could consent to any assignment of any lease to any assignee, relatively safe in the legal presumption that, absent a contractual release from the landlord, the original tenant *cum* assignor would remain liable on the original covenant notwithstanding having transferred the benefit of the lease (note that the presumption is reversed in Quebec). There are, of course, some arguably legitimate non-covenant reasons for insisting upon some discretion over the identity of future tenants-in-possession, but technically, from a purely financial perspective, a landlord can never be worse off with an assignee, regardless of the credit-worthiness of that assignee's covenant, because the landlord always has recourse to the continuing covenant of the original tenant *cum* assignor, which is all of the covenant comfort that the landlord ever had in the first place. To the extent that the landlord gets covenant comfort from the assignee, such recourse is in addition to, rather than in lieu of, the comfort granted by the original covenantor. Had the assignor succeeded in establishing a *Cummer-Yonge* defence at the Supreme Court of Canada, any assignment of any lease to any assignee would constitute, in every such instance, a contingent re-

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

lease of the assignor. What's worse, the contingency giving rise to the release (i.e. petitioning the assignee into bankruptcy) could be unilaterally invoked by the assignee as a "scorched earth" tactic denying the landlord the benefit of the assignor's covenant, or by the assignor itself as a purely strategic self-exculpating manoeuvre, or by a collusion between the two or even by a creditor competing against the landlord. As if to add insult to injury, such a regime would also effectively deny landlords from ever themselves petitioning the tenant-in-possession into bankruptcy (although much of the discussion around *Cummer-Yonge* pre-supposes that landlords would be adverse to a tenant bankruptcy, it has to be remembered that a landlord is also a creditor and may itself have reasons to bankrupt its own tenant where choice of remedy permits). As a consequence of the foregoing, a landlord would never be able to consent to any assignment (except possibly to a materially better covenant), and leasing practice in Canada would quickly grind to a halt as the legal regime converts itself into a leasehold-transfers-by-sublease only jurisdiction.

The Supreme Court of Canada released its reasons in *Crystalline* in January of 2004. Siding with the Court of Appeal, the Supreme Court concluded that, absent a contractual release from the landlord, the original tenant *cum* assignor under the lease would remain liable on the covenant to the landlord, notwithstanding the insolvency of the assignee and notwithstanding any consequent repudiation of the lease. According to Mr. Justice Major's reasons:

the repudiation must be construed as benefiting only the insolvent [e.g. the assignee]. Nothing . . . protects third parties [e.g. the assignor] . . . from the consequences of an insolvent's repudiation of a commercial lease. That is to say that they remain liable . . .

Although the foregoing analysis was in our view, wholly dispositive of the matter before the Court, much to the delight of the Canadian commercial bar, the Supreme Court of Canada did not limit itself to simply the specific issue of assignor liability post lease disclaimer/repudiation. Instead, the Court took it upon itself to "walk on the wild side" by, once and for all, addressing the bigger normative issue posed by *Cummer-Yonge*: just what should happen to third party sureties after the insolvency of the tenant-in-possession and the disclaimer or repudiation of the lease as a result of such insolvency? It is this *obiter dicta* that has literally taken the Canadian commercial leasing bar by storm.

It has to be remembered that the rule in *Cummer-Yonge* also created similar disturbances in English commercial landlord and tenant practice (although, of course, the doctrine was never referred to as such in England). Long before *Cummer-Yonge*, the English Queen's Bench, in its landmark decision in *Stacey v. Hill*, [1901] 1 Q.B. 660, found, much in the same way as had the Ontario High Court in *Cummer-Yonge* some six decades later, that surety liability ends with the bankruptcy. It was not until almost a century after *Stacey v. Hill* that the House of Lords, in *Hindcastle Ltd. v. Barbara Attenborough Associates Ltd.*, [1997] A.C. 70 finally overturned that nation's equivalent to *Cummer-Yonge*. To the delight of many, the Supreme Court of Canada, seven years after *Hindcastle*, followed suit in *Crystalline*. In one fell swoop, the Court expressly overruled almost four decades of *Cummer-Yonge* legal dogma. In its own words, Mr. Justice Major concluded:

The House of Lords went on to overrule *Stacey v. Hill* . . . *Cummer-Yonge* should meet the same fate. Post-disclaimer, assignors and guarantors ought to be treated the same with respect to liability. The disclaimer alone should not relieve either from their contractual obligations.

While the ultimate impact of the Supreme Court of Canada's ruling in *Crystalline* will not be fully appreciated for years to come, there is quickly emerging some excellent learned commentary on the *Crystalline* decision



2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

(see, e.g., D. Rogers "The Swan Lake of *Cummer-Yonge*, *sub nom.* Goodbye *Cummer-Yonge*, Again", *Six-Minute Commercial Leasing*, 2004 (The Law Society of Upper Canada). Already, there is debate brewing among jurists and practitioners alike as to the scope of *Crystalline*, and, far more tantalizing, rumours abound as to some perhaps unintended legal consequences arising from the decision which may have even greater impact on landlord and tenant law than *Cummer-Yonge* ever did. Indeed, we submit that legal history may ultimately record *Crystalline* as being the case that re-opened a line of legal argument long since thought settled, rather than simply the case that finally closed the door on *Cummer-Yonge*. Alas, these theories are not yet fully developed and it would be perhaps premature to raise them now in a published forum.

Stay tuned . . .

Jeffrey W. Lem

Brian Clark

Davies Ward Phillips & Vineberg LLP

**Cases considered by Major J.:**

*Cummer-Yonge Investments Ltd. v. Fagot* (1965), [1965] 2 O.R. 152, 8 C.B.R. (N.S.) 62, 50 D.L.R. (2d) 25, 1965 CarswellOnt 40 (Ont. H.C.) — not followed

*Cummer-Yonge Investments Ltd. v. Fagot* (1965), [1965] 2 O.R. 157n, 8 C.B.R. (N.S.) 62n, 50 D.L.R. (2d) 30n (Ont. C.A.) — referred to

*Francini v. Canuck Properties Ltd.* (1982), 1982 CarswellOnt 1385, 35 O.R. (2d) 321, 132 D.L.R. (3d) 468 (Ont. C.A.) — considered

*Giffen, Re* (1998), 45 B.C.L.R. (3d) 1, 155 D.L.R. (4th) 332, 222 N.R. 29, 1998 CarswellBC 147, 1998 CarswellBC 148, [1998] 1 S.C.R. 91, (sub nom. *Giffen (Bankrupt), Re*) 101 B.C.A.C. 161, (sub nom. *Giffen (Bankrupt), Re*) 164 W.A.C. 161, 1 C.B.R. (4th) 115, [1998] 7 W.W.R. 1, 13 P.P.S.A.C. (2d) 255 (S.C.C.) — considered

*Guarantee Co. of North America v. Gordon Capital Corp.* (1999), [1999] 3 S.C.R. 423, 1999 CarswellOnt 3171, 1999 CarswellOnt 3172, 178 D.L.R. (4th) 1, 247 N.R. 97, [2000] I.L.R. I-3741, 126 O.A.C. 1, 49 B.L.R. (2d) 68, 15 C.C.L.I. (3d) 1, 39 C.P.C. (4th) 100 (S.C.C.) — followed

*Hindcastle Ltd. v. Barbara Attenborough Associates Ltd.* (1996), [1997] A.C. 70, [1996] 2 W.L.R. 262, [1996] 1 All E.R. 737 (U.K. H.L.) — considered

*Husky Oil Operations Ltd. v. Minister of National Revenue* (1995), [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 188 N.R. 1, 24 C.L.R. (2d) 131, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.) — considered

*McNeil v. Train* (1848), 5 U.C.Q.B. 91, 1848 CarswellOnt 55 (U.C. Q.B.) — considered

*Peterborough Hydraulic Power Co. v. McAllister* (1908), 17 O.L.R. 145 — considered

*Stacey v. Hill* (1901), [1901] 1 Q.B. 660 (Eng. C.A.) — considered

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

*Transco Mills Ltd. v. Percan Enterprises Ltd.* (1993), 76 B.C.L.R. (2d) 129, 100 D.L.R. (4th) 359, 29 R.P.R. (2d) 235, 23 B.C.A.C. 181, 39 W.A.C. 181, 1993 CarswellBC 19 (B.C. C.A.) — considered

*Warnford Investments Ltd. v. Duckworth* (1977), [1979] Ch. 127, [1978] 2 All E.R. 517 (Eng. Ch. Div.) — considered

*Wotherspoon v. Canadian Pacific Ltd.* (1979), 22 O.R. (2d) 385, 92 D.L.R. (3d) 545, 1979 CarswellOnt 758 (Ont. H.C.) — considered

#### **Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

Generally — considered

Pt. III — referred to

s. 62(3) — considered

s. 65.2 [en. 1992, c. 27, s. 30; am. 1997, c. 12, s. 42] — considered

s. 65.2(1) [en. 1992, c. 27, s. 30] — considered

s. 65.2(2) [en. 1992, c. 27, s. 30] — considered

s. 65.2(3) [en. 1992, c. 27, s. 30] — referred to

s. 65.2(4) [en. 1992, c. 27, s. 30] — considered

s. 65.2(5) [en. 1992, c. 27, s. 30] — considered

s. 65.2(6) [en. 1992, c. 27, s. 30] — considered

s. 179 — considered

*Landlord and Tenant (Covenants) Act 1995*, (U.K.), c. 30

Generally — referred to

#### **Rules considered:**

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

R. 20.04(2) — considered

APPEAL by tenant from judgment reported at 2002 CarswellOnt 705, 31 C.B.R. (4th) 225, 210 D.L.R. (4th) 659, 156 O.A.C. 392, 58 O.R. (3d) 549, 49 R.P.R. (3d) 171, 27 B.L.R. (3d) 102 (Ont. C.A.) allowing landlords' appeal from decision granting tenant's motion for summary judgment dismissing landlords' actions for rent arrears and other damages.

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

POURVOI de la locataire à l'encontre de l'arrêt publié à 2002 CarswellOnt 705, 31 C.B.R. (4th) 225, 210 D.L.R. (4th) 659, 156 O.A.C. 392, 58 O.R. (3d) 549, 49 R.P.R. (3d) 171, 27 B.L.R. (3d) 102 (Ont. C.A.), qui a accueilli le pourvoi des locatrices à l'encontre du jugement qui avait accueilli la requête pour jugement sommaire de la locataire et rejeté les actions des locatrices en paiement des arrérages de loyer et d'autres dommages-intérêts.

*Major J.:*

## I. Introduction

1 This appeal arises from a motion for summary judgment. The facts are undisputed. The respondents, Crystalline Investments Limited ("Crystalline") and Burnac Leaseholds Limited ("Burnac"), while owners of different properties, are referred to collectively as the landlords.

2 Dominion Stores Limited was the original tenant of the landlords. It is not clear from the record nor is it relevant whether Dominion Stores Limited became Domgroup Limited ("Domgroup") by reorganization or by a change of name. For purposes of this appeal, the appellant Domgroup can be viewed as the original tenant.

3 Domgroup assigned the leases to Coastal Foods Limited, ("Coastal Foods"), a wholly owned subsidiary. The consent of the landlords was not required under the leases for the assignments. Domgroup subsequently sold Coastal Foods which amalgamated to form Food Group Inc. ("Food Group"). Food Group later became insolvent and attempted a reorganization under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended to 1994.

4 The question is whether the terms of the reorganization by the insolvent assignee through its trustee where it purported to repudiate the leases under s. 65.2 of the Act affect the obligations between the landlords and the original tenant.

5 The procedure for granting summary judgment in Ontario was set out in rule 20.04(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. That rule provided as follows at the time:

### 20.04 . . .

(2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

6 In *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), at para. 27, Iacobucci and Bastarache JJ. discussed the legal principles that govern a motion for summary judgment:

The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra*, at para. 15).

The parties do not dispute the test for summary judgment.

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

7 The motions judge held that notices of repudiation given under s. 65.2 terminated the leases for all purposes. Relying on *Cummer-Yonge Investments Ltd. v. Fagot*, [1965] 2 O.R. 152 (Ont. H.C.), he found that, since the leases no longer existed, the liabilities that would have been owed by the original tenant to the landlords also disappeared. He granted summary judgment dismissing the claims of the landlords who sought damages from the original tenant. The Ontario Court of Appeal reversed the trial judge and held that the rights between the landlords and the original tenant were unaffected by proceedings under s. 65.2. The appeal was allowed and the summary judgments set aside.

8 For the reasons that follow, I agree with the Ontario Court of Appeal that the insolvency of the assignee and the order made pursuant to the Act do not affect the landlords who can continue to look to the original tenant for enforcement of the leases. The order affects the insolvent assignee and its creditors, including the original tenant and assignor of the leases, but does not reach to the landlords. I would dismiss the appeal.

9 In this appeal, the appellant sought to rely on certain common law remedies and, in particular, advanced the defence of surrender which was neither pleaded nor raised before the motions judge or the Court of Appeal. Surrender must be pleaded. See *McNeil v. Train* (1848), 5 U.C.Q.B. 91 (U.C. Q.B.); *Wotherspoon v. Canadian Pacific Ltd.* (1979), 22 O.R. (2d) 385 (Ont. H.C.), at p. 562. In these circumstances the court refused to consider the question.

10 This appeal is limited to confirming that Food Group's repudiation of the leases assigned to it by Domgroup did not, by virtue of s. 65.2 alone, terminate Domgroup's rights and obligations under the leases. Section 65.2 relates to the repudiation of leases by insolvent commercial tenants. It is not concerned with the effects of that repudiation on third parties, such as assignors and guarantors. Whether the leases were terminated by surrender, as Domgroup argues for the first time in the Court, or by the application of some other principle of common law, is a question best left for trial.

## II. Background

11 On April 30, 1979, Domgroup leased premises from Crystalline. On April 24, 1980, Domgroup leased a different location from Burnac. Both premises were located in New Brunswick. The leases had 25-year terms and contained the following assignment clause:

Notwithstanding any assignment or sublease the Lessee shall remain fully liable under this lease and shall not be released from performing any of its covenants, obligations or agreements in this lease and shall continue to be bound by this lease.

12 On May 25, 1985, Domgroup assigned both leases to Coastal Foods which later became Food Group.

13 Food Group encountered financial difficulty and attempted a reorganization. In February of 1994, Food Group filed a notice of intention to make a proposal pursuant to Part III of the Act.

14 Food Group then prepared and filed its proposal, stating that it believed the proposal would be "of benefit to its creditors and employees, and will enable the Food Group to continue in business, albeit on a much reduced scale". Part of the proposal was that Food Group's leases with Burnac and Crystalline be terminated pursuant to s. 65.2.

15 On February 18, 1994, the insolvent Food Group, through its trustee, gave the original landlords, Burnac

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

and Crystalline, notice of its intention to repudiate the leases. Neither Burnac nor Crystalline applied to the court to challenge the repudiation of the lease although entitled to do so under the Act. At no time did Food Group advise Domgroup of the proceedings.

16 On March 18, 1994, the proposal was approved by the Court of Queen's Bench for New Brunswick in Bankruptcy. On March 24, 1994, Burnac and Crystalline received compensation payments of \$173,704.39 and \$131,154.54, respectively, being the equivalent of six months rent under the leases pursuant to s. 65.2(3) of the Act. The repudiation was declared to be effective as of March 31, 1994.

17 Food Group vacated Crystalline's premises in March of 1994. It had previously vacated Burnac's premises one year earlier, but had continued to pay rent.

18 Burnac, one of the original landlords, entered into short-term leases with a bingo operation and started modifications to the premises to accommodate another tenant. Similarly, the other landlord, Crystalline, licensed its premises to kiosk-based vendors.

19 On January 20, 1995, Burnac and Crystalline informed the original tenant, Domgroup, by mail that the insolvent, Food Group, had repudiated the leases. At the same time, they asserted their rights to be paid outstanding rent pursuant to the assignment clause in the leases. The letters did not acknowledge the termination of the leases as of March 31, 1994.

20 Domgroup declined to pay. Burnac and Crystalline both sued in Ontario Superior Court. Domgroup, on application, was granted summary judgment in both cases. Both were later reversed by the Ontario Court of Appeal.

### III. Relevant Statutory Provisions

21 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

65.2 (1) At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial tenant under a lease of real property, the insolvent person may repudiate the lease on giving thirty days notice to the landlord in the prescribed manner, subject to subsection (2).

