Court File No. CV-12-9667-00CL

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 SINO-FOREST CORPORATION

Court File No.: CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, THE TRUSTEES OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 793 PENSION PLAN FOR OPERATING ENGINEERS IN ONTARIO, SJUNDE AP-FONDEN, DAVID GRANT and ROBERT WONG

Plaintiffs

- and -

SINO-FOREST CORPORATION, ERNST & YOUNG LLP, BDO LIMITED (formerly known as BDO MCCABE LO LIMITED), ALLEN T.Y. CHAN, W. JUDSON MARTIN, KAI KIT POON, DAVID J. HORSLEY, WILLIAM E. ARDELL, JAMES P. BOWLAND, JAMES M.E. HYDE, EDMUND MAK, SIMON MURRAY, PETER WANG, GARRY J. WEST, PÖYRY (BEIJING) CONSULTING COMPANY LIMITED, CREDIT SUISSE SECURITIES (CANADA), INC., TD SECURITIES INC., DUNDEE SECURITIES CORPORATION, RBC DOMINION SECURITIES INC., SCOTIA CAPITAL INC., CIBC WORLD MARKETS INC., MERRILL LYNCH CANADA INC., CANACCORD FINANCIAL LTD., MAISON PLACEMENTS CANADA INC., CREDIT SUISSE SECURITIES (USA) LLC and MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED (successor by merger to Banc of America Securities LLC)

Defendants

Proceeding under the Class Proceedings Act, 1992

RESPONDING BOOK OF AUTHORITIES OF SFC LITIGATION TRUST
(Settlement Approval Motion Returnable May 11, 2015)

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Court File No. CV-12-9667-00-CL

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT INVOLVING METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 4446372 CANADA INC. AND 6932819 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO

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Heard: June 25-26, 2008
Judgment: August 18, 2008 *
Docket: CA C48969

Proceedings: affirming *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List])

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Cases considered by *R.A. Blair J.A.*:

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s. 92 — referred to

s. 92 ¶ 13 — referred to

Words and phrases considered:

arrangement

"Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor.

APPEAL by opponents of creditor-initiated plan from judgment reported at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 3523, 43 C.B.R. (5th) 269, 47 B.L.R. (4th) 74 (Ont. S.C.J. [Commercial List]), granting application for approval of plan.

***R.A. Blair J.A.*:**

A. Introduction

1 In August 2007 a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

2 By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007 pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

3 Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the application judge erred in holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to Appeal

4 Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument we encouraged counsel to combine their submissions on both matters.

5 The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide. There are serious and arguable grounds of appeal and — given the expedited time-table — the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as *Cineplex Odeon Corp., Re* (2001), 24 C.B.R. (4th) 201 (Ont. C.A.), and *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30 (Ont. C.A. [In Chambers]), are met. I would grant leave to appeal.

Appeal

6 For the reasons that follow, however, I would dismiss the appeal.

B. Facts

The Parties

7 The appellants are holders of ABCP Notes who oppose the Plan. They do so principally on the basis that it requires them to grant releases to third party financial institutions against whom they say they have claims for relief arising out of their purchase of ABCP Notes. Amongst them are an airline, a tour operator, a mining company, a wireless provider, a pharmaceuticals retailer, and several holding companies and energy companies.

8 Each of the appellants has large sums invested in ABCP — in some cases, hundreds of millions of dollars. Nonetheless, the collective holdings of the appellants — slightly over $1 billion — represent only a small fraction of the more than $32 billion of ABCP involved in the restructuring.

9 The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies, and some smaller holders of ABCP product. They participated in the market in a number of different ways.

The ABCP Market

10 Asset Backed Commercial Paper is a sophisticated and hitherto well-accepted financial instrument. It is primarily a form of short-term investment — usually 30 to 90 days — typically with a low interest yield only slightly better than that available through other short-term paper from a government or bank. It is said to be "asset backed" because the cash that is used to purchase an ABCP Note is converted into a portfolio of financial assets or other asset interests that in turn provide security for the repayment of the notes.

11 ABCP was often presented by those selling it as a safe investment, somewhat like a guaranteed investment certificate.

12 The Canadian market for ABCP is significant and administratively complex. As of August 2007, investors had placed over $116 billion in Canadian ABCP. Investors range from individual pensioners to large institutional bodies. On the selling and distribution end, numerous players are involved, including chartered banks, investment houses and other financial institutions. Some of these players participated in multiple ways. The Plan in this proceeding relates to approximately $32 billion of non-bank sponsored ABCP the restructuring of which is considered essential to the preservation of the Canadian ABCP market.

13 As I understand it, prior to August 2007 when it was frozen, the ABCP market worked as follows.

14 Various corporations (the "Sponsors") would arrange for entities they control ("Conduits") to make ABCP Notes available to be sold to investors through "Dealers" (banks and other investment dealers). Typically, ABCP was issued by series and sometimes by classes within a series.

15 The cash from the purchase of the ABCP Notes was used to purchase assets which were held by trustees of the Conduits ("Issuer Trustees") and which stood as security for repayment of the notes. Financial institutions that sold or provided the Conduits with the assets that secured the ABCP are known as "Asset Providers". To help ensure that investors would be able to redeem their notes, "Liquidity Providers" agreed to provide funds that could be drawn upon to meet the demands of maturing ABCP Notes in certain circumstances. Most Asset Providers were also Liquidity Providers. Many of these banks and financial institutions were also holders of ABCP Notes ("Noteholders"). The Asset and Liquidity Providers held first charges on the assets.

16 When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The Liquidity Crisis

17 The types of assets and asset interests acquired to "back" the ABCP Notes are varied and complex. They were generally long-term assets such as residential mortgages, credit card receivables, auto loans, cash collateralized debt obligations and derivative investments such as credit default swaps. Their particular characteristics do not matter for the purpose of this appeal, but they shared a common feature that proved to be the Achilles heel of the ABCP market: because of their long-term nature there was an inherent timing mismatch between the cash they generated and the cash needed to repay maturing ABCP Notes.

18 When uncertainty began to spread through the ABCP marketplace in the summer of 2007, investors stopped buying the ABCP product and existing Noteholders ceased to roll over their maturing notes. There was no cash to redeem those notes. Although calls were made on the Liquidity Providers for payment, most of the Liquidity Providers declined to fund the redemption of the notes, arguing that the conditions for liquidity funding had not been met in the circumstances. Hence the "liquidity crisis" in the ABCP market.

19 The crisis was fuelled largely by a lack of transparency in the ABCP scheme. Investors could not tell what assets were backing their notes — partly because the ABCP Notes were often sold before or at the same time as the assets backing them were acquired; partly because of the sheer complexity of certain of the underlying assets; and partly because of assertions of confidentiality by those involved with the assets. As fears arising from the spreading U.S. sub-prime mortgage crisis mushroomed, investors became increasingly concerned that their ABCP Notes may be supported by those crumbling assets. For the reasons outlined above, however, they were unable to redeem their maturing ABCP Notes.

The Montreal Protocol

20 The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze — the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement — known as the Montréal Protocol — the parties committed to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

21 The work of implementing the restructuring fell to the Pan-Canadian Investors Committee, an applicant in the proceeding and respondent in the appeal. The Committee is composed of 17 financial and investment institutions, including chartered banks, credit unions, a pension board, a Crown corporation, and a university board of governors. All 17 members are themselves Noteholders; three of them also participated in the ABCP market in other capacities as well. Between them, they hold about two thirds of the $32 billion of ABCP sought to be restructured in these proceedings.

22 Mr. Crawford was named the Committee's chair. He thus had a unique vantage point on the work of the Committee and the restructuring process as a whole. His lengthy affidavit strongly informed the application judge's understanding of the factual context, and our own. He was not cross-examined and his evidence is unchallenged.

23 Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible, and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan

a) Plan Overview

24 Although the ABCP market involves many different players and kinds of assets, each with their own challenges, the committee opted for a single plan. In Mr. Crawford's words, "all of the ABCP suffers from common problems that are best addressed by a common solution." The Plan the Committee developed is highly complex and involves many parties. In its essence, the Plan would convert the Noteholders' paper — which has been frozen and therefore effectively worthless for many months — into new, long-term notes that would trade freely, but with a discounted face value. The hope is that a strong secondary market for the notes will emerge in the long run.

25 The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

26 Under the Plan, the vast majority of the assets underlying ABCP would be pooled into two master asset vehicles (MAV1 and MAV2). The pooling is designed to increase the collateral available and thus make the notes more secure.

27 The Plan does not apply to investors holding less than $1 million of notes. However, certain Dealers have agreed to buy the ABCP of those of their customers holding less than the $1-million threshold, and to extend financial assistance to these customers. Principal among these Dealers are National Bank and Canaccord, two of the respondent financial institutions the appellants most object to releasing. The application judge found that these developments appeared to be designed to secure votes in favour of the Plan by various Noteholders, and were apparently successful in doing so. If the Plan is approved, they also provide considerable relief to the many small investors who find themselves unwittingly caught in the ABDP collapse.

b) The Releases

28 This appeal focuses on one specific aspect of the Plan: the comprehensive series of releases of third parties provided for in Article 10.

29 The Plan calls for the release of Canadian banks, Dealers, Noteholders, Asset Providers, Issuer Trustees, Liquidity Providers, and other market participants — in Mr. Crawford's words, "virtually all participants in the Canadian ABCP market" — from any liability associated with ABCP, with the exception of certain narrow claims relating to fraud. For instance, under the Plan as approved, creditors will have to give up their claims against the Dealers who sold them their ABCP Notes, including challenges to the way the Dealers characterized the ABCP and provided (or did not provide) information about the ABCP. The claims against the proposed defendants are mainly in tort: negligence, misrepresentation, negligent misrepresentation, failure to act prudently as a dealer/advisor, acting in conflict of interest, and in a few cases fraud or potential fraud. There are also allegations of breach of fiduciary duty and claims for other equitable relief.

30 The application judge found that, in general, the claims for damages include the face value of the Notes, plus interest and additional penalties and damages.

31 The releases, in effect, are part of a *quid pro quo*. Generally speaking, they are designed to compensate various participants in the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:

> a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets, and provide below-cost financing for margin funding facilities that are designed to make the notes more secure;
>
> b) Sponsors — who in addition have cooperated with the Investors' Committee throughout the process, including by sharing certain proprietary information — give up their existing contracts;
>
> c) The Canadian banks provide below-cost financing for the margin funding facility and,
>
> d) Other parties make other contributions under the Plan.

32 According to Mr. Crawford's affidavit, the releases are part of the Plan "because certain key participants, whose participation is vital to the restructuring, have made comprehensive releases a condition for their participation."

The CCAA Proceedings to Date

33 On March 17, 2008 the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25th. The vote was overwhelmingly in support of the Plan — 96% of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the Monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan — 99% of those connected with the development of the Plan voted positively, as did 80% of those Noteholders who had not been involved in its formulation.

34 The vote thus provided the Plan with the "double majority" approval — a majority of creditors representing two-thirds in value of the claims — required under s. 6 of the CCAA.

35 Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

36 The result of this renegotiation was a "fraud carve-out" — an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

37 A second sanction hearing — this time involving the amended Plan (with the fraud carve-out) — was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third-party releases and that the Plan including the third-party releases in question here was fair and reasonable.

38 The appellants attack both of these determinations.

C. Law and Analysis

39 There are two principal questions for determination on this appeal:

1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors?

2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it?

(1) Legal Authority for the Releases

40 The standard of review on this first issue — whether, as a matter of law, a CCAA plan may contain third-party releases — is correctness.

41 The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [1] The requirement that objecting creditors release claims against third parties is illegal, they contend, because:

a) on a proper interpretation, the CCAA does not permit such releases;

b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect;

c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the *Constitution Act*, 1867;

d) the releases are invalid under Quebec rules of public order; and because

e) the prevailing jurisprudence supports these conclusions.

42 I would not give effect to any of these submissions.

Interpretation, "Gap Filling" and Inherent Jurisdiction

43 On a proper interpretation, in my view, the CCAA permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on *all* creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

44 The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it

is that very flexibility which gives the Act its efficacy: *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]). As Farley J. noted in *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), at 111, "[t]he history of CCAA law has been an evolution of judicial interpretation."

45 Much has been said, however, about the "evolution of judicial interpretation" and there is some controversy over both the source and scope of that authority. Is the source of the court's authority statutory, discerned solely through application of the principles of statutory interpretation, for example? Or does it rest in the court's ability to "fill in the gaps" in legislation? Or in the court's inherent jurisdiction?

46 These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters,"[2] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools — statutory interpretation, gap-filling, discretion and inherent jurisdiction — it is not necessary in my view to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

47 The Supreme Court of Canada has affirmed generally — and in the insolvency context particularly — that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26.

48 More broadly, I believe that the proper approach to the judicial interpretation and application of statutes — particularly those like the CCAA that are skeletal in nature — is succinctly and accurately summarized by Jackson and Sarra in their recent article, *supra*, at p. 56:

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in *Québec* as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

49 I adopt these principles.

50 The remedial purpose of the CCAA — as its title affirms — is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 318, Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

> Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the

> C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.

51 The CCAA was enacted in 1933 and was necessary — as the then Secretary of State noted in introducing the Bill on First Reading — "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), *per* Doherty J.A. in dissent; *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 125 (Ont. Gen. Div. [Commercial List]); *Anvil Range Mining Corp., Re* (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]).

52 In this respect, I agree with the following statement of Doherty J.A. in *Elan, supra*, at pp. 306-307:

> . . . [T]he Act was designed to serve a "broad constituency of investors, creditors and employees".[3] Because of that "broad constituency" the court must, when considering applications brought under the Act, *have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.* [Emphasis added.]

Application of the Principles of Interpretation

53 An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

54 The appellants argue that the application judge erred in taking this approach and in treating the Plan and the proceedings as an attempt to restructure a financial market (the ABCP market) rather than simply the affairs between the debtor corporations who caused the ABCP Notes to be issued and their creditors. The Act is designed, they say, only to effect reorganizations between a corporate debtor and its creditors and not to attempt to restructure entire marketplaces.

55 This perspective is flawed in at least two respects, however, in my opinion. First, it reflects a view of the purpose and objects of the CCAA that is too narrow. Secondly, it overlooks the reality of the ABCP marketplace and the context of the restructuring in question here. It may be true that, in their capacity as ABCP *Dealers*, the releasee financial institutions are "third-parties" to the restructuring in the sense that they are not creditors of the debtor corporations. However, in their capacities as *Asset Providers* and *Liquidity Providers*, they are not only creditors but they are prior secured creditors to the Noteholders. Furthermore — as the application judge found — in these latter capacities they are making significant contributions to the restructuring by "foregoing immediate rights to assets and ... providing real and tangible input for the preservation and enhancement of the Notes" (para. 76). In this context, therefore, the application judge's remark at para. 50 that the restructuring "involves the commitment and participation of all parties" in the ABCP market makes sense, as do his earlier comments at paras. 48-49:

> Given the nature of the ABCP market and all of its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.
>
> In these circumstances, *it is unduly technical to classify the Issuer Trustees as debtors and the claims of the Noteholders as between themselves and others as being those of third party creditors*, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring. [Emphasis added.]

56 The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper ..." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring

as between debtor and creditors. His focus was on *the effect* of the restructuring, a perfectly permissible perspective, given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair-and-reasonable issue, he stated at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal."

57 I agree. I see no error on the part of the application judge in approaching the fairness assessment or the interpretation issue with these considerations in mind. They provide the context in which the purpose, objects and scheme of the CCAA are to be considered.

The Statutory Wording

58 Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in:

> a) the skeletal nature of the CCAA;
>
> b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in
>
> c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable".

Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

59 Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
>
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and
>
> (b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act* or is in the course of being wound up under the *Winding-up and Restructuring Act*, on the trustee in bankruptcy or liquidator and contributories of the company.

Compromise or Arrangement

60 While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, loose-leaf, 3rd ed., vol. 4 (Toronto: Thomson Carswell) at 10A-12.2, N§10. It has been said to be "a very wide and indefinite [word]": *Reference re Refund of Dues*

Paid under s.47 (f) of Timber Regulations in the Western Provinces, [1935] A.C. 184 (Canada P.C.) at 197, affirming S.C.C. [1933] S.C.R. 616 (S.C.C.). See also, *Guardian Assurance Co., Re*, [1917] 1 Ch. 431 (Eng. C.A.) at 448, 450; *T&N Ltd., Re* (2006), [2007] 1 All E.R. 851 (Eng. Ch. Div.).