(2) Within fifteen days after being given notice of the repudiation of a lease under subsection (1), the landlord may apply to the court for a declaration that subsection (1) does not apply in respect of that lease, and the court, on notice to such parties as it may direct, shall make such a declaration unless the insolvent person satisfies the court that the insolvent person would not be able to make a viable proposal, or that the proposal the insolvent person has made would not be viable, without the repudiation of that lease and all other leases that the tenant has repudiated under subsection (1).

(3) Where a lease is repudiated pursuant to subsection (1), a proposal filed by the insolvent person must provide for payment to the landlord, immediately after court approval of the proposal, of compensation equal to the lesser of

(a) an amount equal to six months rent under the lease, and

(b) the rent for the remainder of the lease, from the date on which the repudiation takes effect.

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

(4) For the purpose of voting on any question relating to a proposal referred to in subsection (3), the landlord does not have any claim in respect of accelerated rent, damages arising out of the repudiation, or the compensation referred to in subsection (3).

(5) Nothing in subsections (1) to (4) affects the operation of section 146 in the event of bankruptcy.

(6) Where an insolvent person who has made a proposal referred to in subsection (3) becomes bankrupt

(a) after court approval of the proposal and before the proposal is fully performed, and

(b) after compensation referred to in subsection (3) has been paid,

the landlord has no claim against the estate of the bankrupt for accelerated rent.

#### **IV. Judicial History**

##### ***A. Ontario Superior Court of Justice (2001), 39 R.P.R. (3d) 49 (Ont. S.C.J.)***

22 The motions for summary judgment by Domgroup were heard by Trafford J. on March 1, 2001, and by consent, the legal issue was stated as follows:

Is a landlord, following the Court-approved termination of a commercial lease under s. 65.2 of the 1992 Act and following acceptance of the compensation provided for by the statutory code, entitled to arrears of rent, or for damages, in respect of the unexpired term of the terminated lease as against the pre-proposal assignor of the lease?

23 The motions judge held that the court-approved termination of the leases ended all obligations of the parties and rendered the assignment clause inoperative. The compensation paid to the landlords under s. 65.2 constituted the total compensation for all damages to which they were entitled under the leases. Since the entire lease, including the assignment clause, was terminated by the court order, there was no basis in law for the claims made against the original tenant, Domgroup. He granted summary judgment in both cases.

##### ***B. Ontario Court of Appeal (2002), 58 O.R. (3d) 549 (Ont. C.A.)***

24 The Ontario Court of Appeal rejected the conclusion of the motions judge that the provisions of s. 65.2 terminated the leases for all purposes. In the view of Carthy J.A., the rights between the landlords and the original tenant were unaffected by the insolvency proceedings. He found no change in this result was warranted by the 1997 amendment to the English version of s. 65.2 from the term "repudiate" to "disclaim".

25 The Court of Appeal held that the consequences of repudiation should be restricted to those provided for in s. 65.2 having regard to the purposes of insolvency proceedings as a whole. While the insolvency proceedings permitted Food Group as the insolvent to shed its obligations, the rights and liabilities of Domgroup to the landlords under the leases remained intact.

#### **V. Analysis**

##### ***A. The Construction of Section 65.2***

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

26 The dispute is whether the Act has relieved the appellant Domgroup of its obligations by the assignment of the leases ultimately to the insolvent. More precisely, should s. 65.2 be interpreted to bring all the obligations between the appellant and respondents to an end when the leases were repudiated by the insolvent, Food Group?

27 While the drafting of s. 65.2 focusses on bilateral relationships, such as a simple lease between a landlord and a tenant, the effect of the repudiation does not change in circumstances such as the present ones, involving a tripartite arrangement resulting from the assignment of a lease. In both situations, the repudiation must be construed as benefiting only the insolvent.

28 I, thus, agree with the Court of Appeal that s. 65.2 should be read narrowly. The plain purposes of the section are to free an insolvent from the obligations under a commercial lease that have become too onerous, to compensate the landlord for the early determination of the lease, and to allow the insolvent to resume viable operations as best it can. Nothing in s. 65.2, or any part of the Act, protects third parties (i.e., guarantors, assignors or others) from the consequences of an insolvent's repudiation of a commercial lease. That is to say that they remain liable when the party on whose behalf they acted becomes insolvent.

29 When a lease is finalized, the landlord and tenant then have privity of contract and privity of estate. See *Francini v. Canuck Properties Ltd.* (1982), 35 O.R. (2d) 321 (Ont. C.A.), at pp. 322-23. When the lease is assigned, the landlord's privity of estate with the original tenant comes to an end, but the privity of contract continues and the original tenant remains liable upon its covenant. The estate or interest in the tenancy is transferred to the assignee, who, by being entitled to possession, is obliged to make payment of rent, but, subject to the terms of the lease and the agreement of the parties, the original tenant remains liable should his assignee not pay the rent. See C. S. Goldfarb, "The Rights and Obligations of the Original Tenant and Subsequent Tenants after an Assignment of Lease", in H. M. Haber, ed., *Assignment, Subletting and Change of Control in a Commercial Lease* (2002), 157.

30 Both the British Columbia Court of Appeal in *Transco Mills Ltd. v. Percan Enterprises Ltd.* (1993), 100 D.L.R. (4th) 359 (B.C. C.A.), at p. 366, and Carthy J.A., here, at para. 16, quoted from Vice-Chancellor Megarry in *Warnford Investments Ltd. v. Duckworth* (1977), [1978] 2 All E.R. 517 (Eng. Ch. Div.), at p. 526, where the position of an original tenant in bankruptcy proceedings is discussed. It is worth repeating:

The original lessee is a person who as principal, undertook towards the lessor, the obligations of the lease for the whole term; and there is nothing in the process of assignment which replaced this liability by the mere collateral liability of a surety who must pay the rent only if the assignee does not. The bankruptcy of the assignee has for the time being destroyed the original lessee's right against the assignee to require him to discharge the obligations of the lease, and it has impaired the lessee's right of indemnity against him when he has to discharge the obligations himself; but it has not affected his primary liability towards the lessor, which continues unaffected. At no time does an original lessee become a mere guarantor to the lessor of the liability of any assignee of the lease.

[Emphasis added.]

31 From the time a lease is completed, the original tenant is bound by all the conditions, including the term. Despite the hardship that may later develop, the covenant is fully enforceable even if it has been assigned. In England, however, public concern over the continuing liability of original tenants in post-assignment bankruptcy situations resulted in the enactment of the *Landlord and Tenant (Covenants) Act 1995* (U.K.), 1995, c. 30. As a result, when a tenant in England lawfully assigns a lease, that tenant will have no further obligations with re-

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

spect to the covenant. To effect the same result in Canada, similar legislation is needed.

***B. Does the Common Law Indemnification Right Frustrate the Act?***

32 If the liabilities remain enforceable by the landlord against the original tenant, then presumably the original tenant can exercise its common law indemnification rights against its assignee as an unsecured creditor. See *Peterborough Hydraulic Power Co. v. McAllister* (1908), 17 O.L.R. 145 (Ont. C.A.), at p. 151. The original tenant could therefore prove a claim in insolvency against that assignee under this right of indemnity. As a result, the insolvent assignee could face an additional claim on the lease in excess of the preferred payment required to be paid to the landlord under s. 65.2.

33 The appellant submits this result would frustrate the objectives of the Act and is the reason that a repudiation under s. 65.2 should terminate a lease for all purposes. I disagree for two reasons.

34 First, an assignor is no different from other alternative debtors, none of which is excused under the Act. For example, s. 179 states:

179. An order of discharge does not release a person who at the date of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with him, or a person who was surety or in the nature of a surety for him.

While s. 62(3) provides:

62. (3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

Parliament therefore saw fit to conserve the liabilities of alternative debtors, yet chose not to extinguish their common law rights of indemnity.

35 Second, where an original tenant seeks indemnification on a contingent claim, provided the claim is provable and not disallowed, it would fall into the insolvency to be dealt with in accordance with the scheme of the Act. The assignor simply joins the other unsecured creditors in the proceedings. If such a claim is approved, it cannot satisfy and at the same time frustrate the Act.

36 Simply stated, the mere possibility that the original tenant may have a right of indemnity against his insolvent assignee and is able to make a claim to participate in the proposal proceedings as an unsecured creditor is not inconsistent with the statutory scheme. On the contrary, it is consistent with the circumstances applicable to other alternative covenantors, and does not affect or alter the nature of the original tenant's contractual relationship and obligations. More importantly, it does not require that the original tenant be discharged from liability.

37 I also question whether there is any justification for distinguishing between a guarantor and an assignor post-disclaimer. In *Cummer-Yonge*, *supra*, the landlord brought an action against guarantors of a bankrupt tenant for the unpaid rent accruing after the tenant's bankruptcy but prior to the reletting of the leased premises. The trustee in bankruptcy had disclaimed the lease in accordance with the trustees' rights under the then applicable federal bankruptcy and provincial landlord and tenancy legislation. The guarantee provision contained in the disclaimed lease provided as follows (at p. 153):



2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

The Guarantors if one is a party hereto join for the first five (5) years of the term hereby granted for valuable consideration and for the purpose of guaranteeing the due performance by the Lessee of all its covenants in this lease including the covenant to pay rent on the part of the Lessee to be performed.

38 Gale C.J.H.C. applied the reasoning of the English Court of Appeal in *Stacey v. Hill*, [1901] 1 Q.B. 660 (Eng. C.A.). He read the guarantee clause strictly as a pure surety provision and found that when the lease was disclaimed by a trustee in bankruptcy, the bankrupt's covenants to perform were dissolved. Since the guarantors' obligation is to assure performance of those covenants, their obligations disappeared with the covenants. The Ontario Court of Appeal affirmed the decision without reasons ([1965] 2 O.R. 157n (Ont. C.A.)).

39 *Cummer-Yonge* has created uncertainty in leasing and bankruptcy. Not only have drafters of leases attempted to circumvent the holding in *Cummer-Yonge* by playing upon the primary and secondary obligation distinction, but courts have also performed what has been called "tortuous distinctions" in order to reimpose liability on guarantors. See J. W. Lem and S. T. Proniuk, "Goodbye '*Cummer-Yonge*': A Review of Modern Developments in the Law Relating to the Liability of Guarantors of Bankrupt Tenants" (1993), 1 *D.R.P.L.* 419, at p. 436.

40 Despite the division over *Cummer-Yonge*, the distinction between guarantors as having secondary obligations that disappear when a lease is disclaimed by a trustee in bankruptcy, and assignors as having primary obligations that survive a disclaimer, thrives in Canadian case law.

41 Not surprisingly, *Stacey v. Hill*, *supra*, led to a similar situation in England. In *Hindcastle Ltd. v. Barbara Attenborough Associates Ltd.*, [1996] 1 All E.R. 737 (U.K. H.L.), Lord Nicholls, faced with facts involving a guarantor of an assignor of a lease, gave a convincing illustration of the absurdity of maintaining this distinction, at p. 754:

This would make no sort of legal or commercial sense. This would mean that directors who guarantee their company's obligations would not be liable if their own company became insolvent whilst tenant, but they would be liable if an assignee from their company encountered financial difficulties whilst tenant. Mr. Whitten, as guarantor of CIT's obligations, remains liable to the landlord. According to *Stacey v. Hill*, had he been a guarantor of Prest's liabilities [the assignee who became bankrupt], the disclaimer would have released him. What sort of a law would this be?

[Emphasis in original.]

42 The House of Lords went on to overrule *Stacey v. Hill*. In my opinion, *Cummer-Yonge* should meet the same fate. Post-disclaimer, assignors and guarantors ought to be treated the same with respect to liability. The disclaimer alone should not relieve either from their contractual obligations.

43 The appellant submits that the English bankruptcy statute that was applied in *Hindcastle* clearly stated that disclaimer will not "affect the rights or liabilities of any other person", and that s. 65.2 of the Act has no similar wording. I agree with the respondents' rebuttal to this argument that the English wording affirms the ordinary construction of the statute. In other words, explicit statutory language is required to divest persons of rights they otherwise enjoy at law. As Carthy J.A. observed in the Court of Appeal, at paras. 11-12, the lease may have real value to the original tenant and, on the wording of s. 65.2, cannot be eliminated in the absence of the original tenant's agreement. In any event, so long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. See *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.); *Gif-*

2004 CarswellOnt 219, 2004 SCC 3, 316 N.R. 1, 16 R.P.R. (4th) 1, 184 O.A.C. 33, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), REJB 2004-53098, J.E. 2004-335, 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513

*fen, Re*, [1998] 1 S.C.R. 91 (S.C.C.).

44 As previously noted, the appellant sought to argue surrender in this Court despite not having pleaded surrender in either action as a defence, and not raising the issue before the motions judge or the Court of Appeal. Like the other defences, surrender represents an issue for trial. The decision whether to allow amendments to the pleadings, and on what terms if any, should be left to the trial judge.

#### **VI. Disposition**

45 I would dismiss the appeal and award the respondents their costs in this Court and below.

*Appeal dismissed.*

*Pourvoi rejeté.*

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# TAB 3

2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446 A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946



2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446 A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946

Devon Canada Corp. v. PE-Pittsfield LLC

Devon Canada Corporation (Appellant / Plaintiff / Applicant) and PE-Pittsfield, LLC and Purenergy I, LLC, both carrying on business under the firm name and style of Pittsfield Generating Company, LP and the said Pittsfield Generating Company, LP, Alteresco, Inc. (sometimes known as Altresco Incorporated) carrying on business under the firm name and style of Pittsfield Generating Company, LP (formerly known as Altresco Pittsfield, LP) Pittsfield Partners, Inc., carrying on business under the firm name and style of Pittsfield Generating Company, LP (formerly known as Altresco Pittsfield, LP) and the said Pittsfield Generating Company, LP (formerly known as Altresco Pittsfield, LP) (Respondents / Defendants / Respondents)

Pittsfield Generating Company, LP (Respondent / Plaintiff by Counterclaim / Respondent) and Devon Canada Corporation (Appellant / Defendant by Counterclaim / Applicant)

Alberta Court of Appeal

C. Hunt, M. Paperny, P. Rowbotham JJ.A.

Heard: October 10, 2008

Judgment: November 20, 2008

Docket: Calgary Appeal 0801-0189-AC

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Proceedings: affirming *Devon Canada Corp. v. PE-Pittsfield LLC* (2008), 94 Alta. L.R. (4th) 392, 48 B.L.R. (4th) 62, 2008 ABQB 394, 2008 CarswellAlta 961, 59 C.P.C. (6th) 101 (Alta. Q.B.)

Counsel: S. Carscallen, Q.C., C.A. Crang for Applicant

P.T. Linder, Q.C., R. Van Dorp for Respondent

Subject: Corporate and Commercial; Civil Practice and Procedure

Business associations --- Legal proceedings involving business associations — Practice and procedure in actions involving corporations — Discovery — Persons subject to examination — Employee — General principles

Plaintiff brought application to examine representatives of defendant partnership's limited partners, or alternatively, to examine C, employee of limited partners — Plaintiff also brought application for order to produce D and B, consultants to defendant — Case management judge granted application in part, finding that plaintiff met burden of showing that B was fulfilling role akin to employee in negotiations — While defendant agreed to pro-

2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446 A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946

duce D, judge found C was not producible — Judge concluded that plaintiff did not have right to examine limited partners — Judge found lack of registration in Alberta of properly registered foreign limited partnership did not change its legal personality into general partnership — Judge noted that registration under s. 52 of Partnership Act is not compulsory, but non-registration did not strip partnership of its limited status in Alberta — Further, judge noted limited partners maintained their limited partner status in Alberta and were not parties to this action — Judge found appropriate party to be examined was general partner and its officers and employees — Judge also found there was no evidence that C acted in capacity akin to employee of general partner — Plaintiff appealed — Appeal dismissed — Limited partners retained their status as such in Alberta and, as limited partners, were not proper parties to action — Principles of private international law and lack of clear statutory language that would change defendant of its limited partnership status and turn it into ordinary partnership supported conclusion that non-registration does not convert otherwise properly constituted foreign limited partnership into general partnership when it carries on business in Alberta — Neither R. 80 nor R. 201 of Alberta Rules of Court make limited partners parties to action against limited partnership, and judge properly adopted reasoning set out in case law in concluding that R. 201 does not apply to limited partnership — Even if it could be suggested that as limited partners, they would be entitled to share in proceeds, this alone would be insufficient to bring them within ambit of R. 201 — Judge's conclusion that claim regarding limited partners taking control of business and thus possibly being liable was not made out on evidence was entitled to considerable deference — There was no basis for judicial intervention.

Civil practice and procedure --- Discovery — Examination for discovery — Who may be examined — General principles

Plaintiff brought application to examine representatives of defendant partnership's limited partners, or alternatively, to examine C, employee of limited partners — Plaintiff also brought application for order to produce D and B, consultants to defendant — Case management judge granted application in part, finding that plaintiff met burden of showing that B was fulfilling role akin to employee in negotiations — While defendant agreed to produce D, judge found C was not producible — Judge concluded that plaintiff did not have right to examine limited partners — Judge found lack of registration in Alberta of properly registered foreign limited partnership did not change its legal personality into general partnership — Judge noted that registration under s. 52 of Partnership Act is not compulsory, but non-registration did not strip partnership of its limited status in Alberta — Further, judge noted limited partners maintained their limited partner status in Alberta and were not parties to this action — Judge found appropriate party to be examined was general partner and its officers and employees — Judge also found there was no evidence that C acted in capacity akin to employee of general partner — Limited partners retained their status as such in Alberta and, as limited partners, were not proper parties to action — Principles of private international law and lack of clear statutory language that would change defendant of its limited partnership status and turn it into ordinary partnership supported conclusion that non-registration does not convert otherwise properly constituted foreign limited partnership into general partnership when it carries on business in Alberta — Neither R. 80 nor R. 201 of Alberta Rules of Court make limited partners parties to action against limited partnership, and judge properly adopted reasoning set out in case law in concluding that R. 201 does not apply to limited partnership — Even if it could be suggested that as limited partners, they would be entitled to share in proceeds, this alone would be insufficient to bring them within ambit of R. 201 — Judge's conclusion that claim regarding limited partners taking control of business and thus possibly being liable was not made out on evidence was entitled to considerable deference — There was no basis for judicial intervention.

**Cases considered by *M. Paperny J.A.*:**

*Crystalline Investments Ltd. v. Domgroup Ltd.* (2004), 2004 SCC 3, 2004 CarswellOnt 219, 2004 Carswel-

2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446 A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946

1Ont 220, 184 O.A.C. 33, 16 R.P.R. (4th) 1, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513, 316 N.R. 1 (S.C.C.) — considered

*Etobicoke (Borough) Board of Education v. Highbury Developments Ltd.* (1958), 12 D.L.R. (2d) 145, (sub nom. *Board of Education for Township of Etobicoke v. Highbury Developments Ltd.*) [1958] S.C.R. 196, 1958 CarswellOnt 70 (S.C.C.) — considered

*Gemini Group Automated Distribution Systems Inc. v. PWA Corp.* (1993), 1993 CarswellOnt 465, 20 C.P.C. (3d) 385, 68 O.A.C. 205, 16 O.R. (3d) 239 (Ont. C.A.) — considered

*Gienow Building Products Ltd. v. Tremco Inc.* (2000), 2000 ABCA 105, 255 A.R. 273, 220 W.A.C. 273, 2000 CarswellAlta 302, 42 C.P.C. (4th) 1, 78 Alta. L.R. (3d) 40, 186 D.L.R. (4th) 730 (Alta. C.A.) — referred to

*H. (G.R.) v. Alberta (Public Trustee)* (2000), 80 Alta. L.R. (3d) 144, [2000] 8 W.W.R. 157, 2000 CarswellAlta 463, 47 C.P.C. (4th) 128, 2000 ABQB 326, 267 A.R. 52 (Alta. Q.B.) — referred to

*International Assn. of Science & Technology for Development v. Hamza* (1995), 28 Alta. L.R. (3d) 125, 34 C.P.C. (3d) 210, 122 D.L.R. (4th) 92, 162 A.R. 349, 83 W.A.C. 349, [1995] 6 W.W.R. 75, 1995 CarswellAlta 112 (Alta. C.A.) — considered

*J.R. McLean & Associates Ltd. v. Glenrobin Place Developments Ltd. Partnership* (1993), 22 C.P.C. (3d) 354, 1993 CarswellBC 697 (B.C. S.C. [In Chambers]) — considered

*Marigold Holdings Ltd. v. Norem Construction Ltd.* (1988), 31 C.L.R. 51, 60 Alta. L.R. (2d) 289, 89 A.R. 81, [1988] 5 W.W.R. 710, 1988 CarswellAlta 116 (Alta. Q.B.) — considered

*Petrifond Midwest Ltd. v. Esso Resources Canada Ltd.* (1996), 42 Alta. L.R. (3d) 157, 29 C.L.R. (2d) 129, 30 C.C.L.T. (2d) 107, [1996] 10 W.W.R. 1, 187 A.R. 107, 127 W.A.C. 107, 6 C.P.C. (4th) 254, 1996 CarswellAlta 713 (Alta. C.A.) — referred to

*Sorrel 1985 Ltd. Partnership v. Sorrel Resources Ltd.* (1992), 3 Alta. L.R. (3d) 90, 7 C.P.C. (3d) 129, 130 A.R. 231, 1992 CarswellAlta 76 (Alta. Master) — considered

*Western Canadian Shopping Centres Inc. v. Dutton* (2001), (sub nom. *Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere*) 201 D.L.R. (4th) 385, [2002] 1 W.W.R. 1, 286 A.R. 201, 253 W.A.C. 201, 8 C.P.C. (5th) 1, 94 Alta. L.R. (3d) 1, 272 N.R. 135, 2001 SCC 46, 2001 CarswellAlta 884, 2001 CarswellAlta 885, [2001] 2 S.C.R. 534 (S.C.C.) — considered

*155569 Canada Ltd. v. 248524 Alberta Ltd.* (2000), 2000 CarswellAlta 91, 2000 ABCA 41, 30 R.P.R. (3d) 185, 255 A.R. 1, 220 W.A.C. 1, 77 Alta. L.R. (3d) 231 (Alta. C.A.) — considered

#### **Statutes considered:**

*Partnership Act*, R.S.A. 2000, c. P-3

Generally — referred to

Pt. 1 — referred to

2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446  
A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946

Pts. 1-3 — referred to

Pt. 2 — referred to

Pt. 3 — referred to

Pt. 4 — referred to

s. 52 — considered

s. 52(2) — considered

s. 52(5) — considered

s. 57 — referred to

s. 64 — referred to

s. 77 — considered

s. 93 — considered

s. 104(1) — considered

s. 105 — considered

s. 106 — referred to

**Rules considered:**

*Alberta Rules of Court*, Alta. Reg. 390/68

Generally — referred to

R. 42 — referred to

R. 80 — considered

R. 80(1) — considered

R. 187(3) — referred to

R. 200 — referred to

R. 200(1) — referred to

R. 201 — considered

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Generally — referred to

2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446 A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946

APPEAL by corporate plaintiff from judgment reported at *Devon Canada Corp. v. PE-Pittsfield LLC* (2008), 94 Alta. L.R. (4th) 392, 48 B.L.R. (4th) 62, 2008 ABQB 394, 2008 CarswellAlta 961, 59 C.P.C. (6th) 101 (Alta. Q.B.), granting in part its application to examine representatives of defendant company's limited partners.

**M. Paperny J.A.:**

1 This appeal concerns the availability of examination for discovery of limited partners when the limited partnership is itself a named defendant. The general partner, PE-Pittsfield, LLC ("Pittsfield") charged with conducting the business of the limited partnership has already been examined. The case management judge declined the requested order for the examination of the limited partners.

2 The appeal also considers the effect of non-registration under the *Partnership Act* of Alberta, R.S.A. 2000, c. P-3, (*Partnership Act*) on the legal status of a foreign limited partnership and its limited partners when the partnership is carrying on business in Alberta.

3 The action has been ongoing for several years and is scheduled for trial in January 2009.

**Background**

4 The plaintiff Devon Canada Corp. ("Devon") commenced this action against several defendants including Pittsfield, carrying on business as Pittsfield Generating Company, LP ("PGC"). PGC is a registered Delaware limited partnership. Pittsfield is the general partner in PGC. Devon's claim relates to the termination of two power sales agreements between PGC and two third parties who are not parties to this litigation. PGC's counterclaim relates to Devon's subsequent failure to deliver gas to PGC under a natural gas supply agreement. General Electric Capital Corp. ("GECC") and General Electric Credit Corp. of Tennessee ("GECC-Tennessee") are limited partners in PGC but are not named in the litigation. Devon wishes to examine them. GECC and GECC-Tennessee, became limited partners in PGC eight days before the alleged cause of action arose.

5 The *Partnership Act* is divided into several parts. Part 1 deals with ordinary partnerships, Part 2 with limited partnerships, Part 3 with limited liability partnerships and Part 4 with general provisions.

6 PGC is not registered in Alberta under Part 2, s. 52 of the *Partnership Act*. The relevant portions of s. 52 provide:

(2) A partnership that

(a) was formed in a jurisdiction, other than Alberta, that is designated by the Lieutenant Governor in Council for the purposes of this subsection, and

(b) is registered or otherwise formally recognized as a limited partnership under the laws of that jurisdiction

may be registered as a limited partnership under this Act on the filing with and recording by the Registrar of a certificate that complies, or in the opinion of the Registrar substantially complies, with subsection (3).

.....

(5) A firm registered as a limited partnership under subsection (2) has the same rights and is subject to the



2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446 A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946

same duties, restrictions and liabilities under this Act as a firm formed as a limited partnership under subsection (1).

It is common ground that PGC was formed in a jurisdiction designated by the Lieutenant Governor in council and could have registered in Alberta.

7 Part 2, Section 77 of the *Partnership Act* provides:

A limited partner, unless the limited partner is also a general partner, is not a proper party to proceedings against a limited partnership, except when the object of the proceedings is to enforce a limited partner's right against or liability to the limited partnership.

8 Registration under the *Partnership Act* is not mandatory. The parties disagree about the effect of non-registration. Devon argues that by failing to register under the Alberta *Partnership Act*, PGC lost its status as a limited partnership in Alberta and became an ordinary or general partnership, making GECC and GECC-Tennessee general rather than limited partners of PGC and, pursuant to *Rule 201* of the *Alberta Rules of Court*, Alta. Reg. 390/68, parties to the present action and examinable for discovery as such. *Rule 201* provides:

A member of a firm which is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination.

9 Devon also maintains that it could have named GECC and GECC-Tennessee as parties but did not because they are deemed parties by *Rule 80(1)* since the limited partnership has been named. *Rule 80(1)* provides:

Subject to the provisions of any enactment, any two or more persons claiming to be entitled or alleged to be liable as partners in respect of a cause of action and carrying on business within the jurisdiction may sue or be sued in the name of the firm of which they were partners at the time when the cause of action accrued.

10 Alternatively, Devon sought to examine Mr. Ed Christie, who Devon alleged acted in a capacity akin to that of an employee of the general partner.

11 The respondents submit that under the principles of private international law, the legal status of PGC, GECC and GECC-Tennessee is the same in Alberta as in Delaware: PGC is a limited partnership, and GECC and GECC-Tennessee are limited partners only and are not proper parties to the proceedings or examinable for discovery.

### Decision Below

12 The case management judge found that non-registration under the *Partnership Act* does not change the status of a limited partner in a foreign limited partnership and that the provisions of *Rules 80(1)* and *201* do not make a limited partner a party to an action against the limited partnership. She held that the rationale underlying the *Rules* is inapplicable to limited partnerships. The case management judge relied in part on *Marigold Holdings Ltd. v. Norem Construction Ltd.* (1988), 89 A.R. 81, [1988] 5 W.W.R. 710 (Alta. Q.B.), where the Court held that a limited partnership enjoys a statutory existence apart from the limited partner, primarily because of the limited liability of the limited partner. The Court characterized a limited partnership as a hybrid of sorts between a corporation and a general partnership.

13 She agreed with the conclusion in *J.R. McLean & Associates Ltd. v. Glenrobin Place Developments Ltd.*

2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446 A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946

*Partnership* (1993), 22 C.P.C. (3d) 354, [1993] B.C.J. No. 2589 (B.C. S.C. [In Chambers]) (*J.R. McLean*), that the defining feature of a limited partnership (as opposed to an ordinary partnership) is the circumscribed role that a limited partner may play in the business. The Court held that a limited partner who does not engage in the management or control of the business carried on by the limited partnership was not intended to be included as a partner who could be examined for discovery on behalf of the partnership, except when there is litigation as between the limited partners and the general partner. Examination for discovery of limited partners cannot secure evidence against the limited partnership as a whole.

14 She also followed the Ontario Court of Appeal's decision in *Gemini Group Automated Distribution Systems Inc. v. PWA Corp.* (1993), 16 O.R. (3d) 239, 20 C.P.C. (3d) 385 (Ont. C.A.) (*Gemini Group*) which held that in order to retain limited liability, a limited partner must avoid engaging in management of the partnership business. Considering both the nature of a limited partnership and the purpose behind the Ontario *Rules*, the Court held that a limited partner who does not engage in management of the business was not intended to be a partner who could be examined for discovery on behalf of the partnership.

15 The case management judge distinguished the decision in *Sorrel 1985 Ltd. Partnership v. Sorrel Resources Ltd.*, [1992] A.J. No. 480, 3 Alta. L.R. (3d) 90 (Alta. Master) (*Sorrel*). *Sorrel* dealt with an action amongst partners, a situation now governed by the exception in what is now s. 77 of the *Partnership Act* (litigation within a partnership). She also characterized the Master's view that a limited partner is producible as a party as *obiter dicta*.

16 She observed that, like the B.C. and Ontario *Rules* considered in the above cases, the Alberta *Rules* were developed for ordinary partnerships. Because the liability, management and control of limited partnerships are fundamentally different from those of ordinary partnerships, the case management judge found that the *Rules* do not apply to limited partnerships.

17 She further found that in order for the limited liability of GECC and GECC-Tennessee to be taken away, legislation would have to do so explicitly, which was not the case here. She concluded that, on these facts, PGC remains a limited partnership and GECC and GECC-Tennessee maintain their limited partner status in Alberta, and are neither parties to this action nor subject to examination for discovery in these circumstances.

### Grounds of Appeal

18 The grounds of appeal are:

1. did the case management judge err in concluding that failure to register under the *Partnership Act* did not convert an otherwise properly constituted foreign limited partnership into a general partnership;
2. do *Rules* 80 and 201 apply to limited partnerships so as to allow examination for discovery of limited partners as parties to the proceedings; and
3. did the case management judge err in determining that the limited partners here had not assumed management of the business and lost their limited partnership status, or in determining that Mr. Christie was not properly examinable under *Rule* 200?

### Standard of Review

2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446 A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946

19 An interpretation of the *Rules of Court* or of the *Partnership Act* is reviewable on a standard of correctness, while orders relating to the nature and scope of examination for discovery are within a case management judge's discretion and are entitled to considerable deference: *Gienow Building Products Ltd. v. Tremco Inc.*, 2000 ABCA 105, 78 Alta. L.R. (3d) 40 (Alta. C.A.).

#### Analysis

20 This appeal turns largely on the legal status of a foreign limited partnership that has not registered under the *Partnership Act* and of its limited partners, and whether *Rules* 80 and 201 apply to limited partners.

21 It is helpful to begin with some general principles regarding the nature of a limited partnership. As stated by R.C. I'Anson Banks in *Lindley & Banks on Partnership*: 18th ed. (London: Sweet & Maxwell, 2002) at 28-01:

The essence of limited partnership is the combination in a firm of (1) one or more partners whose liability for the debts and obligations of the firm is unlimited and who alone are entitled to manage the firm's affairs, and (2) one or more partners whose liability for such debts and obligations is limited in amount and who are *excluded* from all management functions.

[emphasis in original]

22 This is in contrast to the incidents of ordinary partnership, where the partners collectively carry on the business of the partnership with a view to profit and where each does so as both agent and principal for the other(s). In contrast to a limited partnership, in an ordinary partnership every partner is liable jointly and severally with the other partners for the debts and obligations of the partnership.