61 The CCAA is a sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest. Parliament wisely avoided attempting to anticipate the myriad of business deals that could evolve from the fertile and creative minds of negotiators restructuring their financial affairs. It left the shape and details of those deals to be worked out within the framework of the comprehensive and flexible concepts of a "compromise" and "arrangement." I see no reason why a release in favour of a third party, negotiated as part of a package between a debtor and creditor and reasonably relating to the proposed restructuring cannot fall within that framework.

62 A proposal under the *Bankruptcy and Insolvency Act*, R.S., 1985, c. B-3 (the "BIA") is a contract: *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230 (S.C.C.) at 239; *Society of Composers, Authors & Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 (Ont. C.A.) at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List]) at para. 6; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at 518.

63 There is nothing to prevent a debtor and a creditor from including in a contract between them a term providing that the creditor release a third party. The term is binding as between the debtor and creditor. In the CCAA context, therefore, a plan of compromise or arrangement may propose that creditors agree to compromise claims against the debtor and to release third parties, just as any debtor and creditor might agree to such a term in a contract between them. Once the statutory mechanism regarding voter approval and court sanctioning has been complied with, the plan — including the provision for releases — becomes binding on all creditors (including the dissenting minority).

64 *T&N Ltd., Re, supra*, is instructive in this regard. It is a rare example of a court focussing on and examining the meaning and breadth of the term "arrangement". T&N and its associated companies were engaged in the manufacture, distribution and sale of asbestos-containing products. They became the subject of many claims by former employees, who had been exposed to asbestos dust in the course of their employment, and their dependents. The T&N companies applied for protection under s. 425 of the U.K. *Companies Act 1985*, a provision virtually identical to the scheme of the CCAA — including the concepts of compromise or arrangement. [4]

65 T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the "EL claimants") would assert their claims. In return, T&N's former employees and dependants (the "EL claimants") agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

66 Certain creditors argued that the court could not sanction the plan because it did not constitute a "compromise or arrangement" between T&N and the EL claimants since it did not purport to affect rights as between them but only the EL claimants' rights against the EL insurers. The Court rejected this argument. Richards J. adopted previous jurisprudence — cited earlier in these reasons — to the effect that the word "arrangement" has a very broad meaning and that, while both a compromise and an arrangement involve some "give and take", an arrangement need not involve a compromise or be confined to a case of dispute or difficulty (paras. 46-51). He referred to what would be the equivalent of a solvent arrangement under Canadian corporate legislation as an example. [5] Finally, he pointed out that the compromised rights of the EL claimants against the EL insurers were not unconnected with the EL claimants' rights against the T&N companies; the scheme of arrangement involving the EL insurers was "an integral part of a single proposal affecting all the parties" (para. 52). He concluded his reasoning with these observations (para. 53):

> In my judgment it is not a necessary element of an arrangement for the purposes of s 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within s 425. It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning. *Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that party.* [Emphasis added.]

67 I find Richard J.'s analysis helpful and persuasive. In effect, the claimants in *T&N* were being asked to release their claims against the EL insurers in exchange for a call on the fund. Here, the appellants are being required to release their claims against certain financial third parties in exchange for what is anticipated to be an improved position for all ABCP Noteholders, stemming from the contributions the financial third parties are making to the ABCP restructuring. The situations are quite comparable.

The Binding Mechanism

68 Parliament's reliance on the expansive terms "compromise" or "arrangement" does not stand alone, however. Effective insolvency restructurings would not be possible without a statutory mechanism to bind an unwilling minority of creditors. Unanimity is frequently impossible in such situations. But the minority must be protected too. Parliament's solution to this quandary was to permit a wide range of proposals to be negotiated and put forward (the compromise or arrangement) and to bind *all* creditors by class to the terms of the plan, but to do so only where the proposal can gain the support of the requisite "double majority" of votes [6] *and* obtain the sanction of the court on the basis that it is fair and reasonable. In this way, the scheme of the CCAA supports the intention of Parliament to encourage a wide variety of solutions to corporate insolvencies without unjustifiably overriding the rights of dissenting creditors.

The Required Nexus

69 In keeping with this scheme and purpose, I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be "necessary" in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis).

70 The release of the claim in question must be justified as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan. This nexus exists here, in my view.

71 In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) *The claims to be released are rationally related to the purpose of the Plan and necessary for it*;
>
> c) The Plan cannot succeed without the releases;
>
> d) *The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan*; and
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally.

72 Here, then — as was the case in *T&N* — there is a close connection between the claims being released and the restructuring proposal. The tort claims arise out of the sale and distribution of the ABCP Notes and their collapse in value, just as do the contractual claims of the creditors against the debtor companies. The purpose of the restructuring is to stabilize and shore up the value of those notes in the long run. The third parties being released are making separate contributions to enable those results to materialize. Those contributions are identified earlier, at para. 31 of these reasons. The application judge found that the claims being released are not independent of or unrelated to the claims that the Noteholders have against the debtor companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77 he said:

> [76] I do not consider that the Plan in this case involves a change in relationship among creditors "that does not directly involve the Company." Those who support the Plan and are to be released are "directly involved in the Company" in the sense that many are foregoing immediate rights to assets and are providing real and tangible input for the preservation and enhancement of the Notes. It would be unduly restrictive to suggest that the moving parties' claims against released parties do not involve the Company, since the claims are directly related to the value of the Notes. The value of the Notes is in this case the value of the Company.
>
> [77] This Plan, as it deals with releases, doesn't change the relationship of the creditors apart from involving the Company and its Notes.

73 I am satisfied that the wording of the CCAA — construed in light of the purpose, objects and scheme of the Act and in accordance with the modern principles of statutory interpretation — supports the court's jurisdiction and authority to sanction the Plan proposed here, including the contested third-party releases contained in it.

The Jurisprudence

74 Third party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's Bench in *Canadian Airlines Corp., Re* (2000), 265 A.R. 201 (Alta. Q.B.), leave to appeal refused by (2000), 266 A.R. 131 (Alta. C.A. [In Chambers]), and (2001), 293 A.R. 351 (note) (S.C.C.). In *Muscletech Research & Development Inc., Re* (2006), 25 C.B.R. (5th) 231 (Ont. S.C.J.) Justice Ground remarked (para. 8):

> [It] is not uncommon in CCAA proceedings, in the context of a plan of compromise and arrangement, to compromise claims against the Applicants and other parties against whom such claims or related claims are made.

75 We were referred to at least a dozen court-approved CCAA plans from across the country that included broad third-party releases. With the exception of *Canadian Airlines Corp., Re*, however, the releases in those restructurings — including *Muscletech Research & Development Inc., Re* — were not opposed. The appellants argue that those cases are wrongly decided, because the court simply does not have the authority to approve such releases.

76 In *Canadian Airlines Corp., Re* the releases in question were opposed, however. Paperny J. (as she then was) concluded the court had jurisdiction to approve them and her decision is said to be the well-spring of the trend towards third-party releases referred to above. Based on the foregoing analysis, I agree with her conclusion although for reasons that differ from those cited by her.

77 Justice Paperny began her analysis of the release issue with the observation at para. 87 that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company." It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud*,[7] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument — dealt with later in these reasons — that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92).

78 Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors.

79 The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are *Steinberg Inc. c. Michaud, supra*; *NBD Bank, Canada v. Dofasco Inc.* (1999), 46 O.R. (3d) 514 (Ont. C.A.); *Pacific Coastal Airlines Ltd. v. Air Canada* (2001), 19 B.L.R. (3d) 286 (B.C. S.C.); and *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (Ont. C.A.) ("*Stelco I*"). I do not think these cases assist the appellants, however. With the exception of *Steinberg Inc.*, they do not involve third party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that *Steinberg Inc.* does not express a correct view of the law, and I decline to follow it.

80 In *Pacific Coastal Airlines Ltd.*, Tysoe J. made the following comment at para. 24:

> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company.

81 This statement must be understood in its context, however. Pacific Coastal Airlines had been a regional carrier for Canadian Airlines prior to the CCAA reorganization of the latter in 2000. In the action in question it was seeking to assert separate tort claims against Air Canada for contractual interference and inducing breach of contract in relation to certain rights it had to the use of Canadian's flight designator code prior to the CCAA proceeding. Air Canada sought to have the action dismissed on grounds of *res judicata* or issue estoppel because of the CCAA proceeding. Tysoe J. rejected the argument.

82 The facts in *Pacific Coastal Airlines Ltd.* are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian — at a contractual level — may have had some involvement with the particular dispute. Here, however, the disputes that are the subject-matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

83 Nor is the decision of this Court in the *NBD Bank, Canada* case dispositive. It arose out of the financial collapse of Algoma Steel, a wholly-owned subsidiary of Dofasco. The Bank had advanced funds to Algoma allegedly on the strength of misrepresentations by Algoma's Vice-President, James Melville. The plan of compromise and arrangement that was sanctioned by Farley J. in the Algoma CCAA restructuring contained a clause releasing Algoma from all claims creditors "may have had against Algoma or its directors, officers, employees and advisors." Mr. Melville was found liable for negligent misrepresentation in a subsequent action by the Bank. On appeal, he argued that since the Bank was barred from suing Algoma for misrepresentation by its officers, permitting it to pursue the same cause of action against him personally would subvert the CCAA process — in short, he was personally protected by the CCAA release.

84 Rosenberg J.A., writing for this Court, rejected this argument. The appellants here rely particularly upon his following observations at paras. 53-54:

> 53 In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in *Elan Corp. v. Comiskey* (1990), 1 O.R. (3d) 289 at 297, the *CCAA* is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However,

> the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> 54 In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the *CCAA* and the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of *The 2000 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. [Footnote omitted.]

85 Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third party releases was not under consideration at all. What the Court was determining in *NBD Bank, Canada* was whether the release extended by its terms to protect a third party. In fact, on its face, it does not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in *NBD Bank, Canada* to the facts now before the Court" (para. 71). Contrary to the facts of this case, in *NBD Bank, Canada* the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release — as is the situation here. Thus, *NBD Bank, Canada* is of little assistance in determining whether the court has authority to sanction a plan that calls for third party releases.

86 The appellants also rely upon the decision of this Court in *Stelco I*. There, the Court was dealing with the scope of the CCAA in connection with a dispute over what were called the "Turnover Payments". Under an inter-creditor agreement one group of creditors had subordinated their rights to another group and agreed to hold in trust and "turn over" any proceeds received from Stelco until the senior group was paid in full. On a disputed classification motion, the Subordinated Debt Holders argued that they should be in a separate class from the Senior Debt Holders. Farley J. refused to make such an order in the court below, stating:

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves *and not directly involving the company*. [Citations omitted; emphasis added.]

See *Re Stelco Inc.* (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) at para. 7.

87 This Court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the Court were quite different from those raised on this appeal.

88 Indeed, the Stelco plan, as sanctioned, included third party releases (albeit uncontested ones). This Court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and therefore that they were entitled to a separate civil action to determine their rights under the agreement: *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.) (*"Stelco II"*). The Court

rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The Court said (para. 11):

> In [*Stelco I*] — the classification case — the court observed that it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company ... [*H]owever, the present case is not simply an inter-creditor dispute that does not involve the debtor company; it is a dispute that is inextricably connected to the restructuring process.* [Emphasis added.]

89 The approach I would take to the disposition of this appeal is consistent with that view. As I have noted, the third party releases here are very closely connected to the ABCP restructuring process.

90 Some of the appellants — particularly those represented by Mr. Woods — rely heavily upon the decision of the Quebec Court of Appeal in *Steinberg Inc. c. Michaud, supra.* They say that it is determinative of the release issue. In *Steinberg*, the Court held that the CCAA, as worded at the time, did not permit the release of directors of the debtor corporation and that third-party releases were not within the purview of the Act. Deschamps J.A. (as she then was) said (paras. 42, 54 and 58 — English translation):

> [42] Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri.
>
> . . . . .
>
> [54] The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
>
> . . . . .
>
> [58] The [CCAA] and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is [that is, including the releases of the directors].

91 Justices Vallerand and Delisle, in separate judgments, agreed. Justice Vallerand summarized his view of the consequences of extending the scope of the CCAA to third party releases in this fashion (para. 7):

> In short, the Act will have become the Companies' *and Their Officers and Employees* Creditors Arrangement Act — an awful mess — and likely not attain its purpose, which is to enable the company to survive in the face of *its* creditors and through their will, and not in the face of the creditors of its officers. This is why I feel, just like my colleague, that such a clause is contrary to the Act's mode of operation, contrary to its purposes and, for this reason, is to be banned.

92 Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature — they released directors from all claims, including those that were altogether unrelated to their corporate duties with the debtor company — rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para. 90 he said:

> The CCAA is drafted in general terms. It does not specify, among other things, what must be understood by "compromise or arrangement". However, it may be inferred from the purpose of this [A]ct that these terms *encompass all that should enable the person who has recourse to it to fully dispose of his debts*, both those that exist on the date when he has recourse to the statute and *those contingent on the insolvency in which he finds himself* ... [Emphasis added.]

93 The decision of the Court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency

in which he finds himself," however. On occasion such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in *Steinberg Inc.*, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analysing the Act — an approach inconsistent with the jurisprudence referred to above.

94 Finally, the majority in *Steinberg Inc.* seems to have proceeded on the basis that the CCAA cannot interfere with civil or property rights under Quebec law. Mr. Woods advanced this argument before this Court in his factum, but did not press it in oral argument. Indeed, he conceded that if the Act encompasses the authority to sanction a plan containing third-party releases — as I have concluded it does — the provisions of the CCAA, as valid federal insolvency legislation, are paramount over provincial legislation. I shall return to the constitutional issues raised by the appellants later in these reasons.

95 Accordingly, to the extent *Steinberg Inc.* stands for the proposition that the court does not have authority under the CCAA to sanction a plan that incorporates third-party releases, I do not believe it to be a correct statement of the law and I respectfully decline to follow it. The modern approach to interpretation of the Act in accordance with its nature and purpose militates against a narrow interpretation and towards one that facilitates and encourages compromises and arrangements. Had the majority in *Steinberg Inc.* considered the broad nature of the terms "compromise" and "arrangement" and the jurisprudence I have referred to above, they might well have come to a different conclusion.

The 1997 Amendments

96 *Steinberg Inc.* led to amendments to the CCAA, however. In 1997, s. 5.1 was added, dealing specifically with releases pertaining to directors of the debtor company. It states:

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> **Exception**
>
> (2) A provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.
>
> **Powers of court**
>
> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.
>
> **Resignation or removal of directors**
>
> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.
>
> 1997, c. 12, s. 122.

97 Perhaps the appellants' strongest argument is that these amendments confirm a prior lack of authority in the court to sanction a plan including third party releases. If the power existed, why would Parliament feel it necessary to add an amendment specifically permitting such releases (subject to the exceptions indicated) in favour of directors? *Expressio unius est exclusio alterius*, is the Latin maxim sometimes relied on to articulate the principle of interpretation implied in that question: to express or include one thing implies the exclusion of the other.

98 The maxim is not helpful in these circumstances, however. The reality is that there *may* be another explanation why Parliament acted as it did. As one commentator has noted: [8]

> Far from being a rule, [the maxim *expressio unius*] is not even lexicographically accurate, because it is simply not true, generally, that the mere express conferral of a right or privilege in one kind of situation implies the denial of the equivalent right or privilege in other kinds. Sometimes it does and sometimes its does not, and whether it does or does not depends on the particular circumstances of context. Without contextual support, therefore there is not even a mild presumption here. Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.

99 As I have said, the 1997 amendments to the CCAA providing for releases in favour of directors of debtor companies in limited circumstances were a response to the decision of the Quebec Court of Appeal in *Steinberg Inc.*. A similar amendment was made with respect to proposals in the BIA at the same time. The rationale behind these amendments was to encourage directors of an insolvent company to remain in office during a restructuring, rather than resign. The assumption was that by remaining in office the directors would provide some stability while the affairs of the company were being reorganized: see Houlden & Morawetz, vol.1, *supra*, at 2-144, E§11A; *Royal Penfield Inc., Re*, [2003] R.J.Q. 2157 (C.S. Que.) at paras. 44-46.