23 In a limited partnership, however, the limited partners may not participate in the control of the partnership if they wish to preserve their limited status: *Partnership Act*, ss. 57 and 64. Accordingly, limited partners have no power to bind the partnership. Their liability is typically limited to the extent of their capital contribution. The general partner, on the other hand, has the same implied authority to bind the partnership as in an ordinary partnership and the same corresponding liability. Specific rights and obligations fall to be determined under applicable legislation.

***Ground 1: Did the case management judge err in concluding that failure to register under the Partnership Act did not convert an otherwise properly constituted foreign limited partnership into an ordinary partnership?***

24 Devon's position is straightforward. PGC did not register under s. 52(2) of the *Partnership Act*. Therefore, Part 2 of the *Partnership Act* does not apply, and PGC is an ordinary partnership. In the result, GECC and GECC-Tennessee are also ordinary partners. Devon says that principles of private international law do not apply.

25 I disagree and rely on the principles of private international law, that rights cannot be stripped away without express language, and a reading of the *Partnership Act* itself.

26 As a matter of private international law, the limited partnership's status is a substantive matter to be determined by the law of the jurisdiction where it was created: Janet Walker, *Castel & Walker: Canadian Conflict of Laws*: 6th ed. (Markham, Ont.: LexisNexis Canada Inc., Re. 11-4/2008), §30.1:

2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446 A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946

Questions concerning the status of a foreign corporation, especially whether it possesses the attributes of legal personality, are, on the analogy of natural persons, governed by the law of the domicile of the corporation. This domicile is in the state, province or territory of incorporation or organization and it cannot be changed during the corporation's existence even if the corporation carries on business elsewhere.

27 In *International Assn. of Science & Technology for Development v. Hamza* (1995), 162 A.R. 349, [1995] 6 W.W.R. 75 (Alta. C.A.) (*Hamza*), the issue was whether an unincorporated foreign entity that was recognized within its home jurisdiction as a legal person with status to sue should be given similar recognition in Alberta. The Court concluded that it should. If the respondents had been resident in Alberta, they would have lacked the status to sue. However, because they were foreign litigants, the Court considered private international law rules. By analogy to natural persons, questions concerning the status of a foreign corporation within its home jurisdiction are determined by the law of the place where the corporation is formed. Applying this reasoning to limited partnerships, the law of the place of formation of the partnership governs the status of the partnership and the partners. Whether or not PGC is a limited partnership and GECC and GECC-Tennessee are limited partners is a question for the laws of Delaware, not the Alberta *Partnership Act*. This status in Delaware is not challenged.

28 Devon argues that this appeal does not address PGC's substantive rights, but only procedural rights. I disagree. Put simply, seeking to have limited partners treated as ordinary partners engages substantive rights because as ordinary partners they would have joint and several liability. The right to conduct discoveries of ordinary partnerships is premised on the legal concept that all partners are jointly and severally liable and the answers bind the partnership. That is not so for limited partners. The effect of making parties liable in a manner not contemplated by their constating documents is substantive.

29 Moreover, legal rights cannot be removed without express language. This is in keeping with the well-established principle that rights are held not to have been taken away or affected by a statute unless expressed in clear language: *Etobicoke (Borough) Board of Education v. Highbury Developments Ltd.*, [1958] S.C.R. 196, 12 D.L.R. (2d) 145 (S.C.C.). It is presumed that the legislature does not intend to abolish, limit or otherwise interfere with rights, whether statutory or common law, absent words that clearly indicate the legislature's intention to interfere: Ruth Sullivan, *Sullivan on the Construction of Statutes* 5th ed. (Markham, Ont.: LexisNexis, 2008) at 476-7. Or, as the Court put it in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (S.C.C.) at para. 43, [2004] 1 S.C.R. 60 (S.C.C.): "explicit statutory language is required to divest persons of rights they otherwise enjoy at law." The limited liability that goes with being a limited partner is such a right.

30 As indicated above, registration of a foreign limited partnership is optional under s. 52(2) of the *Partnership Act*. The *Partnership Act* is silent as to the effect of non-registration. It does not contain anything that explicitly takes away the limited liability of a limited partner in a foreign limited partnership. In fact, s. 105 specifically protects rights. It provides:

The rules of equity and of common law applicable to partnership continue in force except where they are inconsistent with the express provisions of this Act.

Thus, common law principles, including that of comity of nations, have not been displaced.

31 This conclusion is reinforced by reference to the general scheme of the *Partnership Act*. Parts 1 through 3 deal with ordinary partnerships, limited partnerships and limited liability partnerships, respectively. Part 4 contains general provisions, including a registration requirement for ordinary partnerships in s. 106.

2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446 A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946

32 In contrast to Part 2 of the *Partnership Act* dealing with limited partnerships, Part 3 dealing with limited liability partnerships specifically addresses the effect of the non-registration in Alberta of a foreign limited liability partnership. Section 93 provides:

A partnership that has the status of a limited liability partnership under the laws of a jurisdiction outside Alberta *shall be treated as an ordinary partnership* with respect to rights and obligations that are acquired or incurred by the partnership under Alberta law while the partnership is carrying on business in Alberta before registration as an extra-provincial LLP under section 95 or section 104.1.

[emphasis added]

33 Section 104 provides:

(1) The law of the governing jurisdiction of an extra-provincial LLP applies

(a) to the organization and internal affairs of the LLP, and

(b) to the liability of the partners of the LLP for debts, obligations and liabilities of or chargeable to the partnership.

34 In contrast, as to limited partnerships, s. 52(5) simply says that:

A firm registered as a limited partnership under subsection (2) has the same rights and is subject to the same duties, restrictions and liabilities under this Act as a firm formed as a limited partnership under subsection (1).

This is a far cry from the very clear language of s. 93 in relation to limited liability partnerships and the effect on status of their non-registration.

35 The principles of private international law and the lack of clear statutory language that would change PGC of its limited partnership status and turn it into an ordinary partnership support the conclusion that non-registration does not convert an otherwise properly constituted foreign limited partnership into a general partnership when it carries on business in Alberta. Therefore, GECC and GECC-Tennessee retain their status as limited partners in Alberta and as limited partners are not proper parties to the action.

***Ground 2: Do Rules 80 and 201 apply to limited partnerships so as to allow examination for discovery of limited partners as parties to the proceedings?***

36 In the alternative, Devon argues that the case management judge erred in finding that *Rules 80 and 201* do not apply to limited partnerships. Devon relies on *Sorrel* for the proposition that limited partners are subject to examination under *Rule 201*. However, *Sorrel* involved a claim by a limited partnership against the former general partner. As the case management judge correctly observed, that case falls within an exception in s. 77 of the *Partnership Act*.

37 In addition, Devon argues that the effect of *Rule 80*, and of the decision in *155569 Canada Ltd. v. 248524 Alberta Ltd.*, 2000 ABCA 41, 255 A.R. 1 (Alta. C.A.) (*155569*), is that limited partners are parties by virtue of the limited partnership being named as a defendant. In *155569*, the Court held that *Rule 80* permits both ordinary and limited partnerships to be named in an action. The Court there was not concerned with the

2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446 A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946

ability to examine the limited partners in the discovery process when, as here, they have not been made parties to the litigation. At para. 51, the Court noted that adding the limited partnership (as opposed to adding a limited partner) to the judgment roll does not make the limited partners liable for the judgment. The issue of liability, and thus of the status of limited partners as parties, was not engaged by the appeal. As the Court had earlier noted in *Hamza* in the context of general partnership, *Rule 80* does not affect the status of the legal persons behind the firm name. Naming the limited partnership as a defendant does not make the limited partners parties.

38 Neither *Rule 80* nor *Rule 201* makes limited partners parties to an action against the limited partnership. The case management judge properly adopted the reasoning in *J.R. McLean* and in *Gemini Group* to conclude that *Rule 201* does not apply to a limited partnership. The word "firm" in *Rule 201* refers to an ordinary partnership and reflects the underlying legal principles that all members of the firm can bind each other and share liability for the acts of their partners and all are parties. That is not the case in a limited partnership, a key feature of which is the restricted role that may be played by limited partners on behalf of the partnership.

39 Just as a limited partner is not a "member of a firm" for purposes of *Rule 201*, a limited partner is not "a person for whose benefit an action is prosecuted or defended" unless one of the exceptions in s. 77 of the *Partnership Act* applies. The Supreme Court of Canada considered *Rule 201* in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.) (*Western Canadian Shopping Centres*). One of the issues was whether this Court had properly determined if the requirements for a class action (a representative proceeding) then under *Rule 42* had been met.

40 In discussing the history and function of class actions, McLachlin C.J. noted that the representative action was the result of relaxation of the compulsory joinder rule by the courts of equity. She said at para. 20:

Chancey v. May (1722), Prec. Ch. 592, 24 E.R. 265, members of a partnership were permitted to sue on behalf of themselves and some 800 other partners for misapplication and embezzlement of funds by the partnership's former treasurer and manager. The court allowed the action because "it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, and so all the rest were in effect parties," and because "it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be made parties" (p. 265)[.]

41 The words "a person for whose benefit an action is prosecuted or defended" in *Rule 201* presume that the person in question is a party in the manner in which members of an ordinary partnership are parties or in the manner of persons for whose benefit a representative proceeding is prosecuted or defended are parties; in other words, true parties not typically named in the style of cause because of the relaxation of the compulsory joinder rule. *Rule 201* allows for the discovery of those persons. The more specific language in s. 77 of the *Partnership Act*, providing that a limited partner (who is not also the general partner) is not a proper party to a proceeding against the limited partnership, removes the presumption of party status in the case of a limited partner.

42 The *Rules* do not change the substantive law of limited partnerships. They do not make a limited partner a party to an action and therefore potentially directly liable to another party in a way that ignores the limited partner's limited liability and its corollary, the inability of a limited partner to participate in the management of the limited partnership.

43 In my view, this conclusion is consistent with the case law interpreting *Rule 201* and by analogy, *Rule 187(3)* (document discovery of a person for whose benefit an action is prosecuted or defended): *Petrifond Midw-*

2008 CarswellAlta 1765, 2008 ABCA 393, [2009] A.W.L.D. 48, [2009] A.W.L.D. 56, 63 C.P.C. (6th) 127, 446 A.R. 62, 442 W.A.C. 62, 303 D.L.R. (4th) 460, 171 A.C.W.S. (3d) 946

*est Ltd. v. Esso Resources Canada Ltd.* (1996), 187 A.R.107, 127 W.A.C. 107 (Alta. C.A.); *H. (G.R.) v. Alberta (Public Trustee)*, 2000 ABQB 326, 267 A.R. 52 (Alta. Q.B.), *aff'd*, 2002 ABCA 29, 303 A.R. 25 (Alta. C.A.); and *Western Canadian Shopping Centres*. Even if it could be suggested that as limited partners, GECC and GECC Tennessee would be entitled to share in the proceeds (albeit indirectly), this alone is insufficient to bring them within the rule.

***Ground 3: Did the case management judge err in determining that the limited partners here had not assumed control of the business and lost their limited partnership status, or in determining that Mr. Christie was not properly examinable under Rule 200?***

44 With respect to Devon's argument that the case management judge erred in failing to find that GECC and GECC-Tennessee took part in the control of the business and therefore may be liable, Devon has not named GECC and GECC-Tennessee as parties nor made those allegations in its pleadings. The case management judge concluded that such a claim had not been made out on the evidence before her. Her decision on that point is entitled to considerable deference and there is no basis for appellate intervention.

45 Finally, there is no reviewable error in the case management judge's finding that Mr. Christie was not examinable under *Rule 200(1)* as a person "akin to an employee" of Pittsfield. Her conclusions were grounded in the evidence.

46 The appeal is dismissed.

***C. Hunt J.A.:***

I concur.

***P. Rowbotham J.A.:***

I concur.

*Appeal dismissed.*

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# TAB 4



1994 CarswellAlta 769, 20 Alta. L.R. (3d) 296, [1994] 7 W.W.R. 37, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490, 168 N.R. 381, 115 D.L.R. (4th) 478, 155 A.R. 321, 73 W.A.C. 321, [1994] I.L.R. 1-3077, J.E. 94-1053, EYB 1994-66952



1994 CarswellAlta 769, 20 Alta. L.R. (3d) 296, [1994] 7 W.W.R. 37, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490, 168 N.R. 381, 115 D.L.R. (4th) 478, 155 A.R. 321, 73 W.A.C. 321, [1994] I.L.R. 1-3077, J.E. 94-1053, EYB 1994-66952

Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.

MARITIME LIFE ASSURANCE COMPANY v. SASKATCHEWAN RIVER BUNGALOWS LTD. and CONNIE DOREEN FIKOWSKI

Supreme Court of Canada

La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: March 14, 1994

Judgment: June 23, 1994

Docket: Doc. 23194

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Counsel: *James D. McCartney* and *Brian E. Leroy*, for appellant.

*James S. Peacock*, for respondents.

Subject: Contracts; Insurance; Civil Practice and Procedure

Estoppel --- Estoppel in pais — Particular classes — Corporations — Insurance companies — Cancellation of policy

Insurance --- Contracts of insurance — Cancellation and termination — For non-payment — Waiver

Insurance --- Actions on policies — Relief against forfeiture

Insurance — Insurance generally — Premium — Non-payment or underpayment of premium — Insurance premium remaining unpaid after grace period expiring — Insurer's letter requesting immediate payment of premium — Later letter stating that policy lapsed — Beneficiary picking up both letters at same time — First letter waiving insurer's right to receive timely payment — Insurer not having to give notice of retraction of waiver because insured not relying on waiver.

Equity — Equitable doctrines — Relief against penalties and forfeitures — Life insurance premium remaining unpaid after grace period expiring — Insurer's letter requesting immediate payment of premium — Beneficiary not picking up letter for several months — Beneficiary waiting further three months before paying premium —

1994 CarswellAlta 769, 20 Alta. L.R. (3d) 296, [1994] 7 W.W.R. 37, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490, 168 N.R. 381, 115 D.L.R. (4th) 478, 155 A.R. 321, 73 W.A.C. 321, [1994] I.L.R. 1-3077, J.E. 94-1053, EYB 1994-66952

Court outlining test for relieving from forfeiture and refusing to relieve because beneficiary's conduct unreasonable — As Alberta Insurance Act not "codifying" whole law of insurance, that Act not "occupying" field of equitable relief. .

Insurance — Insurance generally — Interpretation of legislation — As Alberta Insurance Act not "codifying" whole law of insurance, that Act not "occupying" field of equitable relief.

The insurer issued a policy to the company on the insured's life. The policy provided for a grace period of 31 days for the payment of premiums. If the premium still remained unpaid, the policy automatically lapsed but might be reinstated on proof of the insured's good health. One year the company mailed a cheque to pay the annual premium. The insurer never received the cheque. A month later the insurer sent the company a letter agreeing to accept the premium if it were mailed within two weeks. Two months after that the insurer wrote that the policy was "now technically out of force," and that it would require immediate payment of the premium. The insurer awaited payment for another two months. It then sent the company a notice of policy lapse. The company had closed its business for the winter and picked up its mail infrequently. It thus did not learn of the insurer's letters until over two months after the lapse notice was sent. It searched for the lost premium cheque for three months before it sent the insurer a replacement cheque. The insurer refused the cheque, and refused to reinstate the policy because the insured was terminally ill. When the insured died, the company sued the insurer and claimed, alternatively, for relief against forfeiture. The trial judge rejected the claim, and refused to grant relief against forfeiture because the company's conduct was not reasonable. The Court of Appeal allowed the appeal. It held that the insurer had waived the time requirement for paying the premium, and had failed to give the company reasonable notice that the waiver was withdrawn. The insurer appealed.

**Held:**

Appealed allowed.

Waiver occurs when one party foregoes reliance on some known right or defect in the other party's performance. Waiver will be found only where the party waiving had full knowledge of its rights and an unequivocal and conscious intention to abandon them. A demand for payment may constitute waiver. The overriding consideration is whether one party communicated a clear intention to waive a right to the other party. Waiver can be retracted on reasonable notice to the other party. However, the notice requirement should not be imposed where the other party does not rely on the waiver. Here the insurer had full knowledge of its rights. Its letter that the policy was "technically out of force" constituted a waiver of its right to receive timely payment. The word "technically" removed all meaning from the expression "out of force." The insurer was willing to continue the policy's coverage upon payment of the premium. It did not mention the insured's health or reinstatement. However, the company was not aware of the insurer's waiver until it received the waiver and lapse notices together, when it picked up its mail. It thus did not rely on the waiver and so the insurer was not required to give notice of its intention to lapse the policy. Even if a reasonable notice requirement were imposed, it would have been met by the company's failure to act for three months after receiving notice. The insurer's waiver was no longer in effect when the company sought to make payment. The policy had lapsed.

The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors for the court to consider are whether the applicant's conduct was reasonable, the gravity of the breaches, and the disparity between the value of the property forfeited and damage caused by the breach. The company's conduct here was not reasonable. It knew that the insured was terminally ill and uninsurable. When it learned that the

1994 CarswellAlta 769, 20 Alta. L.R. (3d) 296, [1994] 7 W.W.R. 37, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490, 168 N.R. 381, 115 D.L.R. (4th) 478, 155 A.R. 321, 73 W.A.C. 321, [1994] I.L.R. 1-3077, J.E. 94-1053, EYB 1994-66952

premium payment was overdue, it waited three months to tender a replacement cheque. As the company's conduct was not reasonable, it was unnecessary to consider the other factors. However, as the *Insurance Act* does not "codify" the whole law of insurance, that Act does not "occupy" the field of equitable relief.

**Cases considered:**

*Anguish v. Maritime Life Assurance Co.*, [1987] 4 W.W.R. 261, 51 Alta. L.R. (2d) 376, 24 C.C.L.I. 194, 77 A.R. 189, [1987] I.L.R. 1-2226 [additional reasons 29 C.C.L.I. 190, [1988] I.L.R. 1-2340, leave to appeal to S.C.C. refused, [1988] 2 S.C.R. vii, [1988] 6 W.W.R. lxviii, 61 Alta. L.R. (2d) lii, 91 A.R. 80, 32 C.C.L.I. xliiii, 90 N.R. 319] — *referred to*

*Duplisea v. T. Eaton Life Assurance Co.*, [1980] 1 S.C.R. 144, 26 N.B.R. (2d) 319, 55 A.P.R. 319, 27 N.R. 369, 7 B.L.R. 24, [1979] I.L.R. 1-1104, 99 D.L.R. (3d) 445 — *referred to*

*Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.) — *applied*

*Guillaume v. Stirton* (1978), 88 D.L.R. (3d) 191, leave to appeal to S.C.C. refused [1978] 2 S.C.R. vii — *referred to*

*Hartley v. Hymans*, [1920] 3 K.B. 475 — *referred to*

*Holwell Securities Ltd. v. Hughes*, [1974] 1 All E.R. 161 (C.A.) — *referred to*

*Johnston v. Dominion of Canada Guarantee & Accident Insurance Co.* (1908), 17 O.L.R. 462 (C.A.) — *distinguished*

*Liscumb v. Provenzano Estate* (1985), 51 O.R. (2d) 129, 40 R.P.R. 31, affirmed (1986), 55 O.R. (2d) 404 (C.A.) — *applied*

*Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61, [1991] 4 W.W.R. 673, [1991] I.L.R. 1-2729, 3 C.C.L.I. (2d) 173, 125 N.R. 306, 80 D.L.R. (4th) 670, 50 C.P.C. (2d) 231, 73 Man. R. (2d) 271, 30 M.V.R. (2d) 102 — *referred to*

*McGeachie v. North American Life Insurance Co.* (1893), 20 O.A.R. 187, affirmed (1894), 23 S.C.R. 148 — *distinguished*

*Mitchell & Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259, 44 D.L.R. (3d) 603 (Alta. C.A.) — *referred to*

*Northern Life Assurance Co. v. Reiersen*, [1977] 1 S.C.R. 390, [1976] 3 W.W.R. 275, [1976] I.L.R. 1-749, 8 N.R. 351, 67 D.L.R. (3d) 193 — *distinguished*

*Rickards (Charles) Ltd. v. Oppenheim*, [1950] 1 K.B. 616, [1950] 1 All E.R. 420 (C.A.) — *referred to*

*Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691, [1973] 1 All E.R. 90 (H.L.) — *considered*

*Stenhouse v. General Casualty Insurance Co.* (1934), [1934] 3 W.W.R. 564, 2 I.L.R. 36, [1935] 1 D.L.R. 193 (Alta. C.A.) — *distinguished*

*Swan Hills Emporium & Lumber Co. v. Royal General Insurance Co.*, 2 Alta. L.R. (2d) 1, 2 A.R. 63, [1977]

1994 CarswellAlta 769, 20 Alta. L.R. (3d) 296, [1994] 7 W.W.R. 37, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490, 168 N.R. 381, 115 D.L.R. (4th) 478, 155 A.R. 321, 73 W.A.C. 321, [1994] I.L.R. 1-3077, J.E. 94-1053, EYB 1994-66952

I.L.R. 1-844 (C.A.) — *distinguished*

*Tudale Explorations Ltd. v. Bruce* (1978), 20 O.R. (2d) 593, 88 D.L.R. (3d) 584 (Div. Ct.) — *referred to*

*W.J. Alan & Co. v. El Nasr Export & Import Co.*, [1972] 2 Q.B. 189, [1972] 2 All E.R. 127 (C.A.) — *referred to*

#### **Statutes considered:**

Insurance Act, R.S.A. 1980, c. I-5 — *considered*

s. 201 — *considered*

s. 205 — *considered*

s. 211 — *considered*

Judicature Act, R.S.A. 1980, c. J-1 — *considered*

s. 10 — *considered*

Appeal from judgment of Alberta Court of Appeal, 10 C.C.L.I. (2d) 278, [1992] I.L.R. 1-2895, 127 A.R. 43, 92 D.L.R. (4th) 372, reversing judgment of Deyell J. allowing insured's action on policy against insurer.

**The judgment of the court was delivered by Major J.:**

#### **I. FACTS**

1 On July 26, 1978, the appellant Maritime Life Assurance Company ("Maritime") issued an insurance policy on the life of Michael Fikowski Sr. to the respondent Saskatchewan River Bungalows Ltd. ("SRB"). In 1984, ownership of the policy was transferred to the respondent Connie Fikowski, at which time she became the beneficiary. SRB retained the responsibility of paying the annual premiums under the policy.

2 The policy issued to the respondents was a term policy, renewable every five years. The policy expiry date was the insured's 70th birthday — July 26, 2000. However, prior to July 26, 1988, the policy-holder had an option to convert the policy to a new life or endowment policy. The policy contained the following conditions relating to premium payment:

#### **2. PREMIUM PAYMENT PROVISIONS**

##### **(1) General**

The agreements made by the Company and contained in this contract are conditional upon payment of the premiums as they become due.

Each premium is payable on or before its due date at the Head Office of the Company.

##### **(2) Grace Period**

1994 CarswellAlta 769, 20 Alta. L.R. (3d) 296, [1994] 7 W.W.R. 37, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490, 168 N.R. 381, 115 D.L.R. (4th) 478, 155 A.R. 321, 73 W.A.C. 321, [1994] I.L.R. 1-3077, J.E. 94-1053, EYB 1994-66952

After the first period has been paid, a grace period of thirty-one days following its due date is allowed for the payment of each subsequent premium. During the grace period, this policy continues in effect.

**(3) Non-payment of Premiums**

If any premium remains unpaid at the end of the grace period, this policy automatically lapses (terminates because of non-payment of premiums).

Under certain conditions, this policy may be reinstated, as described below.

**(4) Reinstatement**

This policy may be reinstated within 3 years of the date of the lapse upon written application to the Company subject to the following conditions:

- a) evidence that satisfies the Company of the life insured's good health and insurability must be submitted; and
- b) all unpaid premiums plus interest, at a rate to be determined by the Company, must be paid to the Company.

3 Over the years, SRB paid the annual policy premium irregularly. In 1979, the policy lapsed after SRB failed to pay the annual premium within the 31-day grace period. The policy was subsequently reinstated in accordance with the reinstatement provision (cl. 2(4)) of the policy. In 1981, SRB again failed to make payment within the grace period. On this occasion, Maritime accepted late payment and did not require evidence of insurability or an application for reinstatement.

4 On July 24, 1984, SRB mailed a cheque for \$1,316 to pay the annual premium due on July 26, 1984. On August 13, 1984, SRB received a premium due notice from Maritime, requesting payment of \$1,361. It sent Maritime a cheque for \$45 — the difference between the July 24 cheque and the amount demanded in the payment due notice. This second cheque was received by Maritime on August 22, 1984. The first cheque, in the amount of \$1,316, was never received by Maritime, nor was it deducted from SRB's bank account.

5 Subsequent to the expiry of the grace period on August 26, 1984, Maritime sent a late payment offer to SRB. In this offer, Maritime agreed to accept late payment of the July premium if it was "postmarked or, if not mailed, received at the Head Office at Halifax, N.S." on or before September 8, 1984. The offer also contained an explicit reserve of Maritime's right to require evidence of insurability. SRB did not respond to the late payment offer.

6 On November 28, 1984, Maritime wrote a letter ("the November letter") advising the respondent Connie Fikowski that the premium due on July 26, 1984 remained unpaid. This letter contained the following statement:

Unfortunately this policy is now technically out of force, and we will require immediate payment of \$1,361.00 to pay the July 1984-85 premium.

7 Finally, on February 2, 1985, Maritime sent a notice of policy lapse to the respondents. This notice was originally sent to an incorrect address in Vancouver, but was eventually forwarded to SRB. It read, in part:

1994 CarswellAlta 769, 20 Alta. L.R. (3d) 296, [1994] 7 W.W.R. 37, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490, 168 N.R. 381, 115 D.L.R. (4th) 478, 155 A.R. 321, 73 W.A.C. 321, [1994] I.L.R. 1-3077, J.E. 94-1053, EYB 1994-66952

According to our records this policy has lapsed for non-payment of the premium due on the date shown. The policy is no longer in force and no benefits are payable. Because your insurance affords valuable protection and represents a worthwhile investment we invite you to apply for reinstatement of the policy.

The Application for Reinstatement appended to the lapse notice required evidence of insurability.

8 SRB closed its hotel business at Lake Louise, Alberta, for the winter season around the middle of November, 1984. SRB picked up the corporate mail on an infrequent basis throughout the winter. As a result, SRB did not become aware of the late payment offer, the November letter or the lapse notice until April, 1985. They then began to search for the lost premium cheque. It was not until July 1985 that SRB sent a replacement cheque to Maritime, and a cheque for the 1985 premium. Both cheques were refused.

9 On July 9, 1985, SRB's insurance agent informed Maritime that Michael Fikowski Sr. was terminally ill and uninsurable. On August 10, 1985, Michael Fikowski Sr. died. On October 11, 1985, Maritime rejected SRB's claim for benefits under the policy on the ground that it was no longer in force. The respondents then commenced the present action, claiming a right to benefits under the policy or, alternatively, relief against forfeiture.

## II. JUDGMENTS BELOW

### *A. Alberta Court of Queen's Bench*

10 Deyell J. rejected the plaintiffs' claim and refused to grant them relief against forfeiture. He made no specific finding as to whether a cheque was actually mailed to Maritime by SRB in July 1984, but emphasized that Maritime did not receive payment and advised SRB accordingly. Deyell J. reasoned that the respondents had to "live with the results" of their decision to have their corporate mail sent to Lake Louise throughout the year. As well, he considered that SRB was obliged to do more than search for a cancelled cheque when they learned of the policy lapse in April of 1985. Deyell J. further ruled that Connie Fikowski was bound by SRB's actions.

### *B. Alberta Court of Appeal*

11 A majority of the Alberta Court of Appeal allowed the respondents' appeal: (1992), 127 A.R. 43, 20 W.A.C. 43, 92 D.L.R. (4th) 372, 10 C.C.L.I. (2d) 278, [1992] I.L.R. 1-2895. The majority held that the postal acceptance rule did not apply, since an express term of the policy required that premiums be paid, not posted, by the due date: *Holwell Securities Ltd. v. Hughes*, [1974] 1 All E.R. 161 (C.A.). However, both Harradence and Hetherington J.J.A. considered that, because it encouraged policy-holders to mail premium payments, Maritime was barred from demanding strict compliance with the time requirements for payment under the policy. Harradence J.A. cast this ruling in terms of estoppel, while Hetherington J.A. relied on waiver. Both agreed that, until the respondents were notified that the 1984 cheque had not been received and were given a reasonable period during which to effect payment, Maritime could not terminate the policy for non-payment.

12 Hetherington J.A. considered that none of Maritime's acts, including the late payment offer, the November letter and the lapse notice, gave the respondents reasonable notice that Maritime intended to rely on the lapsing provision of the policy. The February lapse notice was premature because it stated that "this policy has lapsed", without giving reasonable notice to the respondents. As such, Maritime's right to rely on the lapsing provision of the policy was never reinstated. She concluded that the policy was still in force in August 1985.

1994 CarswellAlta 769, 20 Alta. L.R. (3d) 296, [1994] 7 W.W.R. 37, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490, 168 N.R. 381, 115 D.L.R. (4th) 478, 155 A.R. 321, 73 W.A.C. 321, [1994] I.L.R. 1-3077, J.E. 94-1053, EYB 1994-66952

13 Harradence J.A. found that the respondents could have made payment within a reasonable period after they received actual notice of the overdue premium in April 1985. However, the respondents failed to pay within this period. Their three-month delay in providing a replacement cheque was unreasonable, and the policy lapsed. However, Harradence J.A. concluded that it was an appropriate case to relieve against forfeiture under s. 10 of the *Judicature Act*, R.S.A. 1980, c. J-1.

14 In dissent, McClung J.A. stated that Maritime did not waive its right to rely on the lapsing provision of the policy by encouraging policy holders to use the mail. He found that while Maritime had waived its position in the November letter, the eventual payment of the missing premium in July 1985 did not comply with the request for "immediate payment" in the November letter. As a result, there was no waiver. In addition, he concluded that the Court had no jurisdiction to relieve against forfeiture since the field was occupied by a statutory scheme (the *Insurance Act*, R.S.A. 1980, c. I-5).

### III. ISSUES

15 This appeal raises two issues:

- (1) Did Maritime waive its right to compel timely payment in accordance with the terms of the policy?
- (2) If there was no waiver, are the respondents entitled to relief against forfeiture under the *Judicature Act*, R.S.A. 1980, c. J-1, s. 10?

### IV. ANALYSIS

#### A. Waiver

16 Maritime's position is that the policy issued to the respondents lapsed after the expiry of the grace period for payment of the 1984 premium. Fikowski Sr.'s death occurred when the policy was not in force and the respondents had no right to benefits under it.

17 The respondents' position is that Maritime, through its conduct, waived its right to compel timely payment under the policy. The respondents further submit that none of Maritime's acts were sufficient to retract its waiver of time and that the policy was still in force at the time of death.

18 Although the parties argued in terms of waiver, Harradence J.A. considered the doctrine of promissory or equitable estoppel. Recent cases have indicated that waiver and promissory estoppel are closely related: see, e.g., *Alan (W.J.) & Co. v. El Nasr Export & Import Co.*, [1972] 2 Q.B. 189 (C.A.), and *Tudale Explorations Ltd. v. Bruce* (1978), 88 D.L.R. (3d) 584 (Ont. Div. Ct.), at p. 587. The noted author Waddams suggests that the principle underlying both doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so: S.M. Waddams, *The Law of Contracts* (3rd ed., 1993), p. 418, at para. 606. It is not necessary for the purpose of this appeal to determine how or whether promissory estoppel and waiver should be distinguished. As the parties have chosen to frame their submissions in waiver, only that doctrine need be dealt with.

19 Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party: *Mitchell & Jewell Ltd. v. Canadian Pacific Express Co.*, [1974] 3 W.W.R. 259 (Alta. C.A.); *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] 2 S.C.R. 61 [[1991] 4 W.W.R. 673] (waiver of a limitation period). The elements of waiver were de-

1994 CarswellAlta 769, 20 Alta. L.R. (3d) 296, [1994] 7 W.W.R. 37, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490, 168 N.R. 381, 115 D.L.R. (4th) 478, 155 A.R. 321, 73 W.A.C. 321, [1994] I.L.R. 1-3077, J.E. 94-1053, EYB 1994-66952

scribed in *Federal Business Development Bank v. Steinbock Development Corp.* (1983), 42 A.R. 231 (C.A.), cited by both parties to the present appeal (Laycraft J.A. for the court, at p. 236):

The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. In whatever fashion the intention to relinquish the right is communicated, however, the conscious intention to do so is what must be ascertained.