100 Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The Deprivation of Proprietary Rights

101 Mr. Shapray very effectively led the appellants' argument that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights — including the right to bring an action — in the absence of a clear indication of legislative intention to that effect: *Halsbury's Laws of England*, 4th ed. reissue, vol. 44 (1) (London: Butterworths, 1995) at paras. 1438, 1464 and 1467; Driedger, 2nd ed., *supra*, at 183; Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., (Markham: Butterworths, 2002) at 399. I accept the importance of this principle. For the reasons I have explained, however, I am satisfied that Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself. I would therefore not give effect to the appellants' submissions in this regard.

The Division of Powers and Paramountcy

102 Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the *Constitution Act, 1867*, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the *Civil Code of Quebec*.

103 I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.). As the Supreme Court confirmed in that case (p. 661), citing Viscount Cave L.C. in *Quebec (Attorney General) v. Bélanger (Trustee of)*, [1928] A.C. 187 (Canada P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament." Chief Justice Duff elaborated:

> Matters normally constituting part of a bankruptcy scheme but not in their essence matters of bankruptcy and insolvency may, of course, from another point of view and in another aspect be dealt with by a provincial legislature; but, when treated as matters pertaining to bankruptcy and insolvency, they clearly fall within the legislative authority of the Dominion.

104 That is exactly the case here. The power to sanction a plan of compromise or arrangement that contains third-party releases of the type opposed by the appellants is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action — normally a matter of provincial concern — or trump Quebec rules of public order is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount. Mr. Woods properly conceded this during argument.

Conclusion With Respect to Legal Authority

105 For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.

(2) The Plan is "Fair and Reasonable"

106 The second major attack on the application judge's decision is that he erred in finding that the Plan is "fair and reasonable" and in sanctioning it on that basis. This attack is centred on the nature of the third-party releases contemplated and, in particular, on the fact that they will permit the release of some claims based in fraud.

107 Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In the absence of a demonstrable error an appellate court will not interfere: see *Ravelston Corp., Re* (2007), 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]).

108 I would not interfere with the application judge's decision in this regard. While the notion of releases in favour of third parties — including leading Canadian financial institutions — that extend to claims of fraud is distasteful, there is no legal impediment to the inclusion of a release for claims based in fraud in a plan of compromise or arrangement. The application judge had been living with and supervising the ABCP restructuring from its outset. He was intimately attuned to its dynamics. In the end he concluded that the benefits of the Plan to the creditors as a whole, and to the debtor companies, outweighed the negative aspects of compelling the unwilling appellants to execute the releases as finally put forward.

109 The application judge was concerned about the inclusion of fraud in the contemplated releases and at the May hearing adjourned the final disposition of the sanctioning hearing in an effort to encourage the parties to negotiate a resolution. The result was the "fraud carve-out" referred to earlier in these reasons.

110 The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers, (ii) limits the type of damages that may be claimed (no punitive damages, for example), (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order, and (iv) limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

111 The law does not condone fraud. It is the most serious kind of civil claim. There is therefore some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: *Fotinis Restaurant Corp. v. White Spot Ltd* (1998), 38 B.L.R. (2d) 251 (B.C. S.C. [In Chambers]) at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings — the claims here all being untested allegations of fraud — and to include releases of such claims as part of that settlement.

112 The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, that the need "to avoid the potential cascade of litigation that ... would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

113 At para. 71 above I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here — with two additional findings — because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:

> a) The parties to be released are necessary and essential to the restructuring of the debtor;
>
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
>
> c) The Plan cannot succeed without the releases;
>
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
>
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
>
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
>
> g) The releases are fair and reasonable and not overly broad or offensive to public policy.

114 These findings are all supported on the record. Contrary to the submission of some of the appellants, they do not constitute a new and hitherto untried "test" for the sanctioning of a plan under the CCAA. They simply represent findings of fact and inferences on the part of the application judge that underpin his conclusions on jurisdiction and fairness.

115 The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they — as individual creditors — make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

116 All of these arguments are persuasive to varying degrees when considered in isolation. The application judge did not have that luxury, however. He was required to consider the circumstances of the restructuring as a whole, including the reality that many of the financial institutions were not only acting as Dealers or brokers of the ABCP Notes (with the impugned releases relating to the financial institutions in these capacities, for the most part) but also as Asset and Liquidity Providers (with the financial institutions making significant contributions to the restructuring in these capacities).

117 In insolvency restructuring proceedings almost everyone loses something. To the extent that creditors are required to compromise their claims, it can always be proclaimed that their rights are being unfairly confiscated and that they are being called upon to make the equivalent of a further financial contribution to the compromise or arrangement. Judges have observed on a number of occasions that CCAA proceedings involve "a balancing of prejudices," inasmuch as everyone is adversely affected in some fashion.

118 Here, the debtor corporations being restructured represent the issuers of the more than $32 billion in non-bank sponsored ABCP Notes. The proposed compromise and arrangement affects that entire segment of the ABCP market and the financial markets as a whole. In that respect, the application judge was correct in adverting to the importance of the restructuring to the resolution of the ABCP liquidity crisis and to the need to restore confidence in the financial system in Canada. He was required to consider and balance the interests of *all* Noteholders, not just the interests of the appellants, whose notes represent only about 3% of that total. That is what he did.

119 The application judge noted at para. 126 that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out specific claims in fraud" within the fraud carve-out provisions of the releases. He also recognized at para. 134 that:

> No Plan of this size and complexity could be expected to satisfy all affected by it. The size of the majority who have approved it is testament to its overall fairness. No plan to address a crisis of this magnitude can work perfect equity among all stakeholders.

120 In my view we ought not to interfere with his decision that the Plan is fair and reasonable in all the circumstances.

D. Disposition

121 For the foregoing reasons, I would grant leave to appeal from the decision of Justice Campbell, but dismiss the appeal.

***J.I. Laskin J.A.*:**

I agree.

***E.A. Cronk J.A.*:**

I agree.

Schedule A — Conduits

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

Schedule B — Applicants

ATB Financial

Caisse de dépôt et placement du Québec

Canaccord Capital Corporation

Canada Mortgage and Housing Corporation

Canada Post Corporation

Credit Union Central Alberta Limited

Credit Union Central of BC

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank of Canada/National Bank Financial Inc.

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta

Schedule A — Counsel

1) Benjamin Zarnett and Frederick L. Myers for the Pan-Canadian Investors Committee

2) Aubrey E. Kauffman and Stuart Brotman for 4446372 Canada Inc. and 6932819 Canada Inc.

3) Peter F.C. Howard and Samaneh Hosseini for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG

4) Kenneth T. Rosenberg, Lily Harmer and Max Starnino for Jura Energy Corporation and Redcorp Ventures Ltd.

5) Craig J. Hill and Sam P. Rappos for the Monitors (ABCP Appeals)

6) Jeffrey C. Carhart and Joseph Marin for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor

7) Mario J. Forte for Caisse de Dépôt et Placement du Québec

8) John B. Laskin for National Bank Financial Inc. and National Bank of Canada

9) Thomas McRae and Arthur O. Jacques for Ad Hoc Retail Creditors Committee (Brian Hunter, et al)

10) Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd.

11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank

12) Jeffrey S. Leon for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees

13) Usman Sheikh for Coventree Capital Inc.

14) Allan Sternberg and Sam R. Sasso for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc.

15) Neil C. Saxe for Dominion Bond Rating Service

16) James A. Woods, Sebastien Richemont and Marie-Anne Paquette for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

17) Scott A. Turner for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd.

18) R. Graham Phoenix for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Application granted; appeal dismissed.

Footnotes

* Leave to appeal refused at *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

1 Section 5.1 of the CCAA specifically authorizes the granting of releases to directors in certain circumstances.

2 Justice Georgina R. Jackson and Dr. Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, ed., *Annual Review of Insolvency Law, 2007* (Vancouver: Thomson Carswell, 2007).

3 Citing Gibbs J.A. in *Chef Ready Foods*, *supra*, at pp.319-320.

4 The Legislative Debates at the time the CCAA was introduced in Parliament in April 1933 make it clear that the CCAA is patterned after the predecessor provisions of s. 425 of the *Companies Act 1985* (U.K.): see *House of Commons Debates (Hansard)*, *supra*.

5 See *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 192; *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16, s. 182.

6 A majority in number representing two-thirds in value of the creditors (s. 6)

7 *Steinberg Inc.* was originally reported in French: *Steinberg Inc. c. Michaud*, [1993] R.J.Q. 1684 (C.A. Que.). All paragraph references to *Steinberg Inc.* in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055 (C.A. Que.)

8 Reed Dickerson, *The Interpretation and Application of Statutes* (1975) at pp.234-235, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at 621.

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TAB 2

2010 ONSC 4209
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2010 CarswellOnt 5510, 2010 ONSC 4209, 191 A.C.W.S. (3d) 378, 70 C.B.R. (5th) 1

IN THE MATTER OF SECTION 11 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 CANWEST GLOBAL COMMUNICATIONS AND THE OTHER APPLICANTS

Pepall J.

Judgment: July 28, 2010
Docket: CV-09-8396-00CL

Counsel: Lyndon Barnes, Jeremy Dacks, Shawn Irving for CMI Entities
David Byers, Marie Konyukhova for Monitor
Robin B. Schwill, Vince Mercier for Shaw Communications Inc.
Derek Bell for Canwest Shareholders Group (the "Existing Shareholders")
Mario Forte for Special Committee of the Board of Directors
Robert Chadwick, Logan Willis for Ad Hoc Committee of Noteholders
Amanda Darrach for Canwest Retirees
Peter Osborne for Management Directors
Steven Weisz for CIBC Asset-Based Lending Inc.

Subject: Insolvency; Corporate and Commercial

Table of Authorities

Cases considered by *Pepall J.*:

Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) — referred to

A&M Cookie Co. Canada, Re (2009), 2009 CarswellOnt 3473 (Ont. S.C.J. [Commercial List]) — referred to

Armbro Enterprises Inc., Re (1993), 1993 CarswellOnt 241, 22 C.B.R. (3d) 80 (Ont. Bktcy.) — considered

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

Beatrice Foods Inc., Re (1996), 43 C.B.R. (4th) 10, 1996 CarswellOnt 5598 (Ont. Gen. Div. [Commercial List]) — referred to

Cadillac Fairview Inc., Re (1995), 1995 CarswellOnt 3702 (Ont. Gen. Div. [Commercial List]) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — referred to

Canadian Airlines Corp., Re (2000), [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 2000 CarswellAlta 662, 2000 ABQB 442, 265 A.R. 201 (Alta. Q.B.) — considered

Canadian Airlines Corp., Re (2000), 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 2000 ABCA 238, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

Canadian Airlines Corp., Re (2000), 88 Alta. L.R. (3d) 8, 2001 ABCA 9, 2000 CarswellAlta 1556, [2001] 4 W.W.R. 1, 277 A.R. 179, 242 W.A.C. 179 (Alta. C.A.) — referred to

Canadian Airlines Corp., Re (2001), 2001 CarswellAlta 888, 2001 CarswellAlta 889, 275 N.R. 386 (note), 293 A.R. 351 (note), 257 W.A.C. 351 (note) (S.C.C.) — referred to

Laidlaw, Re (2003), 39 C.B.R. (4th) 239, 2003 CarswellOnt 787 (Ont. S.C.J.) — referred to

MEI Computer Technology Group Inc., Re (2005), 2005 CarswellQue 13408 (C.S. Que.) — referred to

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to

Uniforêt inc., Re (2003), 43 C.B.R. (4th) 254, 2003 CarswellQue 3404 (C.S. Que.) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 173 — considered

s. 173(1)(e) — considered

s. 173(1)(h) — considered

s. 191 — considered

s. 191(1) "reorganization" (c) — considered

s. 191(2) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 2(1) "debtor company" — referred to

s. 6 — considered

s. 6(1) — considered

s. 6(2) — considered

s. 6(3) — considered

s. 6(5) — considered

s. 6(6) — considered

s. 6(8) — referred to

s. 36 — considered

APPLICATION by debtors for order sanctioning plan of compromise, arrangement, and reorganization and for related relief.

***Pepall J.*:**

1 This is the culmination of the *Companies' Creditors Arrangement Act* [1] restructuring of the CMI Entities. The proceeding started in court on October 6, 2009, experienced numerous peaks and valleys, and now has resulted in a request for an order sanctioning a plan of compromise, arrangement and reorganization (the "Plan"). It has been a short road in relative terms but not without its challenges and idiosyncrasies. To complicate matters, this restructuring was hot on the heels of the amendments to the CCAA that were introduced on September 18, 2009. Nonetheless, the CMI Entities have now successfully concluded a Plan for which they seek a sanction order. They also request an order approving the Plan Emergence Agreement, and other related relief. Lastly, they seek a post-filing claims procedure order.

2 The details of this restructuring have been outlined in numerous previous decisions rendered by me and I do not propose to repeat all of them.

The Plan and its Implementation

3 The basis for the Plan is the amended Shaw transaction. It will see a wholly owned subsidiary of Shaw Communications Inc. ("Shaw") acquire all of the interests in the free-to-air television stations and subscription-based specialty television channels currently owned by Canwest Television Limited Partnership ("CTLP") and its subsidiaries and all of the interests in the specialty television stations currently owned by CW Investments and its subsidiaries, as well as certain other assets of the CMI Entities. Shaw will pay to CMI US $440 million in cash to be used by CMI to satisfy the claims of the 8% Senior Subordinated Noteholders (the "Noteholders") against the CMI Entities. In the event that the implementation of the Plan occurs after September 30, 2010, an additional cash amount of US $2.9 million per month will be paid to CMI by Shaw and allocated by CMI to the Noteholders. An additional $38 million will be paid by Shaw to the Monitor at the direction of CMI to be used to satisfy the claims of the Affected Creditors (as that term is defined in the Plan) other than the Noteholders, subject to a pro rata increase in that cash amount for certain restructuring period claims in certain circumstances.

4 In accordance with the Meeting Order, the Plan separates Affected Creditors into two classes for voting purposes:

(a) the Noteholders; and

(b) the Ordinary Creditors. Convenience Class Creditors are deemed to be in, and to vote as, members of the Ordinary Creditors' Class.

5 The Plan divides the Ordinary Creditors' pool into two sub-pools, namely the Ordinary CTLP Creditors' Sub-pool and the Ordinary CMI Creditors' Sub-pool. The former comprises two-thirds of the value and is for claims against the CTLP Plan Entities and the latter reflects one-third of the value and is used to satisfy claims against Plan Entities other than the CTLP Plan Entities. In its 16 th Report, the Monitor performed an analysis of the relative value of the assets of the CMI Plan Entities and the CTLP Plan Entities and the possible recoveries on a going concern liquidation and based on that analysis, concluded that it was fair and reasonable that Affected Creditors of the CTLP Plan Entities share pro rata in two-thirds of the Ordinary Creditors' pool and Affected Creditors of the Plan Entities other than the CTLP Plan Entities share pro rata in one-third of the Ordinary Creditors' pool.

6 It is contemplated that the Plan will be implemented by no later than September 30, 2010.

7 The Existing Shareholders will not be entitled to any distributions under the Plan or other compensation from the CMI Entities on account of their equity interests in Canwest Global. All equity compensation plans of Canwest Global will be extinguished and any outstanding options, restricted share units and other equity-based awards outstanding thereunder will be terminated and cancelled and the participants therein shall not be entitled to any distributions under the Plan.

8 On a distribution date to be determined by the Monitor following the Plan implementation date, all Affected Creditors with proven distribution claims against the Plan Entities will receive distributions from cash received by CMI (or the Monitor at CMI's direction) from Shaw, the Plan Sponsor, in accordance with the Plan. The directors and officers of the remaining CMI Entities and other subsidiaries of Canwest Global will resign on or about the Plan implementation date.

9 Following the implementation of the Plan, CTLP and CW Investments will be indirect, wholly-owned subsidiaries of Shaw, and the multiple voting shares, subordinate voting shares and non-voting shares of Canwest Global will be delisted from the TSX Venture Exchange. It is anticipated that the remaining CMI Entities and certain other subsidiaries of Canwest Global will be liquidated, wound-up, dissolved, placed into bankruptcy or otherwise abandoned.

10 In furtherance of the Minutes of Settlement that were entered into with the Existing Shareholders, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares, new subordinated voting shares and new non-voting shares; and (b) an unlimited number of new non-voting preferred shares. The terms of the new non-voting preferred shares will provide for the mandatory transfer of the new preferred shares held by the Existing Shareholders to a designated entity affiliated with Shaw for an aggregate amount of $11 million to be paid upon delivery by Canwest Global of the transfer notice to the transfer agent. Following delivery of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

11 Canwest Global, CMI, CTLP, New Canwest, Shaw, 7316712 and the Monitor entered into the Plan Emergence Agreement dated June 25, 2010 detailing certain steps that will be taken before, upon and after the implementation of the plan. These steps primarily relate to the funding of various costs that are payable by the CMI Entities on emergence from the CCAA proceeding. This includes payments that will be made or may be made by the Monitor to satisfy post-filing amounts owing by the CMI Entities. The schedule of costs has not yet been finalized.

Creditor Meetings

12 Creditor meetings were held on July 19, 2010 in Toronto, Ontario. Support for the Plan was overwhelming. 100% in number representing 100% in value of the beneficial owners of the 8% senior subordinated notes who provided instructions for voting at the Noteholder meeting approved the resolution. Beneficial Noteholders holding approximately 95% of the principal amount of the outstanding notes validly voted at the Noteholder meeting.

13 The Ordinary Creditors with proven voting claims who submitted voting instructions in person or by proxy represented approximately 83% of their number and 92% of the value of such claims. In excess of 99% in number representing in excess of 99% in value of the Ordinary Creditors holding proven voting claims that were present in person or by proxy at the meeting voted or were deemed to vote in favour of the resolution.

Sanction Test

14 Section 6(1) of the CCAA provides that the court has discretion to sanction a plan of compromise or arrangement if it has achieved the requisite double majority vote. The criteria that a debtor company must satisfy in seeking the court's approval are:

(a) there must be strict compliance with all statutory requirements;

(b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and

(c) the Plan must be fair and reasonable.

See *Canadian Airlines Corp., Re*[2]

(a) Statutory Requirements

15 I am satisfied that all statutory requirements have been met. I already determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that they had total claims against them exceeding $5 million. The notice of meeting was sent in accordance with the Meeting Order. Similarly, the classification of Affected Creditors for voting purposes was addressed in the Meeting Order which was unopposed and not appealed. The meetings were both properly constituted and voting in each was properly carried out. Clearly the Plan was approved by the requisite majorities.

16 Section 6(3), 6(5) and 6(6) of the CCAA provide that the court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of Plan provides that the claims listed in paragraph (l) of the definition of "Unaffected Claims" shall be paid in full from a fund known as the Plan Implementation Fund within six months of the sanction order. The Fund consists of cash, certain other assets and further contributions from Shaw. Paragraph (l) of the definition of "Unaffected Claims" includes any Claims in respect of any payments referred to in section 6(3), 6(5) and 6(6) of the CCAA. I am satisfied that these provisions of section 6 of the CCAA have been satisfied.

(b) Unauthorized Steps

17 In considering whether any unauthorized steps have been taken by a debtor company, it has been held that in making such a determination, the court should rely on the parties and their stakeholders and the reports of the Monitor: *Canadian Airlines Corp., Re*[3].

18 The CMI Entities have regularly filed affidavits addressing key developments in this restructuring. In addition, the Monitor has provided regular reports (17 at last count) and has opined that the CMI Entities have acted and continue to act in good faith and with due diligence and have not breached any requirements under the CCAA or any order of this court. If it was not obvious from the hearing on June 23, 2010, it should be stressed that there is no payment of any equity claim pursuant to section 6(8) of the CCAA. As noted by the Monitor in its 16th Report, settlement with the Existing Shareholders did not and does not in any way impact the anticipated recovery to the Affected Creditors of the CMI Entities. Indeed I referenced the inapplicability of section 6(8) of the CCAA in my Reasons of June 23, 2010. The second criterion relating to unauthorized steps has been met.

(c) Fair and Reasonable

19 The third criterion to consider is the requirement to demonstrate that a plan is fair and reasonable. As Paperny J. (as she then was) stated in *Canadian Airlines Corp., Re*:

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.[4]

20 My discretion should be informed by the objectives of the CCAA, namely to facilitate the reorganization of a debtor company for the benefit of the company, its creditors, shareholders, employees and in many instances, a much broader constituency of affected persons.

21 In assessing whether a proposed plan is fair and reasonable, considerations include the following:

(a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;

(b) what creditors would have received on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.

22 I have already addressed the issue of classification and the vote. Obviously there is an unequal distribution amongst the creditors of the CMI Entities. Distribution to the Noteholders is expected to result in recovery of principal, pre-filing interest and a portion of post-filing accrued and default interest. The range of recoveries for Ordinary Creditors is much less. The recovery of the Noteholders is substantially more attractive than that of Ordinary Creditors. This is not unheard of. In *Armbro Enterprises Inc., Re*[5] Blair J. (as he then was) approved a plan which included an uneven allocation in favour of a single major creditor, the Royal Bank, over the objection of other creditors. Blair J. wrote:

> "I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the court in interfering with the business decision made by the creditor class in approving the proposed Plan, as they have done. RBC's cooperation is a sine qua non for the Plan, or any Plan, to work and it is the only creditor continuing to advance funds to the applicants to finance the proposed re-organization."[6]

23 Similarly, in *Uniforêt inc., Re*[7] a plan provided for payment in full to an unsecured creditor. This treatment was much more generous than that received by other creditors. There, the Québec Superior Court sanctioned the plan and noted that a plan can be more generous to some creditors and still fair to all creditors. The creditor in question had stepped into the breach on several occasions to keep the company afloat in the four years preceding the filing of the plan and the court was of the view that the conduct merited special treatment. See also Romaine J.'s orders dated October 26, 2009 in *SemCanada Crude Company et al.*

24 I am prepared to accept that the recovery for the Noteholders is fair and reasonable in the circumstances. The size of the Noteholder debt was substantial. CMI's obligations under the notes were guaranteed by several of the CMI Entities. No issue has been taken with the guarantees. As stated before and as observed by the Monitor, the Noteholders held a blocking position in any restructuring. Furthermore, the liquidity and continued support provided by the Ad Hoc Committee both prior to and during these proceedings gave the CMI Entities the opportunity to pursue a going concern restructuring of their businesses. A description of the role of the Noteholders is found in Mr. Strike's affidavit sworn July 20, 2010, filed on this motion.

25 Turning to alternatives, the CMI Entities have been exploring strategic alternatives since February, 2009. Between November, 2009 and February, 2010, RBC Capital Markets conducted the equity investment solicitation process of which I have already commented. While there is always a theoretical possibility that a more advantageous plan could be developed than the Plan proposed, the Monitor has concluded that there is no reason to believe that restarting the equity investment solicitation process or marketing 100% of the CMI Entities assets would result in a better or equally desirable outcome. Furthermore, restarting the process could lead to operational difficulties including issues relating to the CMI Entities' large studio suppliers and advertisers. The Monitor has also confirmed that it is unlikely that the recovery for a going concern liquidation sale of the assets of the CMI Entities would result in greater recovery to the creditors of the CMI Entities. I am not satisfied that there is any other alternative transaction that would provide greater recovery than the recoveries contemplated in the Plan. Additionally, I am not persuaded that there is any oppression of creditor rights or unfairness to shareholders.

26 The last consideration I wish to address is the public interest. If the Plan is implemented, the CMI Entities will have achieved a going concern outcome for the business of the CTLP Plan Entities that fully and finally deals with the Goldman Sachs Parties, the Shareholders Agreement and the defaulted 8% senior subordinated notes. It will ensure the continuation of

employment for substantially all of the employees of the Plan Entities and will provide stability for the CMI Entities, pensioners, suppliers, customers and other stakeholders. In addition, the Plan will maintain for the general public broad access to and choice of news, public and other information and entertainment programming. Broadcasting of news, public and entertainment programming is an important public service, and the bankruptcy and liquidation of the CMI Entities would have a negative impact on the Canadian public.

27 I should also mention section 36 of the CCAA which was added by the recent amendments to the Act which came into force on September 18, 2009. This section provides that a debtor company may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. The section goes on to address factors a court is to consider. In my view, section 36 does not apply to transfers contemplated by a Plan. These transfers are merely steps that are required to implement the Plan and to facilitate the restructuring of the Plan Entities' businesses. Furthermore, as the CMI Entities are seeking approval of the Plan itself, there is no risk of any abuse. There is a further safeguard in that the Plan including the asset transfers contemplated therein has been voted on and approved by Affected Creditors.

28 The Plan does include broad releases including some third party releases. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* [8], the Ontario Court of Appeal held that the CCAA court has jurisdiction to approve a plan of compromise or arrangement that includes third party releases. The *Metcalfe* case was extraordinary and exceptional in nature. It responded to dire circumstances and had a plan that included releases that were fundamental to the restructuring. The Court held that the releases in question had to be justified as part of the compromise or arrangement between the debtor and its creditors. There must be a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan.

29 In the *Metcalfe* decision, Blair J.A. discussed in detail the issue of releases of third parties. I do not propose to revisit this issue, save and except to stress that in my view, third party releases should be the exception and should not be requested or granted as a matter of course.

30 In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. Fraud, wilful misconduct and gross negligence are excluded. I have already addressed, on numerous occasions, the role of the Noteholders and the Ad Hoc Committee. I am satisfied that the CMI Entities would not have been able to restructure without materially addressing the notes and developing a plan satisfactory to the Ad Hoc Committee and the Noteholders. The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. No one has appeared to oppose the sanction of the Plan that contains these releases and they are considered by the Monitor to be fair and reasonable. Under the circumstances, I am prepared to sanction the Plan containing these releases.

31 Lastly, the Monitor is of the view that the Plan is advantageous to Affected Creditors, is fair and reasonable and recommends its sanction. The board, the senior management of the CMI Entities, the Ad Hoc Committee, and the CMI CRA all support sanction of the Plan as do all those appearing today.

32 In my view, the Plan is fair and reasonable and I am granting the sanction order requested. [9]

33 The Applicants also seek approval of the Plan Emergence Agreement. The Plan Emergence Agreement outlines steps that will be taken prior to, upon, or following implementation of the Plan and is a necessary corollary of the Plan. It does not confiscate the rights of any creditors and is necessarily incidental to the Plan. I have the jurisdiction to approve such an agreement: *Air Canada, Re* [10] and *Calpine Canada Energy Ltd., Re* [11] I am satisfied that the agreement is fair and reasonable and should be approved.

34 It is proposed that on the Plan implementation date the articles of Canwest Global will be amended to facilitate the settlement reached with the Existing Shareholders. Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder approval or a dissent right. In particular, section 191(1)(c) provides that reorganization means a court order made under any other Act of Parliament that affects the rights among the corporation, its

shareholders and creditors. The CCAA is such an Act: *Beatrice Foods Inc., Re* [12] and *Laidlaw, Re* [13]. Pursuant to section 191(2), if a corporation is subject to a subsection (1) order, its articles may be amended to effect any change that might lawfully be made by an amendment under section 173. Section 173(1)(e) and (h) of the CBCA provides that:

> (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> (e) create new classes of shares;
>
> (h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.

35 Section 6(2) of the CCAA provides that if a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

36 In exercising its discretion to approve a reorganization under section 191 of the CBCA, the court must be satisfied that: (a) there has been compliance with all statutory requirements; (b) the debtor company is acting in good faith; and (c) the capital restructuring is fair and reasonable: *A&M Cookie Co. Canada, Re* [14] and *MEI Computer Technology Group Inc., Re* [15]

37 I am satisfied that the statutory requirements have been met as the contemplated reorganization falls within the conditions provided for in sections 191 and 173 of the CBCA. I am also satisfied that Canwest Global and the other CMI Entities were acting in good faith in attempting to resolve the Existing Shareholder dispute. Furthermore, the reorganization is a necessary step in the implementation of the Plan in that it facilitates agreement reached on June 23, 2010 with the Existing Shareholders. In my view, the reorganization is fair and reasonable and was a vital step in addressing a significant impediment to a satisfactory resolution of outstanding issues.

38 A post-filing claims procedure order is also sought. The procedure is designed to solicit, identify and quantify post-filing claims. The Monitor who participated in the negotiation of the proposed order is satisfied that its terms are fair and reasonable as am I.

39 In closing, I would like to say that generally speaking, the quality of oral argument and the materials filed in this CCAA proceeding has been very high throughout. I would like to express my appreciation to all counsel and the Monitor in that regard. The sanction order and the post-filing claims procedure order are granted.

Application granted.

Footnotes

1 R.S.C. 1985, c. C-36 as amended.

2 2000 ABQB 442 (Alta. Q.B.) at para. 60, leave to appeal denied 2000 ABCA 238 (Alta. C.A. [In Chambers]), aff'd 2001 ABCA 9 (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)].

3 Ibid,at para. 64 citing *Olympia & York Developments Ltd. v. Royal Trust Co.*, [1993] O.J. No. 545 (Ont. Gen. Div.) and *Cadillac Fairview Inc., Re*, [1995] O.J. No. 274 (Ont. Gen. Div. [Commercial List]).

4 Ibid, at para. 3.

5 (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.).

6 *Ibid*, at para. 6.

7 (2003), 43 C.B.R. (4th) 254 (C.S. Que.).

8 (2008), 92 O.R. (3d) 513 (Ont. C.A.).

9 The Sanction Order is extraordinarily long and in large measure repeats the Plan provisions. In future, counsel should attempt to simplify and shorten these sorts of orders.

10 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]).

11 (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.).

12 (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]).

13 (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.).

14 [2009] O.J. No. 2427 (Ont. S.C.J. [Commercial List]) at para. 8/

15 [2005] Q.J. No. 22993 (C.S. Que.) at para. 9.

End of Document

TAB 3

Sattva Capital Corporation (formerly Sattva Capital Inc.) *Appellant*

v.

Creston Moly Corporation (formerly Georgia Ventures Inc.) *Respondent*

and

Attorney General of British Columbia and BCICAC Foundation *Interveners*

INDEXED AS: SATTVA CAPITAL CORP. *v.* CRESTON MOLY CORP.

2014 SCC 53

File No.: 35026.

2013: December 12; 2014: August 1.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Arbitration — Appeals — Commercial arbitration awards — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price shares for payment of finder's fee and entering into arbitration — Leave to appeal arbitral award sought pursuant to s. 31(2) of the Arbitration Act — Leave to appeal denied but granted on appeal to Court of Appeal — Appeal of award dismissed but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in granting leave to appeal — What is appropriate standard of review to be applied to commercial arbitral decisions made under Arbitration Act — Arbitration Act, R.S.B.C. 1996, c. 55, s. 31(2).

Contracts — Interpretation — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price the shares for payment of finder's fee and entering into arbitration — Whether arbitrator reasonably construed contract

Sattva Capital Corporation (anciennement Sattva Capital Inc.) *Appelante*

c.

Creston Moly Corporation (anciennement Georgia Ventures Inc.) *Intimée*

et

Procureur général de la Colombie-Britannique et BCICAC Foundation *Intervenants*

RÉPERTORIÉ : SATTVA CAPITAL CORP. *c.* CRESTON MOLY CORP.

2014 CSC 53

N° du greffe : 35026.

2013 : 12 décembre; 2014 : 1er août.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Arbitrage — Appels — Sentences arbitrales commerciales — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation et recours à l'arbitrage — Autorisation d'appel de la sentence arbitrale demandée en application de l'art. 31(2) de l'Arbitration Act — Rejet initial de la demande d'autorisation d'appel, qui est accueillie à l'issue d'un appel devant la Cour d'appel — Rejet de l'appel interjeté de la sentence infirmé par la Cour d'appel — La Cour d'appel a-t-elle accordé à tort l'autorisation d'appel? — Quelle est la norme de contrôle applicable aux sentences arbitrales commerciales rendues sous le régime de l'Arbitration Act? — Arbitration Act, R.S.B.C. 1996, ch. 55, art. 31(2).

Contrats — Interprétation — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation

as a whole — Whether contractual interpretation is question of law or of mixed fact and law.

S and C entered into an agreement that required C to pay S a finder's fee in relation to the acquisition of a molybdenum mining property by C. The parties agreed that under this agreement, S was entitled to a finder's fee of US$1.5 million and was entitled to be paid this fee in shares of C. However, they disagreed on which date should be used to price the shares and therefore the number of shares to which S was entitled. S argued that the share price was dictated by the date set out in the Market Price definition in the agreement and therefore that it should receive approximately 11,460,000 shares priced at $0.15. C claimed that the agreement's "maximum amount" proviso prevented S from receiving shares valued at more than US$1.5 million on the date the fee was payable, and therefore that S should receive approximately 2,454,000 shares priced at $0.70. The parties entered into arbitration pursuant to the B.C. *Arbitration Act* and the arbitrator found in favour of S. C sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *Arbitration Act*, but leave was denied on the basis that the question on appeal was not a question of law. The Court of Appeal reversed the decision and granted C's application for leave to appeal, finding that the arbitrator's failure to address the meaning of the agreement's "maximum amount" proviso raised a question of law. The superior court judge on appeal dismissed C's appeal, holding that the arbitrator's interpretation of the agreement was correct. The Court of Appeal allowed C's appeal, finding that the arbitrator reached an absurd result. S appeals the decisions of the Court of Appeal that granted leave and that allowed the appeal.