20 Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.

21 As there is little doubt that Maritime had full knowledge of its rights under the respondents' policy, the waiver issue turns entirely on Maritime's intentions. The respondents have identified several factors which, in their view, support a finding that Maritime "clearly and unequivocally" intended to waive its right to timely payment. In particular, the respondents submit that by encouraging policy-holders to pay by mail, by requesting payment of the 1984 premium after the expiry of the policy grace period, by delaying issuance of the February lapse notice, by failing to return the \$45 partial payment, and in accepting late payment in 1981, Maritime waived its right to require payment in accordance with the terms of the policy.

22 It is not necessary to address each of the factors identified by the respondents, for it seems clear that the November letter, taken alone, constituted a waiver of Maritime's right to receive timely payment under the policy. The November letter contained the following statement:

Unfortunately this policy is now technically out of force, and we will require immediate payment of \$1,361.00 to pay the July 1984-85 premium.

23 As late as November 28, 1984, Maritime was willing to *continue* coverage under the policy upon payment of the July 1984 premium. The November letter makes no mention of evidence of insurability, nor does it speak of reinstatement. As such, it constitutes clear evidence of Maritime's intention to waive its right to compel timely payment. In this regard, little weight should be given to the assertion that the policy was "technically out of force", for the qualifier "technical" removes all meaning from the expression "out of force". In any event, this assertion does not detract from the clarity of Maritime's demand for payment.

24 The appellant submits that, whereas the right to compel timely payment is clearly waived where premium payments are received and deposited by an insurance company after the expiry of the policy grace period (*Duplisea v. T. Eaton Life Assurance Co.*, [1980] 1 S.C.R. 144; *Anguish v. Maritime Life Assurance Co.* (1987), 51 Alta. L.R. (2d) 376 [[1987] 4 W.W.R. 261] (C.A.), leave to appeal refused [1988] 2 S.C.R. vii [[1988] 6 W.W.R. lxxviii, 61 Alta. L.R. (2d) lii]), a mere demand for payment beyond the grace period is insufficient. Support for that proposition is found in *McGeachie v. North American Life Assurance Co.* (1893), 20 O.A.R. 187 (C.A.), affirmed (1894), 23 S.C.R. 148; and in *Northern Life Assurance Co. v. Reiersen*, [1977] 1 S.C.R. 390 [1976] 3 W.W.R. 275]. In both cases, this Court concluded that a demand for payment was equivocal or insufficient to give rise to a waiver. However, in some circumstances a demand for payment may constitute waiver. The nature of waiver is such that hard and fast rules for what can and cannot constitute waiver should not be proposed. The overriding consideration in each case is whether one party communicated a clear intention to



1994 CarswellAlta 769, 20 Alta. L.R. (3d) 296, [1994] 7 W.W.R. 37, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490, 168 N.R. 381, 115 D.L.R. (4th) 478, 155 A.R. 321, 73 W.A.C. 321, [1994] I.L.R. 1-3077, J.E. 94-1053, EYB 1994-66952

waive a right to the other party.

25 The demand for payment in the present appeal provides stronger evidence of waiver than did the demands in either *McGeachie* or *Reierson*. The demand for payment by the appellant in its November letter was made well beyond the expiry of the grace period. As well, payment in the present case was tendered prior to the occurrence of the event insured against. Any doubt about whether Maritime intended to waive the time requirements of the policy was resolved by the testimony of its legal advisor, who indicated that, having received the \$45 partial payment, Maritime was *still* awaiting payment of the July 1984 premium in January 1985. It was for this reason that the lapse notice was not sent until February 2, 1985. In these circumstances, the demand for payment in the November letter was a clear and unequivocal expression of Maritime's intention to continue coverage upon payment of the July premium and, as such, constituted waiver of the time requirements for payment under the policy.

26 As the November letter constituted waiver, the question is then whether the waiver was still in effect when SRB tendered payment of the missing premium in July 1985.

27 Waiver can be retracted if reasonable notice is given to the party in whose favour it operates: *Hartley v. Hyman*, [1920] 3 K.B. 475; *Rickards (Charles) Ltd. v. Oppenheim*, [1950] 1 K.B. 616 (C.A.); *Guillaume v. Stirton* (1978), 88 D.L.R. (3d) 191 (Sask. C.A.), leave to appeal refused [1978] 2 S.C.R. vii. As Waddams notes, the "reasonable notice" requirement has the effect of protecting reliance by the person in whose favour waiver operates: *The Law of Contracts*, at paras. 604 and 606. It follows that a notice requirement should not be imposed where reliance is not an issue: *ibid.*, at para. 606. In the present appeal, the respondents were not aware of Maritime's waiver until they received the November letter, along with the lapse notice and late payment offer, in April 1985. It follows that they did not rely on Maritime's waiver. In such circumstances, Maritime was not required to give any notice of its intention to lapse the policy. The statement that "this policy has lapsed", contained in the February lapse notice, took effect on its terms.

28 In any event, once the respondents opened their mail in April 1985, they clearly became aware of Maritime's intention to retract its waiver. An informal communication of a party's intention to insist on strict compliance with the terms of a contract is sufficient notice: see, e.g., *Guillaume v. Stirton*, *supra*. The respondents did not tender a replacement cheque until July 1985, three months after they became aware of Maritime's intentions. As such, even if a reasonable notice requirement were imposed, it would be adequately met by the respondents' failure to act between April and July.

29 Maritime's waiver, as contained in the November letter, was no longer in effect when the respondents sought to make payment in July 1985. Maritime had no obligation to accept the replacement cheque, and the policy lapsed. Maritime was required to reinstate coverage only if the respondents provided evidence of insurability, which was not possible in this case. Therefore, the respondents are not entitled to any of the benefits under the policy.

### ***B. Relief Against Forfeiture***

30 The second issue on appeal is the Court's equitable jurisdiction to relieve against forfeiture. The respondents submit that the general power to grant relief, contained in s. 10 of the *Judicature Act*, should be exercised in this case. The appellant contends that the *Judicature Act* does not apply since the field is occupied by a statutory scheme (the *Insurance Act*). It further submits that the respondents' loss was not a forfeiture and argues that, in any event, this is not an appropriate case for granting relief.

1994 CarswellAlta 769, 20 Alta. L.R. (3d) 296, [1994] 7 W.W.R. 37, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490, 168 N.R. 381, 115 D.L.R. (4th) 478, 155 A.R. 321, 73 W.A.C. 321, [1994] I.L.R. 1-3077, J.E. 94-1053, EYB 1994-66952

31 Section 10 of the *Judicature Act* reads:

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

32 The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach: *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691 (H.L.) ; *Snell's Principles of Equity* (29th ed., 1990), at pp. 541-42.

33 The Ontario High Court in *Liscumb v. Provenzano Estate* (1985), 51 O.R. (2d) 129, affirmed 55 O.R. (2d) 404 (C.A.), relying on the *Shiloh* decision, summarized the governing principles as follows (at p. 137, per McKinlay J.):

I consider that the following are the appropriate questions to consider in determining whether there should be relief from forfeiture in this case: first, was the conduct of the plaintiff reasonable in the circumstances; second, was the object of the right of forfeiture essentially to secure the payment of money, and third, was there a substantial disparity between the value of the property forfeited and the damage caused the vendor by the breach?

34 The first element of the test set out in *Liscumb* — the reasonable conduct requirement — is not met in this case. The respondents knew, at all relevant times, that Fikowski Sr. was terminally ill and uninsurable. Nonetheless, they chose to have their correspondence from Maritime sent to Lake Louise over the winter, and to collect their mail only intermittently. When the respondents learned that payment of the premium was nine months overdue in April 1985, they did not tender a replacement cheque, but rather waited three months, until July 1985. The trial judge, who was in a position to assess the respondents' conduct, concluded that it was not reasonable. He wrote:

The corporation chose to have a mail box at the Post Office at Lake Louise to receive its corporate mail on a 12-month basis and, having made that decision, I think they must live with the results. If you only pick up your mail every two weeks then you are going to be late in getting notices that may be of some importance. Ultimately, when the advice that the policy had lapsed was received in late April or early May of 1985, Mr. Michael Fikowski and Mr. J.D. Thomas started a search for a cancelled cheque. Under the circumstances, in this day and age of long distance telephones and all the communications that are available I think that they had an obligation to their company to take additional procedures in regard to this matter. They were advised that payment had not been made. There were procedures to have the policy reinstated. If they were going to do anything about it, it had to be done quickly. It wasn't until July 25th, if memory serves me correctly, met [sic] the replacement cheque was sent out, that is, three months after they ultimately received the notice.

I therefore find that the plaintiffs' case fails and that they are not entitled to relieve against forfeiture.

35 As the failure to satisfy the first test in *Liscumb* determines the outcome of this appeal, it is unnecessary to comment on the second and third tests outlined in the case.

36 As the respondents are barred by their conduct from recovering, it is not necessary to determine whether

1994 CarswellAlta 769, 20 Alta. L.R. (3d) 296, [1994] 7 W.W.R. 37, 23 C.C.L.I. (2d) 161, [1994] 2 S.C.R. 490, 168 N.R. 381, 115 D.L.R. (4th) 478, 155 A.R. 321, 73 W.A.C. 321, [1994] I.L.R. 1-3077, J.E. 94-1053, EYB 1994-66952

our general power to relieve against forfeiture under s. 10 of the *Judicature Act* applies to contracts regulated by the *Insurance Act*. However, I would note that the existence of a statutory power to grant relief where other types of insurance are forfeited (*Insurance Act*, ss. 201, 205, 211) does not preclude application of the *Judicature Act* to contracts of life insurance. The *Insurance Act* does not "codify" the whole law of insurance; it merely imposes minimum standards on the industry. The appellant's argument that the "field" of equitable relief is occupied by the *Insurance Act* must therefore be rejected.

37 Several of the authorities cited by the appellant involved forfeitures made under statutory insurance conditions, which is not the case here: *Stenhouse v. General Casualty Insurance Co.*, [1934] 3 W.W.R. 564 (Alta. C.A.); *Swan Hills Emporium & Lumber Co. v. Royal General Insurance Co.* (1977), 2 A.R. 63 [2 Alta. L.R. (2d) 1] (C.A.). The case of *Johnston v. Dominion of Canada Guarantee & Accident Insurance Co.* (1908), 17 O.L.R. 462 (C.A.), treated the insurance legislation at issue as a statutory code, and for this reason is no longer good law.

38 It is also unnecessary to determine whether relief from forfeiture can operate generally as a before-loss remedy in the insurance context. Clearly, the holder of a term life policy has no vested right to benefits until the loss insured against — death of the insured — has occurred. However, a modern understanding of the doctrine of relief would likely expand the notion of forfeiture to include less tangible losses, such as the loss of an option to convert a term policy into one under which benefits would be certain, or the loss of one's insurability. This question remains open.

### ***C. Conclusion***

39 For the foregoing reasons, I would allow the appeal with costs, set aside the judgment of the Alberta Court of Appeal and restore the judgment at trial.

*Appeal allowed.*

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# **TAB 5**

2012 CarswellOnt 11173, 2012 ONCA 597, 14 C.L.R. (4th) 169, 2 M.P.L.R. (5th) 1, 220 A.C.W.S. (3d) 333, 296 O.A.C. 218, 354 D.L.R. (4th) 516

## H

2012 CarswellOnt 11173, 2012 ONCA 597, 14 C.L.R. (4th) 169, 2 M.P.L.R. (5th) 1, 220 A.C.W.S. (3d) 333, 296 O.A.C. 218, 354 D.L.R. (4th) 516

Technicore Underground Inc. v. Toronto (City)

Technicore Underground Inc., Plaintiff and City of Toronto, Defendant (Respondent) and Clearway Construction Inc., Third Party (Appellant)

Ontario Court of Appeal

E.E. Gillese, R.G. Juriansz, G.J. Epstein JJ.A.

Heard: June 20, 2012

Judgment: September 12, 2012

Docket: CA C54801

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Proceedings: affirming *Technicore Underground Inc. v. Toronto (City)* (2011), 2011 ONSC 7205, 2011 CarswellOnt 14960, 11 C.L.R. (4th) 268, 94 M.P.L.R. (4th) 115 (Ont. S.C.J.)

Counsel: Christos Papadopoulos, for Appellant

Darrel A. Smith, for Respondent

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

Construction law --- Construction and builders' liens — Practice on enforcement of lien — Entitlement to summary and default judgment — Partial summary judgment

C Inc. entered into contract with city to construct water main — C Inc. subcontracted with T Inc. to do underground tunnelling — Water main burst, flooding T Inc.'s tunnel boring machine — T Inc. brought action against city for damages arising from flood — City brought third party claim against C Inc. — C Inc. counterclaimed against city for about \$1,270,000 ("March 2007 claim") — C Inc. brought second claim against city, adding new claims in excess of \$3,000,000 ("August 2010 claim") — City brought motion for partial summary judgment, seeking dismissal of parts of C Inc.'s counterclaim that exceeded March 2007 claim as disclosing no genuine issue requiring trial — Motion was granted on basis that August 2010 claim had been made years after time required by notice provision in construction contract — Appeal by C Inc. dismissed — Notice provision set out mandatory procedure for filing of claims under contract, including time limit — Motion judge did not err in her interpretation of notice provision, which she concluded operated as condition precedent to bar August 2010 claim — There was no onus on city to lead evidence of prejudice resulting from non-compliance with notice provision — City's alleged failure by city to negotiate in 2007 was not relevant to August 2010 claim, as negoti-

2012 CarswellOnt 11173, 2012 ONCA 597, 14 C.L.R. (4th) 169, 2 M.P.L.R. (5th) 1, 220 A.C.W.S. (3d) 333, 296 O.A.C. 218, 354 D.L.R. (4th) 516

ation requirement in contract did not arise until that claim had been made — Items 3 and 6 of March 2007 claim did not give notice required by notice provision such that C Inc. could rely on them to proceed with its claims in items 7 and 8 of August 2010 claim, which it alleged were same — City did not waive compliance with notice provision, nor was there any pattern of conduct by parties that had effect of varying terms of contract.

**Cases considered by E.E. Gillese J.A.:**

*Bemar Construction (Ontario) Inc. v. Mississauga (City)* (2004), 2004 CarswellOnt 222, 30 C.L.R. (3d) 169, [2004] O.T.C. 51 (Ont. S.C.J.) — considered

*Bemar Construction (Ontario) Inc. v. Mississauga (City)* (2007), 2007 CarswellOnt 6359, 2007 ONCA 685, 63 C.L.R. (3d) 161 (Ont. C.A.) — referred to

*Colautti Construction Ltd. v. Ottawa (City)* (1984), 9 D.L.R. (4th) 265, 46 O.R. (2d) 236, 1984 CarswellOnt 731, 7 C.L.R. 264, 5 O.A.C. 74 (Ont. C.A.) — distinguished

*Corpex (1977) Inc. v. Canada* (1982), [1982] 2 S.C.R. 643, 6 C.L.R. 221, 1982 CarswellNat 143, 50 N.R. 197, 1982 CarswellNat 493 (S.C.C.) — followed

*Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.* (1988), 27 B.C.L.R. (2d) 89, 1988 CarswellBC 204 (B.C. C.A.) — considered

*First City Development Corp. v. Stevenson Construction Co.* (1985), 1985 CarswellBC 762, 14 C.L.R. 250 (B.C. C.A.) — considered

*HREIT Holdings 36 Corp. v. R.A.S. Food Services (Kenora) Inc.* (2009), 80 R.P.R. (4th) 64, 2009 CarswellOnt 636 (Ont. S.C.J.) — referred to

*Jones v. Laurie* (2004), 2004 NSSC 87, 2004 CarswellNS 164, 223 N.S.R. (2d) 129, 705 A.P.R. 129 (N.S. S.C.) — referred to

*Maracle v. Travelers Indemnity Co. of Canada* (1991), [1991] I.L.R. 1-2728, 125 N.R. 294, 80 D.L.R. (4th) 652, 47 O.A.C. 333, (sub nom. *Travellers Indemnity Co. of Canada v. Maracle*) [1991] 2 S.C.R. 50, 50 C.P.C. (2d) 213, 3 C.C.L.I. (2d) 186, 1991 CarswellOnt 450, 3 O.R. (3d) 510 (note), 1991 CarswellOnt 1019 (S.C.C.) — followed

*Med-Chem Health Care Inc., Re* (2000), 2000 CarswellOnt 3820 (Ont. S.C.J. [Commercial List]) — referred to

*Petridis v. Shabinsky* (1982), 1982 CarswellOnt 631, 35 O.R. (2d) 215, 22 R.P.R. 297, 132 D.L.R. (3d) 430 (Ont. H.C.) — referred to

*Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.* (1994), [1994] 2 S.C.R. 490, 1994 CarswellAlta 744, [1994] 7 W.W.R. 37, 20 Alta. L.R. (3d) 296, 168 N.R. 381, (sub nom. *Maritime Life Assurance Co. v. Saskatchewan River Bungalows Ltd.*) [1994] I.L.R. 1-3077, 155 A.R. 321, 73 W.A.C. 321, 115 D.L.R. (4th) 478, 23 C.C.L.I. (2d) 161, 1994 CarswellAlta 769 (S.C.C.) — followed

*Tudale Explorations Ltd. v. Bruce* (1978), 20 O.R. (2d) 593, 88 D.L.R. (3d) 584, 1978 CarswellOnt 778 (Ont. Div. Ct.) — referred to

2012 CarswellOnt 11173, 2012 ONCA 597, 14 C.L.R. (4th) 169, 2 M.P.L.R. (5th) 1, 220 A.C.W.S. (3d) 333, 296 O.A.C. 218, 354 D.L.R. (4th) 516

APPEAL by third party from judgment reported at *Technicore Underground Inc. v. Toronto (City)* (2011), 2011 ONSC 7205, 2011 CarswellOnt 14960, 11 C.L.R. (4th) 268, 94 M.P.L.R. (4th) 115 (Ont. S.C.J.), granting partial summary judgment dismissing its counterclaim against city.