Held: The appeal should be allowed and the arbitrator's award reinstated.

Appeals from commercial arbitration decisions are narrowly circumscribed under the *Arbitration Act*. Under s. 31(1), they are limited to questions of law, and leave to appeal is required if the parties do not consent to the appeal. Section 31(2)(a) sets out the requirements for leave at issue in the present case: the court may grant leave if it determines that the result is important to the parties and

et recours à l'arbitrage — L'arbitre a-t-il donné une interprétation raisonnable de l'entente dans son ensemble? — L'interprétation contractuelle constitue-t-elle une question de droit ou une question mixte de fait et de droit?

S et C ont conclu une entente selon laquelle C devait payer à S des honoraires d'intermédiation relativement à l'acquisition d'une propriété minière de molybdène par C. Les parties reconnaissaient qu'en vertu de l'entente, S a droit à des honoraires d'intermédiation de 1,5 million $US, versés en actions de C. Cependant, elles ne s'entendaient pas sur la date qui devrait être retenue pour évaluer le cours de l'action et, par conséquent, sur le nombre d'actions que S doit recevoir. S prétendait que la valeur de l'action était dictée par la date établie dans la définition du cours prévue dans l'entente et, par conséquent, qu'elle devait recevoir environ 11 460 000 actions, à raison de 0,15 $ l'unité. C prétendait que la stipulation relative au « plafond », qui figure dans l'entente, empêchait S de recevoir des actions d'une valeur supérieure à 1,5 million $US à la date du versement des honoraires et donc que S devait obtenir environ 2 454 000 actions, à raison de 0,70 $ l'unité. Les parties ont soumis le différend à l'arbitrage conformément à l'*Arbitration Act* de la Colombie-Britannique et l'arbitre a statué en faveur de S. C a demandé l'autorisation d'interjeter appel de la sentence arbitrale en vertu du par. 31(2) de l'*Arbitration Act*. La demande a été rejetée au motif que la question soulevée n'était pas une question de droit. La Cour d'appel a infirmé la décision et accueilli la demande, présentée par C, en autorisation d'interjeter appel, jugeant que l'omission par l'arbitre d'examiner la signification de la stipulation de l'entente relative au « plafond » soulevait une question de droit. Le juge de la cour supérieure saisi de l'appel a rejeté l'appel de C et conclu que l'interprétation de l'entente par l'arbitre était correcte. La Cour d'appel a accueilli l'appel de C, concluant que l'interprétation de l'arbitre menait à un résultat absurde. S interjette appel des décisions de la Cour d'appel ayant accordé l'autorisation d'appel et ayant accueilli l'appel.

Arrêt : Le pourvoi est accueilli et la sentence arbitrale est rétablie.

L'appel d'une sentence arbitrale commerciale est étroitement circonscrit par l'*Arbitration Act*. Aux termes du par. 31(1), il ne peut être interjeté appel que sur une question de droit, et l'autorisation d'appel est requise lorsque les parties ne consentent pas à l'appel. L'alinéa 31(2)(a) énonce les critères d'autorisation sur lesquels porte le présent litige, à savoir que le tribunal peut accorder

the determination of the point of law may prevent a miscarriage of justice.

In the case at bar, the Court of Appeal erred in finding that the construction of the finder's fee agreement constituted a question of law. Such an exercise raises a question of mixed fact and law, and therefore, the Court of Appeal erred in granting leave to appeal.

The historical approach according to which determining the legal rights and obligations of the parties under a written contract was considered a question of law should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix of the contract.

It may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law; however, the close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. The goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. Accordingly, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Legal errors made in the course of contractual interpretation include the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. Concluding that C's application for leave to appeal raised no question of law is sufficient to dispose of this appeal; however, the Court found it salutary to continue with its analysis.

In order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a), an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case. According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

l'autorisation s'il estime que, selon le cas, l'issue est importante pour les parties et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire.

En l'espèce, la Cour d'appel a assimilé à tort l'interprétation de l'entente relative aux honoraires d'intermédiation à une question de droit. Un tel exercice soulève une question mixte de fait et de droit, et la Cour d'appel a donc commis une erreur en accueillant la demande d'autorisation d'appel.

Il faut rompre avec l'approche historique selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit ressortit à une question de droit. L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel de ce dernier.

Il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit, mais le rapport étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les circonstances dans lesquelles il sera possible d'isoler une question de droit au cours de l'exercice d'interprétation. Le but de l'interprétation contractuelle — déterminer l'intention objective des parties — est, de par sa nature même, axé sur les faits. Par conséquent, le tribunal doit faire preuve de prudence avant d'isoler une question de droit dans un litige portant sur l'interprétation contractuelle. L'interprétation contractuelle peut occasionner des erreurs de droit, notamment appliquer le mauvais principe ou négliger un élément essentiel d'un critère juridique ou un facteur pertinent. Conclure que la demande d'autorisation d'appel présentée par C ne soulevait aucune question de droit suffit à trancher le présent pourvoi; toutefois, la Cour juge salutaire de poursuivre l'analyse.

Pour que l'erreur de droit reprochée soit une erreur judiciaire pour l'application de l'al. 31(2)(a), elle doit se rapporter à une question importante en litige qui, si elle était tranchée différemment, aurait une incidence sur le résultat. Suivant cette norme, le règlement d'un point de droit « peut permettre d'éviter une erreur judiciaire » seulement lorsqu'il existe une certaine possibilité que l'appel soit accueilli. Un appel qui est voué à l'échec ne saurait « permettre d'éviter une erreur judiciaire » puisque les possibilités que l'issue d'un tel appel joue sur le résultat final du litige sont nulles.

At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law by the leave court is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case. The appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit, meaning that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law.

Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the standard of review. The leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal.

The words "may grant leave" in s. 31(2) of the *Arbitration Act* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met. Discretionary factors to consider in a leave application under s. 31(2)(a) include: conduct of the parties, existence of alternative remedies, undue delay and the urgent need for a final answer. These considerations could be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria have been met. However, courts should exercise such discretion with caution.

Appellate review of commercial arbitration awards is different from judicial review of a decision of a statutory tribunal, thus the standard of review framework developed for judicial review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it, is not entirely applicable to the commercial arbitration context. Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. As a result, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

Ce n'est pas à l'étape de l'autorisation qu'il convient d'examiner exhaustivement le fond du litige et de se prononcer définitivement sur l'absence ou l'existence d'une erreur de droit. Cependant, le tribunal saisi de la demande d'autorisation doit procéder à un examen préliminaire de la question de droit pour déterminer si l'appel a une chance d'être accueilli et, par conséquent, de modifier l'issue du litige. Ce qu'il faut démontrer, pour l'application du par. 31(2), c'est que la question de droit invoquée a un fondement défendable, à savoir que l'argument soulevé par le demandeur ne peut être rejeté à l'issue d'un examen préliminaire de la question de droit.

L'examen visant à décider si la question soulevée dans la demande d'autorisation d'appel a un fondement défendable doit se faire à la lumière de la norme de contrôle applicable à l'analyse du bien-fondé de l'appel. Il faut donc procéder à un examen préliminaire ayant pour objet cette norme. Le tribunal saisi de la demande d'autorisation ne procède qu'à un examen préliminaire à l'égard de la norme de contrôle, qui ne lie pas celui qui se penchera sur le bien-fondé de l'appel.

Les termes « peut accorder l'autorisation » figurant au par. 31(2) de l'*Arbitration Act* confèrent au tribunal un pouvoir discrétionnaire résiduel qui lui permet de refuser l'autorisation même quand les critères prévus par la disposition sont respectés. Les facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a) comprennent : la conduite des parties, l'existence d'autres recours, un retard indu et le besoin urgent d'obtenir un règlement définitif. Ces facteurs pourraient justifier le rejet de la demande sollicitant l'autorisation d'interjeter appel d'une sentence arbitrale même dans le cas où il est satisfait aux critères légaux. Cependant, les tribunaux devraient faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire.

L'examen en appel des sentences arbitrales commerciales diffère du contrôle judiciaire d'une décision rendue par un tribunal administratif, de sorte que le cadre relatif à la norme de contrôle judiciaire établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts rendus depuis, ne peut être tout à fait transposé dans le contexte de l'arbitrage commercial. Il demeure que le contrôle judiciaire d'une décision rendue par un tribunal administratif et l'appel d'une sentence arbitrale se ressemblent dans une certaine mesure. Par conséquent, certains éléments du cadre établi dans l'arrêt *Dunsmuir* aident à déterminer le degré de déférence qu'il convient d'accorder aux sentences arbitrales commerciales.

In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise. The question at issue here does not fall into one of those categories and thus the standard of review in this case is reasonableness.

In the present case, the arbitrator reasonably construed the contract as a whole in determining that S is entitled to be paid its finder's fee in shares priced at $0.15. The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both that definition and the "maximum amount" proviso and reconciles them in a manner that cannot be said to be unreasonable. The arbitrator's reasoning meets the reasonableness threshold of justifiability, transparency and intelligibility.

A court considering whether leave should be granted is not adjudicating the merits of the case. It decides only whether the matter warrants granting leave, not whether the appeal will be successful, even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. For this reason, comments by a leave court regarding the merits cannot bind or limit the powers of the court hearing the actual appeal.

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Referred to: *British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122; *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945; *Prenn v. Simmonds*, [1971] 3 All E.R. 237; *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570; *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (CanLII); *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221; *Minister of National Revenue v. Costco Wholesale Canada Ltd.*, 2012 FCA 160, 431 N.R. 78; *WCI Waste Conversion Inc. v. ADI International Inc.*,

En matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte, comme les questions constitutionnelles ou les questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur. La question dont nous sommes saisis n'appartient pas à l'une ou l'autre de ces catégories; la norme de la décision raisonnable s'applique donc à la présente affaire.

En l'espèce, l'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble en déterminant que S était en droit de recevoir ses honoraires d'intermédiation en actions, à raison de 0,15 $ l'action. La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donne effet à cette dernière et à la stipulation relative au « plafond » en les conciliant d'une manière qui ne peut être considérée comme déraisonnable. Le raisonnement de l'arbitre satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité.

Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond. Il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli, même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. C'est pourquoi les remarques sur le bien-fondé de l'affaire formulées par le tribunal saisi de la demande d'autorisation ne sauraient lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs.

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Michael A. Feder and *Tammy Shoranick*, for the appellant.

Darrell W. Roberts, *Q.C.*, and *David Mitchell*, for the respondent.

Jonathan Eades and *Micah Weintraub*, for the intervener the Attorney General of British Columbia.

David Wotherspoon and *Gavin R. Cameron*, for the intervener the BCICAC Foundation.

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Michael A. Feder et *Tammy Shoranick*, pour l'appelante.

Darrell W. Roberts, *c.r.*, et *David Mitchell*, pour l'intimée.

Jonathan Eades et *Micah Weintraub*, pour l'intervenant le procureur général de la Colombie-Britannique.

David Wotherspoon et *Gavin R. Cameron*, pour l'intervenante BCICAC Foundation.

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APPENDIX I

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APPENDIX III

Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (as it read on January 12, 2007) (now the *Arbitration Act*)

The judgment of the Court was delivered by

[1] ROTHSTEIN J. — When is contractual interpretation to be treated as a question of mixed fact and law and when should it be treated as a question of law? How is the balance between reviewability and finality of commercial arbitration awards under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now the *Arbitration Act*, hereinafter the "*AA*"), to be determined? Can findings made by a court granting leave to appeal with respect to the merits of an appeal bind the court that ultimately decides the appeal? These are three of the issues that arise in this appeal.

I. Facts

[2] The issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder's fee to Sattva Capital

E. *La formation saisie de l'appel n'est pas liée par les observations formulées par la formation saisie de la demande d'autorisation sur le bien-fondé de l'appel* 120

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ANNEXE I

Dispositions pertinentes de l'entente relative aux honoraires d'intermédiation conclue entre Sattva et Creston

ANNEXE II

Point 3.3 de la politique 5.1 de la Bourse de croissance TSX : Emprunts, primes, honoraires d'intermédiation et commissions

ANNEXE III

Commercial Arbitration Act, R.S.B.C. 1996, ch. 55 (dans sa version du 12 janvier 2007) (maintenant l'*Arbitration Act*)

Version française du jugement de la Cour rendu par

[1] LE JUGE ROTHSTEIN — Dans quelles circonstances l'interprétation contractuelle est-elle une question mixte de fait et de droit et dans quelles circonstances est-elle une question de droit? Comment établir l'équilibre entre le caractère révisable et l'irrévocabilité des sentences arbitrales commerciales prononcées sous le régime de la *Commercial Arbitration Act*, R.S.B.C. 1996, ch. 55 (maintenant l'*Arbitration Act*, ci-après l'« *AA* »)? Les conclusions relatives au bien-fondé de l'appel tirées par le tribunal qui autorise l'appel peuvent-elles lier celui qui est appelé à trancher l'appel? Voilà trois questions qui sont soulevées dans le présent pourvoi.

I. Faits

[2] Les questions soulevées dans le présent pourvoi découlent de l'obligation de Creston Moly Corporation (anciennement Georgia Ventures Inc.) de

Corporation (formerly Sattva Capital Inc.). The parties agree that Sattva is entitled to a finder's fee of US$1.5 million and is entitled to be paid this fee in shares of Creston, cash or a combination thereof. They disagree on which date should be used to price the Creston shares and therefore the number of shares to which Sattva is entitled.

[3] Mr. Hai Van Le, a principal of Sattva, introduced Creston to the opportunity to acquire a molybdenum mining property in Mexico. On January 12, 2007, the parties entered into an agreement (the "Agreement") that required Creston to pay Sattva a finder's fee in relation to the acquisition of this property. The relevant provisions of the Agreement are set out in Appendix I.

[4] On January 30, 2007, Creston entered into an agreement to purchase the property for US$30 million. On January 31, 2007, at the request of Creston, trading of Creston's shares on the TSX Venture Exchange ("TSXV") was halted to prevent speculation while Creston completed due diligence in relation to the purchase. On March 26, 2007, Creston announced it intended to complete the purchase and trading resumed the following day.

[5] The Agreement provides that Sattva was to be paid a finder's fee equal to the maximum amount that could be paid pursuant to s. 3.3 of Policy 5.1 in the TSXV Policy Manual. Section 3.3 of Policy 5.1 is incorporated by reference into the Agreement at s. 3.1 and is set out in Appendix II of these reasons. The maximum amount pursuant to s. 3.3 of Policy 5.1 in this case is US$1.5 million.

[6] According to the Agreement, by default, the fee would be paid in Creston shares. The fee would only be paid in cash or a combination of shares and cash if Sattva made such an election. Sattva made no such election and was therefore entitled to be paid the fee in shares. The finder's fee was to be paid no later than five working days after the closing of the transaction purchasing the molybdenum mining property.

payer des honoraires d'intermédiation à Sattva Capital Corporation (anciennement Sattva Capital Inc.). Les parties reconnaissent que Sattva a droit à des honoraires d'intermédiation de 1,5 million $US, qui peuvent lui être versés en argent, en actions de Creston, ou en argent et en actions. Elles ne s'entendent pas sur la date qui devrait être retenue pour évaluer le cours de l'action et, par conséquent, sur le nombre d'actions que Sattva recevra.

[3] M. Hai Van Le, un directeur de Sattva, a fait part à Creston de la possibilité d'acquérir une propriété minière de molybdène au Mexique. Le 12 janvier 2007, les parties ont conclu une entente (l'« entente »), selon laquelle Creston devait payer à Sattva des honoraires d'intermédiation relativement à l'acquisition de cette propriété. Les dispositions pertinentes de l'entente sont énoncées à l'annexe I.

[4] Le 30 janvier 2007, Creston a conclu une convention d'achat de la propriété, le prix étant fixé à 30 millions $US. Le 31 janvier 2007, Creston a demandé que la négociation de ses actions à la Bourse de croissance TSX (la « Bourse ») soit suspendue afin d'empêcher la spéculation le temps d'achever le contrôle diligent préalable à l'achat. Le 26 mars 2007, Creston a annoncé qu'elle avait l'intention de conclure l'achat, et la négociation à la bourse a repris le lendemain.

[5] Aux termes de l'entente, Sattva doit recevoir des honoraires d'intermédiation correspondant au plafond autorisé par le point 3.3 de la politique 5.1 qui se trouve dans le Guide du financement des sociétés de la Bourse. Le point 3.3 est incorporé par renvoi à l'entente, à l'art. 3.1, et il est reproduit à l'annexe II des présents motifs. Dans le cas qui nous occupe, le plafond autorisé au point 3.3 de la politique 5.1 est de 1,5 million $US.

[6] Aux termes de l'entente, à moins d'indication contraire, les honoraires sont payés sous forme d'actions de Creston. Ils ne seraient versés en argent ou en argent et en actions que si Sattva avait indiqué avoir fait tel choix, ce qu'elle n'a pas fait. Ses honoraires devaient donc lui être versés sous forme d'actions au plus tard cinq jours ouvrables après la conclusion de l'achat de la propriété minière de molybdène.

[7] The dispute between the parties concerns which date should be used to determine the price of Creston shares and thus the number of shares to which Sattva is entitled. Sattva argues that the share price is dictated by the Market Price definition at s. 2 of the Agreement, i.e. the price of the shares "as calculated on close of business day before the issuance of the press release announcing the Acquisition". The press release announcing the acquisition was released on March 26, 2007. Prior to the halt in trading on January 31, 2007, the last closing price of Creston shares was $0.15. On this interpretation, Sattva would receive approximately 11,460,000 shares (based on the finder's fee of US$1.5 million).

[8] Creston claims that the Agreement's "maximum amount" proviso means that Sattva cannot receive cash or shares valued at more than US$1.5 million on the date the fee is payable. The shares were payable no later than five days after May 17, 2007, the closing date of the transaction. At that time, the shares were priced at $0.70 per share. This valuation is based on the price an investment banking firm valued Creston at as part of underwriting a private placement of shares on April 17, 2007. On this interpretation, Sattva would receive approximately 2,454,000 shares, some 9 million fewer shares than if the shares were priced at $0.15 per share.

[9] The parties entered into arbitration pursuant to the *AA*. The arbitrator found in favour of Sattva. Creston sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *AA*. Leave was denied by the British Columbia Supreme Court (2009 BCSC 1079 (CanLII) ("SC Leave Court")). Creston successfully appealed this decision and was granted leave to appeal the arbitrator's decision by the British Columbia Court of Appeal (2010 BCCA 239, 7 B.C.L.R. (5th) 227 ("CA Leave Court")).

[10] The British Columbia Supreme Court judge who heard the merits of the appeal (2011 BCSC

[7] Le différend qui oppose les parties porte sur la date à retenir pour fixer le cours de l'action de Creston et, par conséquent, le nombre d'actions auquel Sattva a droit. Cette dernière prétend que la valeur de l'action est dictée par la définition du « cours », à l'art. 2 de l'entente, c.-à-d. la valeur de l'action [TRADUCTION] « le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition ». Le communiqué de presse a été publié le 26 mars 2007. Avant la suspension de la négociation des actions le 31 janvier 2007, le dernier cours de clôture de l'action de Creston s'établissait à 0,15 $. Suivant cette interprétation, Sattva recevrait environ 11 460 000 actions (selon le calcul effectué en fonction des honoraires d'intermédiation de 1,5 million $US).

[8] Creston prétend que la stipulation relative au « plafond », qui figure dans l'entente, a pour effet de limiter à 1,5 million $US la somme d'argent ou la valeur des actions que peut recevoir Sattva à la date de versement des honoraires. Les actions devaient être cédées au plus tard cinq jours après le 17 mai 2007, date de conclusion de l'achat. À ce moment-là, l'action de Creston valait 0,70 $, selon les calculs effectués par une société bancaire d'investissement en vue d'un placement privé par voie de prise ferme le 17 avril 2007. Suivant cette interprétation, Sattva recevrait environ 2 454 000 actions, soit environ 9 millions d'actions de moins que si chacune valait 0,15 $.

[9] Les parties ont soumis le différend à l'arbitrage conformément à l'*AA*. L'arbitre a statué en faveur de Sattva. Creston a demandé l'autorisation d'interjeter appel de la sentence arbitrale en vertu du par. 31(2) de l'*AA*. La Cour suprême de la Colombie-Britannique a refusé l'autorisation (2009 BCSC 1079 (CanLII) (« formation de la CS saisie de la demande d'autorisation »)). Creston a appelé de cette décision et obtenu l'autorisation de la Cour d'appel de la Colombie-Britannique d'interjeter appel de la sentence arbitrale (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (« formation de la CA saisie de la demande d'autorisation »)).

[10] Le juge de la Cour suprême de la Colombie-Britannique chargé de statuer sur le bien-fondé de

597, 84 B.L.R. (4th) 102 ("SC Appeal Court")) upheld the arbitrator's award. Creston appealed that decision to the British Columbia Court of Appeal (2012 BCCA 329, 36 B.C.L.R. (5th) 71 ("CA Appeal Court")). That court overturned the SC Appeal Court and found in favour of Creston. Sattva appeals the decisions of the CA Leave Court and CA Appeal Court to this Court.

II. Arbitral Award

[11] The arbitrator, Leon Getz, Q.C., found in favour of Sattva, holding that it was entitled to receive its US$1.5 million finder's fee in shares priced at $0.15 per share.

[12] The arbitrator based his decision on the Market Price definition in the Agreement:

> What, then, was the "Market Price" within the meaning of the Agreement? The relevant press release is that issued on March 26 . . . . Although there was no closing price on March 25 (the shares being on that date halted), the "last closing price" within the meaning of the definition was the $0.15 at which the [Creston] shares closed on January 30, the day before trading was halted "pending news" . . . . This conclusion requires no stretching of the words of the contractual definition; on the contrary, it falls literally within those words. [para. 22]

[13] Both the Agreement and the finder's fee had to be approved by the TSXV. Creston was responsible for securing this approval. The arbitrator found that it was either an implied or an express term of the Agreement that Creston would use its best efforts to secure the TSXV's approval and that Creston did not apply its best efforts to this end.

[14] As previously noted, by default, the finder's fee would be paid in shares unless Sattva made an election otherwise. The arbitrator found that

l'appel (2011 BCSC 597, 84 B.L.R. (4th) 102 (« formation de la CS saisie de l'appel »)) a confirmé la sentence arbitrale. Creston a interjeté appel de cette décision devant la Cour d'appel de la Colombie-Britannique (2012 BCCA 329, 36 B.C.L.R. (5th) 71 (« formation de la CA saisie de l'appel »)), laquelle a infirmé la décision de la formation de la CS saisie de l'appel et a donné gain de cause à Creston. Sattva interjette appel des décisions des deux formations de la CA, soit celle saisie de la demande d'autorisation et celle saisie de l'appel, devant la Cour.

II. Sentence arbitrale

[11] L'arbitre, Leon Getz, c.r., a donné gain de cause à Sattva, concluant qu'elle était en droit de recevoir des honoraires d'intermédiation de 1,5 million $US en actions, à raison de 0,15 $ l'action.

[12] L'arbitre a fondé sa décision sur la définition du « cours » figurant dans l'entente :

> [TRADUCTION] Qu'était donc le « cours » au sens de l'entente? Le communiqué de presse pertinent est celui qui a été publié le 26 mars [. . .] Il n'y avait pas de cours de clôture le 25 mars (la négociation des actions était suspendue à cette date). Par conséquent, le « dernier cours de clôture », au sens où cette expression est employée dans la définition, était de 0,15 $, soit le cours de clôture des actions de [Creston] le 30 janvier, le jour précédant la suspension des opérations « jusqu'à nouvel ordre » [. . .] Cette conclusion ne nécessite aucune extension de sens des mots employés dans la définition qui figure au contrat. Au contraire, elle concorde littéralement avec la définition. [par. 22]

[13] L'entente et les honoraires d'intermédiation devaient être approuvés par la Bourse. Creston était chargée d'obtenir cette approbation. L'arbitre a conclu qu'il était implicitement ou expressément prévu dans l'entente que Creston ferait de son mieux pour obtenir l'approbation de la Bourse. Selon lui, Creston n'avait pas fait de son mieux pour y arriver.

[14] Comme nous l'avons expliqué, les honoraires d'intermédiation se payaient en actions à moins d'avis contraire de la part de Sattva. L'arbitre a

Sattva never made such an election. Despite this, Creston represented to the TSXV that the finder's fee was to be paid in cash. The TSXV conditionally approved a finder's fee of US$1.5 million to be paid in cash. Sattva first learned that the fee had been approved as a cash payment in early June 2007. When Sattva raised this matter with Creston, Creston responded by saying that Sattva had the choice of taking the finder's fee in cash or in shares priced at $0.70.

[15] Sattva maintained that it was entitled to have the finder's fee paid in shares priced at $0.15. Creston asked its lawyer to contact the TSXV to clarify the minimum share price it would approve for payment of the finder's fee. The TSXV confirmed on June 7, 2007 over the phone and August 9, 2007 via email that the minimum share price that could be used to pay the finder's fee was $0.70 per share. The arbitrator found that Creston "consistently misrepresented or at the very least failed to disclose fully the nature of the obligation it had undertaken to Sattva" (para. 56(k)) and "that in the absence of an election otherwise, Sattva is entitled under that Agreement to have that fee paid in shares at $0.15" (para. 56(g)). The arbitrator found that the first time Sattva's position was squarely put before the TSXV was in a letter from Sattva's solicitor on October 9, 2007.

[16] The arbitrator found that had Creston used its best efforts, the TSXV could have approved the payment of the finder's fee in shares priced at $0.15 and such a decision would have been consistent with its policies. He determined that there was "a substantial probability that [TSXV] approval would have been given" (para. 81). He assessed that probability at 85 percent.

[17] The arbitrator found that Sattva could have sold its Creston shares after a four-month holding period at between $0.40 and $0.44 per share, netting proceeds of between $4,583,914 and $5,156,934.

conclu que Sattva n'avait pas manifesté de choix. Malgré cela, Creston a déclaré à la Bourse que les honoraires d'intermédiation seraient versés en argent. La Bourse a donc approuvé conditionnellement le versement d'une somme de 1,5 million $US en argent. Sattva a appris qu'un versement en argent de ses honoraires avait été approuvé au début du mois de juin 2007. Quand Sattva a abordé ce point avec Creston, cette dernière a répondu que Sattva avait le choix de percevoir ses honoraires en argent ou en actions, à raison de 0,70 $ l'action.

[15] Sattva a soutenu qu'elle avait droit au versement des honoraires d'intermédiation en actions, à raison de 0,15 $ l'action. Creston a demandé à ses avocats de communiquer avec la Bourse afin qu'elle indique la valeur minimale de l'action qu'elle approuverait pour le versement des honoraires d'intermédiation. La Bourse a confirmé, par téléphone le 7 juin 2007 et par courriel le 9 août de la même année, qu'un cours minimal de 0,70 $ l'action s'appliquait aux fins du calcul des honoraires d'intermédiation. Selon l'arbitre, Creston [TRADUCTION] « a constamment fait des déclarations inexactes quant à l'obligation qu'elle avait contractée envers Sattva ou, à tout le moins, omis d'en divulguer complètement la nature » (par. 56(k)) et qu'« à moins que Sattva n'en décide autrement, elle a le droit aux termes de l'entente de percevoir ces honoraires sous forme d'actions, à raison de 0,15 $ l'action » (par. 56(g)). Selon l'arbitre, la position de Sattva a été véritablement présentée à la Bourse pour la première fois dans la lettre de l'avocat de celle-ci datée du 9 octobre 2007.

[16] L'arbitre était d'avis que si Creston avait fait de son mieux, la Bourse aurait pu approuver le versement des honoraires d'intermédiation sous forme d'actions, à 0,15 $ l'action, et qu'une telle décision aurait été conforme à ses politiques. Il a affirmé que [TRADUCTION] « [la Bourse] aurait fort probablement donné son approbation » (par. 81) et il a évalué cette probabilité à 85 p. 100.

[17] Selon l'arbitre, Sattva aurait pu vendre ses actions de Creston après quatre mois à un prix variant entre 0,40 et 0,44 $ l'unité, ce qui aurait représenté un produit net situé dans une fourchette de

The arbitrator took the average of those two amounts, which came to $4,870,424, and then assessed damages at 85 percent of that number, which came to $4,139,860, and rounded it to $4,140,000 plus costs.

[18] After this award was made, Creston made a cash payment of US$1.5 million (or the equivalent in Canadian dollars) to Sattva. The balance of the damages awarded by the arbitrator was placed in the trust account of Sattva's solicitors.

III. Judicial History

A. *British Columbia Supreme Court — Leave to Appeal Decision, 2009 BCSC 1079*

[19] The SC Leave Court denied leave to appeal because it found the question on appeal was not a question of law as required under s. 31 of the *AA*. In the judge's view, the issue was one of mixed fact and law because the arbitrator relied on the "factual matrix" in coming to his conclusion. Specifically, determining how the finder's fee was to be paid involved examining "the TSX's policies concerning the maximum amount of the finder's fee payable, as well as the discretionary powers granted to the Exchange in determining that amount" (para. 35).

[20] The judge found that even had he found a question of law was at issue he would have exercised his discretion against granting leave because of Creston's conduct in misrepresenting the status of the finder's fee to the TSXV and Sattva, and "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41).

4 583 914 $ à 5 156 934 $. Établissant la moyenne de ces deux sommes d'argent à 4 870 424 $, l'arbitre a ensuite évalué les dommages-intérêts à 85 p. 100 de ce nombre, soit 4 139 860 $, qu'il a ensuite arrondis à la hausse, pour obtenir 4 140 000 $, plus les dépens.

[18] Après le prononcé de cette sentence arbitrale, Creston a versé 1,5 million $US (ou l'équivalent en dollars canadiens) à Sattva. Le solde des dommages-intérêts accordés par l'arbitre a été placé dans le compte en fiducie des avocats de Sattva.

III. Historique judiciaire

A. *Cour suprême de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2009 BCSC 1079*

[19] La Cour suprême de la Colombie-Britannique a rejeté la demande d'autorisation d'appel parce qu'elle était d'avis que la question soulevée n'était pas une question de droit, un critère prévu à l'art. 31 de l'*AA*. Selon le juge, il s'agissait d'une question mixte de fait et de droit puisque l'arbitre avait appuyé sa conclusion sur le [TRADUCTION] « fondement factuel ». Plus précisément, pour déterminer sous quelle forme les honoraires d'intermédiation devaient être versés, il fallait examiner « les politiques de la TSX se rapportant au plafond applicable aux honoraires d'intermédiation, ainsi que les pouvoirs discrétionnaires dont dispose la Bourse pour déterminer le montant des honoraires » (par. 35).

[20] Le juge a conclu que, même s'il avait été d'avis que le litige soulevait une question de droit, il aurait exercé son pouvoir discrétionnaire pour refuser l'autorisation d'appel en raison des déclarations inexactes faites par Creston à propos des honoraires d'intermédiation à la Bourse et à Sattva, et par égard pour le [TRADUCTION] « principe selon lequel l'[*AA*] a notamment pour objectif de favoriser et de préserver l'intégrité du système d'arbitrage » (par. 41).

B. *British Columbia Court of Appeal — Leave to Appeal Decision, 2010 BCCA 239*

[21] The CA Leave Court reversed the SC Leave Court and granted Creston's application for leave to appeal the arbitral award. It found the SC Leave Court "err[ed] in failing to find that the arbitrator's failure to address the meaning of s. 3.1 of the Agreement (and in particular the 'maximum amount' provision) raised a question of law" (para. 23). The CA Leave Court decided that the construction of s. 3.1 of the Agreement, and in particular the "maximum amount" proviso, was a question of law because it did not involve reference to the facts of what the TSXV was told or what it decided.

[22] The CA Leave Court acknowledged that Creston was "less than forthcoming in its dealings with Mr. Le and the [TSXV]" but said that "these facts are not directly relevant to the question of law it advances on the appeal" (para. 27). With respect to the SC leave judge's reference to the preservation of the integrity of the arbitration system, the CA Leave Court said that the parties would have known when they chose to enter arbitration under the *AA* that an appeal on a question of law was possible. Additionally, while the finality of arbitration is an important factor in exercising discretion, when "a question of law arises on a matter of importance and a miscarriage of justice might be perpetrated if an appeal were not available, the integrity of the process requires, at least in the circumstances of this case, that the right of appeal granted by the legislation also be respected" (para. 29).