***E.E. Gillese J.A.:***

1 The City of Toronto (the "City") successfully disposed of the bulk of a multimillion dollar construction claim against it, by means of a partial summary judgment motion. The claimant says that the matter requires a trial and should not have been decided by way of summary judgment.

2 Is the claimant correct? In my view, it is not. As I will explain, this appeal should be dismissed.

**Overview**

3 Clearway Construction Inc. ("Clearway") entered into a construction contract with the City in which it agreed to construct a water main 5.88 kilometres in length (the "Contract"). The water main ran under a number of roads in Toronto, including Leslie Street (the "Leslie Street Project").

4 Clearway subcontracted with Technicore Underground Inc. ("Technicore") to do the underground tunnelling, which it did through a tunnel boring machine.

5 Technicore excavated the tunnel under Leslie Street. During the evening of August 2 - 3, 2006, there was a flood in that tunnel. It is the flood that led to these legal proceedings.

6 As a result of the flood, Technicore's tunnel boring machine was trapped under Leslie Street. After rescuing and refurbishing the boring machine, Technicore completed the tunnelling by December 22, 2006.

7 The Contract work affected by the flood was completed at the end of December 2006.

8 By letter dated February 9, 2007, Technicore made a claim against Clearway for approximately \$800,000 plus G.S.T. for damages arising from the flood (the "Technicore claim").

9 On March 6, 2007, Clearway submitted a claim to the City for additional payment under the Contract to cover costs incurred as a result of the flood (the "March 2007 Claim"). In the March 2007 Claim, Clearway sought approximately \$1,270,000, comprised of indemnity for the Technicore claim plus a claim for approximately \$400,000 of its own costs incurred as a result of the flood. In the March 2007 Claim, Clearway noted the possibility that "some costs have not yet been identified" and "reserve[d] the right to claim payment for work(s) not specifically mentioned herein".

10 By letter dated April 4, 2007, the City denied the March 2007 Claim.

11 Technicore started the main action in these proceedings on July 30, 2008. It claimed solely against the City for damages suffered as a result of the flood.

12 The City defended and started a third party claim against Clearway for contribution and indemnity, and additional damages.

13 Clearway defended the City's third party claim and counterclaimed against the City. In its initial defence and counterclaim, served on the City in March 2010, Clearway sought indemnity for the Technicore claim, plus

damages of \$1,000,000.

14 In August of 2010, Clearway sent the City a claim in which it repeated the amounts sought in the March 2007 Claim and added new claims in excess of \$3,000,000 (the "August 2010 Claim").

15 In an amended defence and counterclaim dated June 23, 2011 (the "Counterclaim"), Clearway continued to seek indemnity for the Technicore claim but increased its damages claim to just over \$3,400,000.

16 In a companion construction lien action, Technicore sues Clearway for damages arising out of the Leslie Street flood and for certain other claims. The lien action has been ordered to be tried together with this proceeding.

17 The City brought a motion for partial summary judgment, seeking a dismissal of those parts of the Counterclaim that were in excess of the March 2007 Claim. The focus of the motion was paragraph GC 3.14.03.03 of the General Conditions that were included as part of the Contract (the "Notice Provision"). The Notice Provision sets out specific requirements for the filing of claims under the Contract. It reads as follows:

The Contractor shall submit detailed claims as soon as reasonably possible and in any event no later than 30 Days after completion of the work affected by the situation. The detailed claim shall:

- a) identify the item or items in respect of which the claim arises;
- b) state the grounds, contractual or otherwise, upon which the claim is made; and
- c) include the Records maintained by the Contractor supporting such claim.

18 The full text of GC 3.14 can be found as appendix A to these reasons.

19 The motion judge concluded that Clearway was limited to the March 2007 Claim. By judgment dated December 5, 2011, she granted partial summary judgment (the "Judgment").

20 Clearway appeals. It contends that the portions of its Counterclaim that the Judgment has the effect of dismissing raise genuine issues requiring a trial. It asks that the Judgment be set aside.

21 In my view, the motion judge correctly decided this matter. I would dismiss the appeal.

#### **A Preliminary Matter**

22 The focus of the motion below was on the timing of the August 2010 Claim, as it had been made years after the time required by the Notice Provision. However, the motion judge struck two other parts of the August 2010 Claim for reasons other than the timing of its delivery.

23 First, she struck those parts of the August 2010 Claim that pre-dated, and were unrelated to, the Leslie Street Project, noting that they failed to raise a genuine issue requiring a trial in respect of the City's liability.

24 Second, she struck the parts in which Clearway sought reimbursement for the claims that Technicore made against it (Clearway) in the related lien action that had not been made against the City. These other Technicore claims against Clearway were unrelated to the flood or the work under Leslie Street ("the non-Leslie



Street Claims").

25 Before the motion judge, the parties agreed that the non-Leslie Street Claims were not properly asserted against the City and should be dismissed, but they disagreed on the procedure that should be followed for their dismissal. The motion judge was satisfied that partial summary judgment was an appropriate method by which to dispose of the non-Leslie Street claims.

26 I do not understand Clearway's appeal to extend to these two other parts of the August 2010 Claim, even though Clearway purports to seek to have the entire Judgment set aside. However, even if Clearway did intend to appeal the dismissal of these parts of the Counterclaim, it is readily apparent that the appeal fails in respect of these items. For the reasons given by the motion judge, they raise no genuine issue requiring a trial in respect of the City.

### **The Issues**

27 Clearway submits that the motion judge erred in:

1. her interpretation of the Notice Provision;
2. granting the motion despite the absence of evidence of prejudice to the City;
3. allowing the City to rely on the Notice Provision when it had failed to comply with GC 3.14.04;
4. failing to recognize and find that items 7 and 8 in Part 1 of the August 2010 Claim are the same as items 3 and 6 of the March 2007 Claim; and
5. allowing the City to rely on the Notice Provision when it has raised no complaint in respect of the date of delivery of the March 2007 Claim.

### **Analysis**

#### ***Issue 1: Interpreting the Notice Provision***

28 Based on the jurisprudence, the motion judge concluded that the Notice Provision operated as a condition precedent that served to bar the August 2010 Claim because Clearway failed to deliver it (the August 2010 Claim) before the expiry of the time limit. Clearway submits that the motion judge erred in her interpretation of the Notice Provision. It argues that had the motion judge reviewed GC 3.14 in its entirety, she would have seen that the Notice Provision in GC 3.14.03 simply sets out a procedure to identify, and provide details of, any claims that are to be subsequently negotiated and possibly mediated pursuant to GC 3.14.04 and 3.14.05. As none of these provisions contains a "failing which" clause, Clearway submits that the Contract does not contain the clear language necessary to deprive it of the right to proceed with its full counterclaim against the City.

29 I do not accept this submission. The Notice Provision sets out a mandatory procedure for the filing of claims under the Contract, including the requirement that detailed claims are to be submitted no later than 30 days after completion of the work affected by the situation.[FN1] The Notice Provision need not include a "failing which" clause in order for it to bar the August 2010 Claim. This conclusion flows inexorably from the decision of the Supreme Court of Canada in *Corpex (1977) Inc. v. Canada*, [1982] 2 S.C.R. 643 (S.C.C.).

30 In *Corpex*, the plaintiff contractor had a contract with the federal government to build a dam across a river. The first stage of the contract required the river to be dewatered. The contractor based his estimate of the pumping costs on incorrect information about the nature of the soil contained in the plans and specifications. After a fortnight of pumping, it became obvious that the pumping equipment was not equal to the task. Additional pumps had to be installed. The contractor did not give written notice to the government that it would claim for the additional costs occasioned by the mistake as to the soil conditions.

31 Notice of the claim was required by clause 12 of the General Conditions to the contract. Clause 12 provided:

12. (1) **No payment shall be made** by Her Majesty to the Contractor **in addition to the payment expressly promised by the contract on account of any extra expense, loss or damage incurred or sustained by the contractor for any reason**, including a misunderstanding on the part of the Contractor as to any fact, whether or not such misunderstanding is attributable directly or indirectly to Her Majesty or any of Her Majesty's agents or servants (whether or not any negligence or fraud on the part of Her Majesty's agents or servants is involved) unless, in the opinion of the Engineer, the extra expense, loss or damage is directly attributable to

(a) a substantial difference between information relating to soil conditions at the work site, or a reasonable assumption of fact based thereon, in the plans and specifications or other documents or material communicated by Her Majesty to the Contractor for his use in preparing his bid and the actual soil conditions encountered at the work site by the Contractor when performing the work, ...

.....

in which case, **if the Contractor has given the Engineer written notice of his claim before the expiry of thirty days after encountering the soil conditions giving rise to the claim [...]** Her Majesty shall pay to the Contractor in respect of the additional expense, loss or damage incurred or sustained by reason of that difference [...] an amount equal to the cost, calculated in accordance with clauses 44 to 47 of the General Conditions, of the additional plant, labour and materials necessarily involved.

[Emphasis added.]

32 Corpex sued the government for, among other things, the additional costs arising from the mistake as to the soil conditions. The trial judge allowed this part of Corpex's claim based on considerations of equity rather than on a "technical application of certain clauses in the General Conditions".[FN2]

33 The Federal Court of Appeal overturned the trial decision on this point because Corpex had failed to give notice as required by clause 12 of the General Conditions.

34 The Supreme Court upheld the decision of the Federal Court of Appeal. In paras. 59 and 60 of *Corpex*, Beetz J., writing for the court, explains that a clause such as clause 12 of the General Conditions is of benefit to both the contractor and the owner.

The contractor is practically certain of being compensated for additional costs either during the work or later, if he complies with the provisions of clause 12, and in particular, if he gives the notice provided for in that clause. ...

2012 CarswellOnt 11173, 2012 ONCA 597, 14 C.L.R. (4th) 169, 2 M.P.L.R. (5th) 1, 220 A.C.W.S. (3d) 333, 296 O.A.C. 218, 354 D.L.R. (4th) 516

An owner who is thus informed of a mistake as to the nature of the soil knows that the contractor will probably not drop his claim, and he is enabled to reconsider his position. He can in practice be assured that the work will go forward if he wishes .... He may conclude another agreement with the same contractor or some other. If he prefers for the work to continue under the new circumstances, he may make arrangements to monitor quantities and costs of additional work so that the payments due the contractor ... can be made.

35 In para. 62, Beetz J. explains why compliance with a notice provision is a condition precedent to legal proceedings:

However, once the work is complete, a contractor cannot claim in a court of law benefits similar to those which clause 12 would have guaranteed if he has not himself observed that clause and given the notice for which the clause provides. Otherwise, he would be depriving the owner of the benefits which he is guaranteed by clause 12.

36 There was no "failing which" provision in *Corpex*. Nonetheless, the contractor was barred from asserting this part of its claim because it had failed to give notice as required by clause 12.

37 Nor was there a "failing which" provision in *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.* (1988), 27 B.C.L.R. (2d) 89 (B.C. C.A.). In *Doyle*, the plaintiff contractor was engaged to construct an expansion of the defendant's brewery. The tender documents did not contain a clear statement that certain items of equipment would be installed by the defendant during the construction. The contractor contracted on the assumption that the equipment would not be installed until after the construction was complete. When the mistake was discovered a new construction schedule had to be drawn up. After the work was completed, the contractor submitted a claim for the extra costs incurred because of delay.

38 The trial judge held that the defendant had not breached the contract but, in any event, the contractor's claim could not proceed because the contractor had failed to give notice as required by the contract. He noted that had the contractor given proper notice, the defendant could have addressed cost reduction measures, insisted on the institution of a cost control system and taken steps to see that all records were preserved. The contractor's failure to comply with the notice provisions deprived the defendant of these rights.

39 The British Columbia Court of Appeal dismissed the contractor's appeal, holding that compliance with the notice provision in the contract was a condition precedent to the contractor's claim.

40 In *Bemar Construction (Ontario) Inc. v. Mississauga (City)* (2004), 30 C.L.R. (3d) 169 (Ont. S.C.J.), Fragomeni J. considered *Doyle* at length and applied the principles set out in it. At para. 194, Fragomeni J. concluded that the contractor could not advance its claims as it had failed to properly comply with the notice provisions in the contract. On appeal, this court approved the trial decision: see *Bemar Construction (Ontario) Inc. v. Mississauga (City)*, 2007 ONCA 685, 63 C.L.R. (3d) 161 (Ont. C.A.).

41 Again, there was no "failing which" provision in *Bemar*.

42 I acknowledge that at para. 6 of *First City Development Corp. v. Stevenson Construction Co.* (1985), 14 C.L.R. 250 (B.C. C.A.), the British Columbia Court of Appeal stated:

I approach the construction of art. 36 with the proposition established by the decided cases in mind: if a party to a building contract is to be deprived of a cause of action, this is only to be done by clear words.

43 However, as the motion judge explained, there are significant factual distinctions between *First City* and this case. In *First City*, there was no express time requirement. Article 36 of the construction contract provided that a claim was to be made in writing "within a reasonable time after the first observance of such damage and not later than the time of final certificate". The plaintiff commenced an action one year after completion. As no final certificate of completion had ever been issued, the claim was permitted to proceed.

44 Two additional points must be made in respect of the decision in *First City*. First, the court makes no mention of *Corpex* in its judgment. Second, *Doyle* was decided after *First City*. The British Columbia Court of Appeal was fully aware of its decision in *First City* when it rendered its decision in *Doyle*.<sup>[FN3]</sup> Nonetheless, and in the absence of a "failing which" clause, the court clearly and emphatically concluded that compliance with a notice provision is a condition precedent to maintaining a claim in the courts.

45 Accordingly, I see no error in the motion judge's interpretation of the Notice Provision. This ground of appeal fails.

#### ***Issue 2: The Absence of Evidence of Prejudice to the City***

46 Clearway submits that when dealing with notice provisions, the court's central concern is to protect parties from any prejudice resulting from non-compliance with them. It contends that *Doyle* and *Bemar Construction (Ontario) Inc. v. Mississauga (City)* are authority for the proposition that notice provisions serve to bar claims only where there is evidence of prejudice resulting from non-compliance. Clearway says that the City provided no evidence that it suffered prejudice as a result of the timing and delivery of the August 2010 Claim and, therefore, the motion judge erred in granting partial summary judgment.