C. *British Columbia Supreme Court — Appeal Decision, 2011 BCSC 597*

[23] Armstrong J. reviewed the arbitrator's decision on a correctness standard. He dismissed the

B. *Cour d'appel de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2010 BCCA 239*

[21] La Cour d'appel a infirmé la décision de la Cour suprême et a accueilli la demande, présentée par Creston, en autorisation d'interjeter appel de la sentence arbitrale. Selon elle, la Cour suprême avait [TRADUCTION] « commis une erreur en ne reconnaissant pas que l'omission par l'arbitre d'examiner la signification de l'art. 3.1 de l'entente (et plus particulièrement de la stipulation relative au "plafond") soulevait une question de droit » (par. 23). La Cour d'appel a conclu que l'interprétation de l'art. 3.1 de l'entente, et plus particulièrement de la stipulation relative au « plafond », constituait une question de droit parce qu'elle ne reposait pas sur les faits de l'affaire, à savoir les renseignements communiqués à la Bourse et la décision de cette dernière.

[22] La Cour d'appel a reconnu que Creston s'était montrée [TRADUCTION] « moins que franche dans ses démarches auprès de M. Le et de [la Bourse] », mais a déclaré que « ces faits n'intéressent pas directement la question de droit qu'elle soulève en appel » (par. 27). Au sujet de la remarque sur la préservation de l'intégrité du système d'arbitrage formulée par la formation de la CS saisie de la demande d'autorisation d'appel, la formation de la CA saisie de la demande d'autorisation a dit que les parties, quand elles ont choisi de soumettre leur différend à l'arbitrage en vertu de l'*AA*, savaient que l'appel d'une question de droit était possible. De plus, bien que l'irrévocabilité de la sentence arbitrale constitue un facteur important dans l'exercice du pouvoir discrétionnaire, lorsqu'« une question de droit importante est soulevée et qu'il y a risque d'erreur judiciaire en cas d'impossibilité d'interjeter appel, l'intégrité du processus exige, du moins dans les circonstances de l'espèce, que le droit d'appel conféré par la loi soit respecté » (par. 29).

C. *Cour suprême de la Colombie-Britannique — décision sur l'appel, 2011 BCSC 597*

[23] Le juge Armstrong a contrôlé la sentence arbitrale selon la norme de la décision correcte. Il

appeal, holding the arbitrator's interpretation of the Agreement was correct.

[24] Armstrong J. found that the plain and ordinary meaning of the Agreement required that the US$1.5 million fee be paid in shares priced at $0.15. He did not find the meaning to be absurd simply because the price of the shares at the date the fee became payable had increased in relation to the price determined according to the Market Price definition. He was of the view that changes in the price of shares over time are inevitable, and that the parties, as sophisticated business persons, would have reasonably understood a fluctuation in share price to be a reality when providing for a fee payable in shares. According to Armstrong J., it is indeed because of market fluctuations that it is necessary to choose a specific date to price the shares in advance of payment. He found that this was done by defining "Market Price" in the Agreement, and that the fee remained US$1.5 million in $0.15 shares as determined by the Market Price definition regardless of the price of the shares at the date that the fee was payable.

[25] According to Armstrong J., that the price of the shares may be more than the Market Price definition price when they became payable was foreseeable as a "natural consequence of the fee agreement" (para. 62). He was of the view that the risk was borne by Sattva, since the price of the shares could increase, but it could also decrease such that Sattva would have received shares valued at less than the agreed upon fee of US$1.5 million.

[26] Armstrong J. held that the arbitrator's interpretation which gave effect to both the Market Price definition and the "maximum amount" proviso should be preferred to Creston's interpretation of the agreement which ignored the Market Price definition.

[27] In response to Creston's argument that the arbitrator did not consider s. 3.1 of the Agreement

a rejeté l'appel et conclu que l'interprétation de l'entente proposée par l'arbitre était correcte.

[24] Le juge Armstrong estimait que, selon le sens ordinaire de l'entente, les honoraires de 1,5 million $US devaient être versés en actions, à raison de 0,15 $ l'unité. Il n'estimait pas une telle interprétation absurde du simple fait que le cours de l'action à la date du versement des honoraires était supérieur à celui déterminé suivant la définition du cours. Selon lui, avec le temps, la fluctuation des cours est inévitable, et dès lors qu'elles ont prévu la possibilité du versement des honoraires en actions, les parties, des entreprises averties, devaient raisonnablement s'attendre à la fluctuation du marché. De l'avis du juge Armstrong, c'est d'ailleurs à cause de cette fluctuation qu'il faut indiquer une date précise qui servira à déterminer la valeur de l'action avant le versement. Il est arrivé à la conclusion que pour ce faire, le « cours » était défini dans l'entente et que le montant des honoraires demeurait 1,5 million $US, à payer sous forme d'actions à raison de 0,15 $ l'unité, cette valeur étant établie suivant la définition du cours, sans égard à la valeur de l'action à la date du versement des honoraires.

[25] Selon le juge Armstrong, il était prévisible que le cours de l'action à la date du versement soit supérieur à celui établi conformément à la définition du cours et il s'agissait là d'une [TRADUCTION] « conséquence naturelle de l'entente relative aux honoraires d'intermédiation » (par. 62). Il était d'avis que le risque était assumé par Sattva, puisque le prix de l'action pouvait certes augmenter, mais il pouvait aussi diminuer, de sorte que Sattva aurait alors reçu un portefeuille d'actions d'une valeur inférieure au montant des honoraires (1,5 million $US) qui avait été convenu.

[26] Le juge Armstrong était d'avis que l'interprétation de l'arbitre, laquelle donnait effet à la définition du cours et à la stipulation relative au « plafond », était préférable à celle de Creston, qui faisait fi de la définition du cours.

[27] En réponse à l'argument de Creston selon lequel l'arbitre n'avait pas examiné l'art. 3.1 de

which contains the "maximum amount" proviso, Armstrong J. noted that the arbitrator explicitly addressed the "maximum amount" proviso at para. 23 of his decision.

D. *British Columbia Court of Appeal — Appeal Decision, 2012 BCCA 329*

[28] The CA Appeal Court allowed Creston's appeal, ordering that the payment of US$1.5 million that had been made by Creston to Sattva on account of the arbitrator's award constituted payment in full of the finder's fee. The court reviewed the arbitrator's decision on a standard of correctness.

[29] The CA Appeal Court found that both it and the SC Appeal Court were bound by the findings made by the CA Leave Court. There were two findings that were binding: (1) it would be anomalous if the Agreement allowed Sattva to receive US$1.5 million if it received its fee in cash, but shares valued at approximately $8 million if Sattva took its fee in shares; and (2) the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement.

[30] The Court of Appeal found that it was an absurd result to find that Sattva is entitled to an $8 million finder's fee in light of the fact that the "maximum amount" proviso in the Agreement limits the finder's fee to US$1.5 million. The court was of the view that the proviso limiting the fee to US$1.5 million "when paid" should be given paramount effect (para. 47). In its opinion, giving effect to the Market Price definition could not have been the intention of the parties, nor could it have been in accordance with good business sense.

IV. Issues

[31] The following issues arise in this appeal:

l'entente, qui contient la stipulation relative au « plafond », le juge Armstrong a souligné que l'arbitre avait fait expressément référence à cette stipulation au par. 23 de la sentence arbitrale.

D. *Cour d'appel de la Colombie-Britannique — décision sur l'appel, 2012 BCCA 329*

[28] La Cour d'appel a accueilli l'appel de Creston et a statué que la somme de 1,5 million $US versée par Creston en faveur de Sattva en exécution de la sentence arbitrale constituait le paiement intégral des honoraires d'intermédiation. La cour a contrôlé la sentence arbitrale suivant la norme de la décision correcte.

[29] La formation de la CA saisie de l'appel s'estimait liée, de même que la Cour suprême, par deux conclusions tirées par la formation de la CA saisie de la demande d'autorisation, à savoir : 1° il serait incongru que l'entente permette à Sattva, si elle opte pour le versement de ses honoraires en argent, de toucher 1,5 million $US alors que, si elle opte pour le versement sous forme d'actions, elle recevra un portefeuille valant environ 8 millions $ et 2° l'arbitre n'a pas tenu compte de cette anomalie et a fait fi de l'art. 3.1 de l'entente.

[30] Selon la Cour d'appel, conclure que Sattva avait droit à des honoraires d'intermédiation de 8 millions $ menait à un résultat absurde, étant donné la stipulation de l'entente relative au « plafond », qui limite le montant de tels honoraires à 1,5 million $US. La cour était d'avis qu'il faudrait donner l'effet prépondérant à cette stipulation qui limite à 1,5 million $US les honoraires [TRADUCTION] « à la date de leur versement » (par. 47). Elle était d'avis que donner effet à la définition du cours ne saurait avoir été l'intention des parties, et ce n'était pas non plus une décision sensée sur le plan commercial.

IV. Questions en litige

[31] Les questions suivantes sont soulevées dans le présent pourvoi :

(a) Is the issue of whether the CA Leave Court erred in granting leave under s. 31(2) of the *AA* properly before this Court?

(b) Did the CA Leave Court err in granting leave under s. 31(2) of the *AA*?

(c) If leave was properly granted, what is the appropriate standard of review to be applied to commercial arbitral decisions made under the *AA*?

(d) Did the arbitrator reasonably construe the Agreement as a whole?

(e) Did the CA Appeal Court err in holding that it was bound by comments regarding the merits of the appeal made by the CA Leave Court?

V. Analysis

A. *The Leave Issue Is Properly Before This Court*

[32] Sattva argues, in part, that the CA Leave Court erred in granting leave to appeal from the arbitrator's decision. In Sattva's view, the CA Leave Court did not identify a question of law, a requirement to obtain leave pursuant to s. 31(2) of the *AA*. Creston argues that this issue is not properly before this Court. Creston makes two arguments in support of this point.

[33] First, Creston argues that this issue was not advanced in Sattva's application for leave to appeal to this Court. This argument must fail. Unless this Court places restrictions in the order granting leave, the order granting leave is "at large". Accordingly, appellants may raise issues on appeal that were not set out in the leave application. However, the Court may exercise its discretion to refuse to deal with issues that were not addressed in the courts below, if there is prejudice to the respondent, or if for any other reason the Court considers it appropriate not to deal with a question.

a) La Cour a-t-elle été saisie à bon droit de la question de savoir si la Cour d'appel a commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'*AA*?

b) La Cour d'appel a-t-elle commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'*AA*?

c) Si l'autorisation a été accordée à bon droit, quelle norme de contrôle convient-il d'appliquer aux sentences arbitrales commerciales rendues sous le régime de l'*AA*?

d) L'arbitre a-t-il donné une interprétation raisonnable de l'entente dans son ensemble?

e) La Cour d'appel a-t-elle commis une erreur en s'estimant liée par les remarques formulées par la formation de la CA saisie de la demande d'autorisation au sujet du bien-fondé de l'appel?

V. Analyse

A. *Notre Cour est saisie à bon droit de la question de l'autorisation*

[32] Sattva prétend notamment que la Cour d'appel a commis une erreur en accordant l'autorisation d'interjeter appel de la sentence arbitrale. Selon elle, la Cour d'appel n'a cerné aucune question de droit, alors que l'autorisation est subordonnée à l'existence d'une telle question, aux termes du par. 31(2) de l'*AA*. Creston soutient que la Cour n'est pas saisie à bon droit de cette question et avance deux arguments à l'appui de sa position.

[33] Premièrement, Creston fait valoir que cette question n'était pas soulevée dans la demande d'autorisation d'appel que Sattva a présentée à la Cour. Cet argument ne saurait tenir. À moins que la Cour n'impose des restrictions dans l'ordonnance accordant l'autorisation, cette ordonnance est de « portée générale ». Par conséquent, l'appelant peut soulever en appel une question qui n'était pas énoncée dans la demande d'autorisation. La Cour peut toutefois exercer son pouvoir discrétionnaire et refuser de trancher une question qui n'a pas été abordée par les tribunaux d'instance inférieure, s'il en résulte un préjudice pour l'intimé, ou si, pour toute autre raison, elle juge opportun de ne pas la trancher.

[34] Here, this Court's order granting leave to appeal from both the CA Leave Court decision and the CA Appeal Court decision contained no restrictions (2013 CanLII 11315). The issue — whether the proposed appeal was on a question of law — was expressly argued before, and was dealt with in the judgments of, the SC Leave Court and the CA Leave Court. There is no reason Sattva should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to this Court.

[35] Second, Creston argues that the issue of whether the CA Leave Court identified a question of law is not properly before this Court because Sattva did not contest this decision before all of the lower courts. Specifically, Creston states that Sattva did not argue that the question on appeal was one of mixed fact and law before the SC Appeal Court and that it conceded the issue on appeal was a question of law before the CA Appeal Court. This argument must also fail. At the SC Appeal Court, it was not open to Sattva to reargue the question of whether leave should have been granted. The SC Appeal Court was bound by the CA Leave Court's finding that leave should have been granted, including the determination that a question of law had been identified. Accordingly, Sattva could hardly be expected to reargue before the SC Appeal Court a question that had been determined by the CA Leave Court. There is nothing in the *AA* to indicate that Sattva could have appealed the leave decision made by a panel of the Court of Appeal to another panel of the same court. The fact that Sattva did not reargue the issue before the SC Appeal Court or CA Appeal Court does not prevent it from raising the issue before this Court, particularly since Sattva was also granted leave to appeal the CA Leave Court decision by this Court.

[34] En l'espèce, l'ordonnance accordant l'autorisation d'interjeter appel des deux décisions de la Cour d'appel, sur la demande d'autorisation d'appel et sur l'appel, ne comportait aucune restriction (2013 CanLII 11315). La question — à savoir si l'appel proposé soulevait une question de droit — a été expressément débattue devant les formations de la CS et de la CA saisies de la demande d'autorisation, qui l'ont tranchée. Rien n'empêche Sattva de soulever cette question en appel, même si elle ne l'a pas mentionnée dans la demande d'autorisation d'appel qu'elle a présentée à la Cour.

[35] Deuxièmement, Creston soutient que la Cour n'a pas été saisie à bon droit de la question de savoir si la formation de la CA saisie de la demande d'autorisation a cerné une question de droit parce que Sattva n'a pas contesté la décision rendue à ce sujet devant tous les tribunaux d'instance inférieure. Plus précisément, aux dires de Creston, Sattva n'aurait pas fait valoir devant la formation de la CS saisie de l'appel que l'appel soulevait une question mixte de fait et de droit et aurait reconnu devant la Cour d'appel que l'appel soulevait une question de droit. Un tel argument ne tient pas. Devant la formation de la CS saisie de l'appel, il n'était pas possible pour Sattva de débattre à nouveau de la question de savoir si l'autorisation aurait dû être accordée. La formation de la CS saisie de l'appel était liée par les conclusions tirées par la formation de la CA saisie de la demande d'autorisation, à savoir que l'autorisation était opportune et qu'une question de droit avait été cernée. Ainsi, Sattva ne pouvait guère plaider devant la formation de la CS saisie de l'appel un point sur lequel la formation de la CA saisie de la demande d'autorisation s'était déjà prononcée. Rien dans l'*AA* n'habilite Sattva à interjeter appel de la décision sur la demande d'autorisation d'appel rendue par une formation de la Cour d'appel à une autre formation de la même cour. Ce n'est pas parce que Sattva n'a pas plaidé à nouveau le point devant la formation de la CS saisie de l'appel ou devant la formation de la CA saisie de l'appel qu'elle ne peut le soulever devant notre Cour, tout particulièrement étant donné que Sattva a obtenu de notre Cour l'autorisation d'appeler de la décision rendue par la formation de la CA saisie de la demande d'autorisation.

[36] While this Court may decline to grant leave where an issue sought to be argued before it was not argued in the courts appealed from, that is not this case. Here, whether leave from the arbitrator's decision had been sought by Creston on a question of law or a question of mixed fact and law had been argued in the lower leave courts.

[37] Accordingly, the issue of whether the CA Leave Court erred in finding a question of law for the purposes of granting leave to appeal is properly before this Court.