47 I begin by considering *Corpex*. Does it stipulate that prejudice must be proven in order for an owner to rely on a notice provision? No, it does not. As para. 60 of *Corpex* makes clear, one purpose of a notice provision is to enable the owner to consider its position and the financial consequences of the contractor providing additional work. Notice gives the owner the opportunity to decide whether to conclude another agreement with the contractor or have the work done by some other. It also enables the owner to make arrangements to monitor the costs of the additional work. The contractor must give notice in accordance with the notice provision, otherwise it deprives the owner of the benefits guaranteed by the notice provision.

48 What then of *Doyle* and *Bemar*? Do either of these cases stand for the proposition that the owner must show prejudice in order to rely on a notice provision? In my view, they do not.

49 At para. 21 of *Doyle*, the trial judge is quoted as stating that had the contractor given proper notice, the defendant "could have addressed cost reduction measures, could have insisted upon the institution of a cost control system, and could have taken steps to see that all records, including site diaries, were preserved". Similarly, had Clearway given proper notice in this case, the City could have chosen whether to permit Clearway to continue with the work occasioned by the flood and, if so, it could have instituted cost control mechanisms. The fact that the trial judge in *Doyle* made those findings does not make it a requirement in law.

50 *Bemar* does not elevate this aspect of *Doyle* to a requirement of law. It is true that *Doyle* is quoted at length and relied on by the trial judge in *Bemar*, and that the findings of prejudice in *Doyle* set out in the preceding paragraph are quoted. But, Fragomeni J. does not suggest that prejudice must be established before non-compliance with notice provisions will bar a claim. At para. 194 of the *Bemar* trial decision, Fragomeni J. concludes that the contractor did not properly comply with the notice provisions in the contract and, therefore, it

could not advance its claims. He made no finding of prejudice on the part of the city in reaching that conclusion.

51 Accordingly, there was no onus on the City to lead evidence of prejudice. As owner, the City is assumed to have been prejudiced by a multimillion dollar claim being made years after the Contract permitted and long after the City could consider its position and take steps to protect its financial interests.

***Issue 3: Reliance on the Notice Provision despite Failing to Comply with GC 3.14.04***

52 GC 3.14.04 of the Contract requires the parties to "make all reasonable efforts to resolve their dispute by amicable negotiations" and to provide "open and timely disclosure of relevant facts, information, and documents to facilitate these negotiations".

53 Clearway says that instead of attempting to negotiate after receiving the March 2007 Claim, the City simply issued the denial letter of April 4, 2007. Clearway also complains about the City's delay in disclosing the report prepared by its geotechnical engineer on the causes of the flood. Clearway submits that because the City failed to comply with the negotiation and disclosure requirements in GC 3.14.04, it should be barred from relying on the Notice Provision.

54 In my view, this submission completely misses the mark. GC 3.14.04 *follows* the Notice Provision in GC 3.14.03. Therefore, the negotiation and disclosure requirements in GC 3.14.04 arise *after* a claim has been made pursuant to GC 3.14.03. Accordingly, the complaints that Clearway levies against the City about negotiation and disclosure can only relate to the March 2007 Claim, with which the City took no issue in the motion below. An alleged failure on the part of the City to negotiate in the spring of 2007 is not, and cannot be, relevant to the August 2010 Claim, as the negotiation requirement did not arise until the August 2010 Claim had been delivered to the City. Similarly, the disclosure requirement could not have arisen in 2007 in respect of the August 2010 Claim.

55 Finally, while I need not decide the point, it may be that GC 3.14.04 is not engaged at all where, as in this case, the August 2010 Claim was not properly advanced in accordance with the Notice Provision.

***Issue 4: Items 7 and 8 of the August 2010 Claim***

56 Items 3 and 6 of the March 2007 Claim were for the extended maintenance of excavations or pits, and the associated shoring required for the pits. The cost of these two items in the March 2007 Claim was slightly in excess of \$455,000. Clearway says that items 7 and 8 of the August 2010 Claim are for the same items, but for the increased amount of approximately \$1,700,000.

57 Clearway submits that the motion judge erred in failing to recognize that items 7 and 8 of the August 2010 Claim are of the same type as those in items 3 and 6 of the March 2007 Claim and, instead, treated them as new claims. It asks that even if the appeal is otherwise dismissed, it be allowed to continue to pursue the amounts set out as items 7 and 8 of the August 2010 Claim.

58 The City disputes the factual assertion that underpins this ground of appeal. It says that items 3 and 6 of the March 2007 Claim are for extended maintenance of excavations under Leslie Street and under a CN Rail tunnel but that items 7 and 8 are for pit delay costs at numerous locations, including Leslie Street and the CN Rail tunnel.

59 *Corpex* dictates that this ground of appeal must fail. It will be recalled that in para. 62 of *Corpex*, the Su-

preme Court stated:

[O]nce work is complete, a contractor cannot claim in a Court of law benefits similar to those which [the notice provision] would have guaranteed if he has not himself observed that clause and given the notice for which the clause provides.

60 Thus, even if Clearway's factual assertion is correct, Clearway cannot rely on items 3 and 6 of the March 2007 Claim to save items 7 and 8 of the August 2010 Claim. The Notice Provision requires detailed claims in which the items being claimed are identified and supported by records. Items 3 and 6 do not contain the information necessary to meet those requirements in respect of items 7 and 8 of the August 2010 Claim. Accordingly, items 3 and 6 of the March 2007 Claim did not give the notice required by the Notice Provision such that Clearway can rely on them to proceed with its claims in items 7 and 8 of the August 2010 Claim.

***Issue 5: No Complaint by the City in respect of the Date of Delivery of the March 2007 Claim***

61 This ground of appeal rests on the timing of the March 2007 Claim, which Clearway delivered to the City more than 30 days after completion of the work affected by the flood.

62 Clearway contends that as the City did not raise any issue with respect to the timing of the March 2007 Claim, it waived compliance with the Notice Provision or, alternatively, it varied the terms of the Contract by this conduct. On the basis of either waiver or variation of contract, Clearway submits, the City cannot rely on the timing component of the Notice Provision to bar the August 2010 Claim.

63 The Supreme Court of Canada provides guidance on the doctrine of waiver in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 (S.C.C.). In paragraphs 19, 20 and 24, it lays down the following. Waiver occurs when one party to a contract (or proceeding) takes steps that amount to foregoing reliance on some known right or defect in the performance of the other party. It will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. Communication can be formal or informal and it may be inferred from conduct. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

64 There is nothing in Clearway's affidavit material that meets the requirement that the City communicated an "unequivocal and conscious intention to abandon" its right to rely on the Notice Provision or to otherwise waive strict compliance with its terms. Indeed, Clearway did not assert that it had any such belief. Accordingly, there is no factual basis to support this submission. On that basis alone, this ground of appeal must fail.

65 Two other arguments advanced on this ground of appeal warrant comment. The first is Clearway's argument, based on the decision of this court in *Colautti Construction Ltd. v. Ottawa (City)* (1984), 46 O.R. (2d) 236 (Ont. C.A.), that the City varied the terms of the Contract by its conduct such that it cannot rely on the timing component of the Notice Provision.

66 *Colautti Construction* is a very different case from the present one. In *Colautti Construction*, the plaintiff contractor entered into a contract with the defendant city for the construction of a sanitary sewer. The contract stipulated that written authorization was required for additional charges. Nonetheless, at various different times over the course of the project, the contractor billed the city for significant extra charges and the city paid them,

despite the absence of written authorization. This court held that the parties had varied the terms of the contract by their conduct and the city could not rely on the strict provisions of the contract to escape liability for further additional costs.

67 In the present case, there is no pattern of conduct by the parties over the course of the Contract demonstrating that they did not intend to be bound by the Notice Provision. Far from ignoring the relevant provisions in the Contract, the parties acted in compliance with its terms. GC 3.14.03.01 required Clearway to give notice of any situation that might lead to a claim for additional payment. The affidavit evidence shows that Clearway did this. Further, as we have seen, the Notice Provision required Clearway to give a detailed claim after completion of the work affected by the situation. Clearway did that, by delivering its March 2007 Claim. As for the City, GC 3.14.03.05 required that it advise Clearway, in writing, within 90 days of receiving the detailed claim, of its opinion of the validity of the claim. This the City did by means of its letter dated April 4, 2007, which denied the March 2007 Claim. There is no pattern of conduct by the parties that had the effect of varying the terms of the Contract.

68 The second matter warranting comment is the City's contention that waiver and promissory estoppel are one and the same. Based on this view, the City submitted that Clearway had to meet the test for promissory estoppel enunciated by the Supreme Court of Canada in *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.), at para. 13:

The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

69 The Supreme Court decided *Saskatchewan River Bungalows* a mere three years after *Maracle*. It did not conflate or equate the requirements for waiver and promissory estoppel in those two cases. Rather, as has been seen, it articulated different requirements for each doctrine. Indeed, at para. 18 of *Saskatchewan River Bungalows*, after acknowledging that waiver and promissory estoppel are "closely related", the Supreme Court expressly declined to determine how and whether the two doctrines should be distinguished. Instead, it decided the appeal based on waiver, because that is how "the parties [had] chosen to frame their submissions".

70 There has been much speculation, both judicial and academic, on whether waiver and promissory estoppel are essentially the same thing, with the sole or primary difference being that waiver developed as a common law doctrine whereas promissory estoppel arose in equity.[FN4] That determination awaits the proper case, one in which it is squarely raised and fully argued. Following the lead of the Supreme Court, I would decide this ground of appeal based on waiver and variation, as that is how Clearway framed the issue. I would add, however, that if the doctrine of promissory estoppel is in play, my conclusion that Clearway has failed to establish the necessary evidentiary basis is reinforced because there is no evidence of detrimental reliance.

### **Disposition**

71 Accordingly, I would dismiss the appeal, with costs to the City in the agreed-on amount of \$5,000, inclusive of disbursements and applicable taxes.

*R.G. Juriansz J.A.:*

I agree

**G.J. Epstein J.A.:**

I agree

*Appeal dismissed.*

## Appendix A

### GC 3.14 Claims, Negotiations, Mediation

#### GC 3.14.01 Continuance of the Work

.01 Unless the Contract has been terminated or completed, the Contractor shall in every case, after serving or receiving any notification of a claim or dispute, verbal or written, continue to proceed with the Work with due diligence and expedition. It is understood by the parties that such action will not jeopardize any claim it may have.

#### GC 3.14.02 Record Keeping

.01 Immediately upon commencing work which may result in a claim, the Contractor shall keep Daily Work Records during the course of the Work, sufficient to substantiate the Contractor's claim, and the Contract Administrator will keep Daily Work Records to be used in assessing the Contractor's claim, all in accordance with clause *GC 8.02.07*, Records.

.02 The Contractor and the Contract Administrator shall reconcile their respective Daily Work Records on a daily basis, to simplify review of the claim, when submitted.

.03 The keeping of Daily Work Records by the Contract Administrator or the reconciling of such Daily Work Records with those of the Contractor shall not be construed to be acceptance of the claim.

#### GC 3.14.03 Claims Procedure

.01 The Contractor shall give oral notice to the Contract Administrator of any situation which may lead to a claim for additional payment immediately upon becoming aware of the situation and shall provide written notice to the Contract Administrator of such situation or of any express intent to claim such payment, within seven days of the commencement of any part of the work which may be affected by the situation or will form part of the claim.

.02 Not used.

.03 The Contractor shall submit detailed claims as soon as reasonably possible and in any event no later than 30 Days after completion of the work affected by the situation. The detailed claim shall:

- a) identify the item or items in respect of which the claim arises;
- b) state the grounds, contractual or otherwise, upon which the claim is made; and



c) include the Records maintained by the Contractor supporting such claim.

In exceptional cases the 30 Days may be increased to a maximum of 90 Days with approval in writing from the Contract Administrator.

.04 Within 30 Days of the receipt of the Contractor's detailed claim, the Contract Administrator may request the Contractor to submit any further and other particulars as the Contract Administrator considers necessary to assess the claim. The Contractor shall submit the requested information within 30 Days of receipt of such request.

.05 Within 90 Days of receipt of the detailed claim, the Contract Administrator shall advise the Contractor, in writing, of the Contract Administrator's opinion with regard to the validity of the claim.

#### **GC 3.14.04 Negotiations**

.01 The parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, open and timely disclosure of relevant facts, information, and documents to facilitate these negotiations.

.02 Should the Contractor disagree with the opinion given in paragraph *GC 3.14.03.05*, with respect to any part of the claim, the Contract Administrator shall enter into negotiations with the Contractor to resolve the matters in dispute. Where a negotiated settlement cannot be reached and it is agreed that payment cannot be made on a Time and Material basis in accordance with clause *GC 8.02.04*, Payment on a Time and Material Basis, the parties shall proceed in accordance with clause *GC 3.14.05*, Mediation.

#### **GC 3.14.05 Mediation**

.01 If a claim is not resolved satisfactorily through the negotiation stage noted in clause *GC 3.14.04*, Negotiations, within a period of 30 Days following the opinion given in paragraph *GC 3.14.03.05*, and the Contractor wishes to pursue the issue further, the parties may, upon mutual agreement, utilize the services of an independent third party mediator.

.02 The mediator shall be mutually agreed upon by the Owner and Contractor.

.03 The mediator shall be knowledgeable regarding the area of the disputed issue. The mediator shall meet with the parties together and separately, as necessary, to review all aspects of the issue. In a final attempt to assist the parties in resolving the issue themselves prior to proceeding to arbitration the mediator shall provide, without prejudice, a non-binding recommendation for settlement.

.04 The review by the mediator shall be completed within 90 Days following the opinion given in paragraph *GC 3.14.03.05*.

.05 Each party is responsible for its own costs related to the use of the third party mediator process. The costs of the third party mediator shall be equally shared by the Owner and Contractor.

#### **GC 3.14.06 Payment**

.01 Payment of the claim will be made no later than 30 Days after the date of resolution of the claim or dispute. Such payment will be made according to the terms of *Section GC 8.0*, Measurement and Payment.

2012 CarswellOnt 11173, 2012 ONCA 597, 14 C.L.R. (4th) 169, 2 M.P.L.R. (5th) 1, 220 A.C.W.S. (3d) 333, 296 O.A.C. 218, 354 D.L.R. (4th) 516

### **GC 3.14.07 Rights of Both Parties**

.01 It is agreed that no action taken under this subsection *GC 3.14*, Claims, Negotiations, Mediation, by either party shall be construed as a renunciation or waiver of any of the rights or recourse available to the parties, provided that the requirements set out in this subsection are fulfilled.

FN1 The Notice Provision allows for time extensions of up to 90 days in "exceptional cases", with approval in writing from the Contract Administrator. As the August 2010 Claim greatly exceeds either time limit, for ease of reference I refer only to the 30-day limit.

FN2 *Corpex*, at para. 31.

FN3 See pp. 101-103.

FN4 See, for example, *Med-Chem Health Care Inc., Re*, [2000] O.J. No. 4009 (Ont. S.C.J. [Commercial List]); *HREIT Holdings 36 Corp. v. R.A.S. Food Services (Kenora) Inc.* (2009), 80 R.P.R. (4th) 64 (Ont. S.C.J.), at paras. 57-61; *Tudale Explorations Ltd. v. Bruce* (1978), 20 O.R. (2d) 593 (Ont. Div. Ct.), at pp. 595 -99; *Petridis v. Shabinsky* (1982), 35 O.R. (2d) 215 (Ont. H.C.); *Jones v. Laurie*, 2004 NSSC 87 (N.S. S.C.), at para. 14, (2004), 223 N.S.R. (2d) 129 (N.S. S.C.). For academic consideration of this matter see, for example, S.M. Wadams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at paras. 195-206; Angela Swan, *Canadian Contract Law*, 2d ed. (Markham, Ont.: LexisNexis, 2009), at paras. 2.198-255; John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at pp. 275ff.

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

Court File No.: CV-09-8122-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and  
NOVAR INC.

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

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**CHAITONS LLP**  
5000 Yonge Street, 10<sup>th</sup> Floor  
Toronto, ON M2N 7E9

**Harvey Chaiton**  
Tel: 416-218-1129  
Fax: 416-218-1849  
Email: harvey@chaitons.com

**George Benchetrit**  
Tel: (416) 218-1141  
Fax: (416) 218-1841  
Email: george@chaitons.com

Lawyers for George L. Miller, the Chapter 7  
Trustee of the Bankruptcy Estates of the US  
Indalex Debtor