B. *The CA Leave Court Erred in Granting Leave Under Section 31(2) of the AA*

(1) Considerations Relevant to Granting or Denying Leave to Appeal Under the *AA*

[38] Appeals from commercial arbitration decisions are narrowly circumscribed under the *AA*. Under s. 31(1), appeals are limited to either questions of law where the parties consent to the appeal or to questions of law where the parties do not consent but where leave to appeal is granted. Section 31(2) of the *AA*, reproduced in its entirety in Appendix III, sets out the requirements for leave:

(2) In an application for leave under subsection (1)(b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

[36] Ainsi, la Cour peut certes refuser l'autorisation si la question que l'on cherche à soulever devant elle n'a pas été plaidée devant les tribunaux d'instance inférieure, mais ce n'est pas le cas en l'espèce. En l'occurrence, les arguments sur le fondement de la demande d'autorisation d'appel de la sentence arbitrale présentée par Creston — à savoir si elle soulevait une question de droit ou une question mixte de fait et de droit — avaient été plaidés devant les formations saisies des demandes d'autorisation.

[37] Par conséquent, la Cour est saisie à bon droit de la question de savoir si la formation de la CA qui a accueilli la demande d'autorisation a conclu à tort que l'appel soulevait une question de droit.

B. *La Cour d'appel a commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'AA*

(1) Facteurs qui entrent en ligne de compte dans l'analyse de la demande d'autorisation d'appel présentée au titre de l'*AA*

[38] L'appel d'une sentence arbitrale commerciale est étroitement circonscrit par l'*AA*. Aux termes du par. 31(1), il ne peut être interjeté appel que sur une question de droit dans le cas où les parties consentent à l'appel ou, en l'absence de consentement, dans les cas où l'autorisation d'appel est accordée. Le paragraphe 31(2) de l'*AA*, reproduit intégralement à l'annexe III, énonce les critères d'autorisation :

[TRADUCTION]

(2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :

(a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,

(b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,

(c) la question de droit est d'importance publique.

[39] The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* give the courts judicial discretion to deny leave even where the statutory requirements have been met (*British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 ("*BCIT*"), at paras. 25-26). Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) are met and where the leave court does not exercise its residual discretion to nonetheless deny leave.

[40] Although Creston's application to the SC Leave Court sought leave pursuant to s. 31(2)(a), (b) and (c), it appears the arguments before that court and throughout focused on s. 31(2)(a). The SC Leave Court's decision quotes a lengthy passage from *BCIT* that focuses on the requirements of s. 31(2)(a). The SC Leave Court judge noted that both parties conceded the first requirement of s. 31(2)(a): that the issue be of importance to the parties. The CA Leave Court decision expressed concern that denying leave might give rise to a miscarriage of justice — a criterion only found in s. 31(2)(a). Finally, neither the lower courts' leave decisions nor the arguments before this Court reflected arguments about the question of law being important to some class or body of persons of which the applicant is a member (s. 31(2)(b)) or being a point of law of general or public importance (s. 31(2)(c)). Accordingly, the following analysis will focus on s. 31(2)(a).

(2) The Result Is Important to the Parties

[41] In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. However, before dealing with that issue, it will be convenient to quickly address another requirement of s. 31(2)(a) on which the parties agree: whether

[39] De l'avis des tribunaux de la C.-B., l'expression [TRADUCTION] « peut accorder l'autorisation » qui figure au par. 31(2) de l'*AA* confère au tribunal un pouvoir discrétionnaire qui l'habilite à refuser l'autorisation même lorsque les critères légaux sont respectés (*British Columbia Institute of Technology (Student Assn.) c. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 (« *BCIT* »), par. 25-26). L'appel d'une sentence arbitrale n'est donc entendu que si les critères du par. 31(2) sont remplis et que le tribunal saisi de la demande d'autorisation ne refuse pas néanmoins l'autorisation en vertu de son pouvoir discrétionnaire résiduel.

[40] Bien que Creston ait présenté une demande d'autorisation à la Cour suprême sur le fondement des al. 31(2)(a), (b) et (c), il semble que les arguments invoqués devant elle et au cours des autres instances portaient sur l'al. 31(2)(a). La décision de la Cour suprême sur la demande d'autorisation reprend un long passage tiré de l'affaire *BCIT* axé sur les éléments de l'al. 31(2)(a). La Cour suprême y souligne que les deux parties reconnaissent qu'il est satisfait au premier élément de l'al. 31(2)(a), c'est-à-dire que la question est importante pour les parties. Dans sa décision sur la demande d'autorisation d'appel, la Cour d'appel a dit craindre que refuser l'autorisation ne donne lieu à une erreur judiciaire — un critère prévu seulement à l'al. 31(2)(a). Enfin, ni les décisions sur les demandes d'autorisation des tribunaux d'instance inférieure ni les arguments soulevés devant notre Cour ne traitent des autres critères, à savoir que la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie (al. 31(2)(b)) ou est d'importance publique (al. 31(2)(c)). Par conséquent, l'analyse qui suit porte principalement sur l'al. 31(2)(a).

(2) L'issue est importante pour les parties

[41] L'autorisation d'interjeter appel d'une sentence arbitrale commerciale est subordonnée au respect d'un critère minimal : l'appel doit porter sur une question de droit. Toutefois, avant d'aborder ce sujet, il convient d'examiner sommairement un autre élément requis par l'al. 31(2)(a) et sur lequel

the importance of the result of the arbitration to the parties justifies the intervention of the court. Justice Saunders explained this criterion in *BCIT* as requiring that the result of the arbitration be "sufficiently important", in terms of principle or money, to the parties to justify the expense and time of court proceedings (para. 27). The parties in this case have agreed that the result of the arbitration is of importance to each of them. In view of the relatively large monetary amount in dispute and in light of the fact that the parties have agreed that the result is important to them, I accept that the importance of the result of the arbitration to the parties justifies the intervention of the court. This requirement of s. 31(2)(a) is satisfied.

(3) The Question Under Appeal Is Not a Question of Law

(a) *When Is Contractual Interpretation a Question of Law?*

[42] Under s. 31 of the *AA*, the issue upon which leave is sought must be a question of law. For the purpose of identifying the appropriate standard of review or, as is the case here, determining whether the requirements for leave to appeal are met, reviewing courts are regularly required to determine whether an issue decided at first instance is a question of law, fact, or mixed fact and law.

[43] Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law (*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 20, *per* Steel J.A.; K. Lewison, *The Interpretation of Contracts* (5th ed. 2011 & Supp. 2013), at pp. 173-76; and G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 125-26). This rule originated in England at a time when there were frequent civil jury trials and widespread illiteracy. Under those circumstances, the interpretation of written documents had to be considered questions of law because only the judge could be

s'entendent les parties, à savoir que l'importance de l'issue de l'arbitrage pour les parties doit justifier l'intervention du tribunal. Selon l'explication donnée par la juge Saunders de ce critère dans *BCIT*, il faut que l'issue de l'arbitrage soit [TRADUCTION] « suffisamment importante » aux yeux des parties, pour le principe ou les sommes d'argent en jeu, pour justifier le coût et la longueur d'une instance (par. 27). Les parties en l'espèce ont convenu que l'issue de l'arbitrage revêt de l'importance pour chacune. Étant donné la somme relativement considérable en litige et compte tenu du fait que les parties s'entendent pour dire que l'issue est importante pour elles, je conviens que l'importance de l'issue de l'arbitrage pour les parties justifie l'intervention du tribunal. Cette condition prévue à l'al. 31(2)(a) est remplie.

(3) La question soulevée n'est pas une question de droit

a) *Dans quelles circonstances l'interprétation contractuelle est-elle une question de droit?*

[42] Aux termes de l'art. 31 de l'*AA*, la demande d'autorisation d'appel doit porter sur une question de droit. Pour déterminer la norme de contrôle applicable ou, comme c'est le cas en l'espèce, pour déterminer si les critères d'autorisation sont respectés, le tribunal siégeant en révision est régulièrement appelé à décider si une question tranchée en première instance est une question de droit, une question de fait ou une question mixte de fait et de droit.

[43] Autrefois, la détermination des droits et obligations juridiques des parties à un contrat écrit ressortissait à une question de droit (*King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, par. 20, la juge Steel; K. Lewison, *The Interpretation of Contracts* (5e éd. 2011 et suppl. 2013), p. 173-176; G. R. Hall, *Canadian Contractual Interpretation Law* (2e éd. 2012), p. 125-126). Cette règle a pris naissance en Angleterre, à une époque où les procès civils devant jury étaient fréquents et l'analphabétisme courant. Dans de telles circonstances, l'interprétation des documents écrits devait être assimilée à une question de droit parce que le juge était le seul dont on

assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

[44] This historical rationale no longer applies. Nevertheless, courts in the United Kingdom continue to treat the interpretation of a written contract as always being a question of law (*Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945, at paras. 58 and 82-83; and Lewison, at pp. 173-77). They do this despite the fact that U.K. courts consider the surrounding circumstances, a concept addressed further below, when interpreting a written contract (*Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.); and *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

[45] In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, at paras. 11-12; and *Minister of National Revenue v. Costco Wholesale Canada Ltd.*, 2012 FCA 160, 431 N.R. 78, at para. 34. However, some Canadian courts have abandoned the historical approach and now treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law. See for example *WCI Waste Conversion Inc. v. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, at para. 11; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, at para. 44; *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, at paras. 22-23 (majority reasons, *per* Blair J.A.) and paras. 133-35 (*per* Gillese J.A., in dissent, but not on this point); and *King*, at paras. 20-23.

[46] The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract

pouvait être certain qu'il savait lire et écrire et, par conséquent, qu'il était en mesure de prendre connaissance du contrat (Hall, p. 126; Lewison, p. 173-174).

[44] Cette justification historique ne s'applique plus. Néanmoins, pour les tribunaux du Royaume-Uni, l'interprétation d'un contrat écrit ressortit toujours à une question de droit (*Thorner c. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945, par. 58 et 82-83; Lewison, p. 173-177), et ce, même s'ils tiennent compte des circonstances — un concept que nous aborderons — dans l'interprétation du contrat écrit (*Prenn c. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Reardon Smith Line Ltd. c. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

[45] Au Canada, l'approche historique n'a pas perdu tous ses adeptes. Voir par exemple *Jiro Enterprises Ltd. c. Spencer*, 2008 ABCA 87 (CanLII), par. 10; *QK Investments Inc. c. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, par. 26; *Dow Chemical Canada Inc. c. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, par. 11-12; *Canada c. Costco Wholesale Canada Ltd.*, 2012 CAF 160 (CanLII), par. 34. Or, des tribunaux canadiens ont délaissé l'approche historique au profit d'une nouvelle démarche qui conçoit l'interprétation des contrats écrits soit comme une question de droit soit comme une question mixte de fait et de droit. Voir par exemple *WCI Waste Conversion Inc. c. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, par. 11; *269893 Alberta Ltd. c. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, par. 13; *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, par. 44; *Bell Canada c. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, par. 22-23 (les juges majoritaires, sous la plume du juge Blair) et par. 133-135 (la juge Gillese, dissidente, mais pas sur ce point); *King*, par. 20-23.

[46] La tendance à délaisser l'approche historique au Canada semble s'expliquer par deux changements. Le premier est l'adoption d'une méthode d'interprétation contractuelle qui oblige le tribunal à tenir compte des circonstances — que l'on appelle

— often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26 and 31-36.

[47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc.*

souvent le fondement factuel — dans l'interprétation d'un contrat écrit (Hall, p. 13, 21-25 et 127; J. D. McCamus, *The Law of Contracts* (2e éd. 2012), p. 749-751). Le deuxième découle des explications formulées dans les arrêts *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35, et *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 26 et 31-36, sur ce qui distingue la question de droit de la question mixte de fait et de droit.

[47] Relativement au premier changement, l'interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d'interprétation. La question prédominante consiste à discerner « l'intention des parties et la portée de l'entente » (*Jesuit Fathers of Upper Canada c. Cie d'assurance Guardian du Canada*, 2006 CSC 21, [2006] 1 R.C.S. 744, par. 27, le juge LeBel; voir aussi *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69, par. 64-65, le juge Cromwell). Pour ce faire, le décideur doit interpréter le contrat dans son ensemble, en donnant aux mots y figurant le sens ordinaire et grammatical qui s'harmonise avec les circonstances dont les parties avaient connaissance au moment de la conclusion du contrat. Par l'examen des circonstances, on reconnaît qu'il peut être difficile de déterminer l'intention contractuelle à partir des seuls mots, car les mots en soi n'ont pas un sens immuable ou absolu :

> [TRADUCTION] Aucun contrat n'est conclu dans l'abstrait : les contrats s'inscrivent toujours dans un contexte. [. . .] Lorsqu'un contrat commercial est en cause, le tribunal devrait certes connaître son objet sur le plan commercial, ce qui présuppose d'autre part une connaissance de l'origine de l'opération, de l'historique, du contexte, du marché dans lequel les parties exercent leurs activités.

(*Reardon Smith Line*, p. 574, le lord Wilberforce)

[48] Le sens des mots est souvent déterminé par un certain nombre de facteurs contextuels, y compris l'objet de l'entente et la nature des rapports créés par celle-ci (voir *Moore Realty Inc. c. Manitoba*

v. Manitoba Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[49] As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam*. Questions of law "are questions about what the correct legal test is" (*Southam*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

[50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[51] The purpose of the distinction between questions of law and those of mixed fact and law further

Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, par. 15, la juge Hamilton; voir aussi Hall, p. 22; McCamus, p. 749-750). Pour reprendre les propos du lord Hoffmann dans *Investors Compensation Scheme Ltd. c. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.) :

> [TRADUCTION] Le sens d'un document (ou toute autre déclaration) qui est transmis à la personne raisonnable n'équivaut pas au sens des mots qui le composent. Le sens des mots fait intervenir les dictionnaires et les grammaires; le sens du document représente ce qu'il est raisonnable de croire que les parties, en employant ces mots compte tenu du contexte pertinent, ont voulu exprimer. [p. 115]

[49] Relativement au deuxième changement, l'approche historique de l'interprétation contractuelle ne cadre pas bien avec la définition de la pure question de droit formulée dans les arrêts *Housen* et *Southam*. Les questions de droit « concernent la détermination du critère juridique applicable » (*Southam*, par. 35). Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties — un but axé sur les faits — par l'application des principes juridiques d'interprétation. Il me semble que cela se rapproche plutôt de la question mixte de fait et de droit, définie dans l'arrêt *Housen* comme supposant « l'application d'une norme juridique à un ensemble de faits » (par. 26; voir aussi *Southam*, par. 35). Toutefois, certains tribunaux ont émis des doutes sur l'application directe de cette définition, qui avait été établie à l'égard d'une action intentée pour négligence, à des questions d'interprétation contractuelle et laissent entendre que cette dernière est d'abord et avant tout une affaire de droit (voir par exemple *Bell Canada*, par. 25).

[50] Avec tout le respect que je dois aux tenants de l'opinion contraire, à mon avis, il faut rompre avec l'approche historique. L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel.

[51] Cette conclusion est étayée par les raisons qui sous-tendent la distinction établie entre la

supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

> If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

[52] Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

question de droit et la question mixte de fait et de droit. En distinguant ces deux catégories, on visait principalement à restreindre l'intervention de la juridiction d'appel aux affaires qui entraîneraient probablement des répercussions qui ne seraient pas limitées aux parties au litige. Ainsi, le rôle des cours d'appel, qui consiste à assurer la cohérence du droit, et non à offrir aux parties une nouvelle tribune leur permettant de poursuivre leur litige privé, est préservé. C'est pourquoi la Cour dans l'arrêt *Southam* reconnaît le degré de généralité (ou « la valeur comme précédents ») comme la principale différence entre la question de droit et la question mixte de fait et de droit. Plus la règle est stricte, moins l'intervention de la cour d'appel sera utile :

> Si une cour décidait que le fait d'avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l'affaire prend le caractère d'une question d'application pure, et s'approche donc d'une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu'il n'est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n'est pas susceptible de présenter beaucoup d'intérêt pour les juges et les avocats dans l'avenir. [par. 37]

[52] De même, la Cour dans l'arrêt *Housen* conclut que la retenue à l'égard du juge des faits contribue à réduire le nombre, la durée et le coût des appels tout en favorisant l'autonomie du procès et son intégrité (par. 16-17). Ces principes militent également en faveur de la déférence à l'endroit des décideurs de première instance en matière d'interprétation contractuelle. Les obligations juridiques issues d'un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d'application limitée que notre système judiciaire confère aux tribunaux de première instance appuie la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

[53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[54] However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

> Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" . . . . [para. 36]

[55] Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of

[53] Néanmoins, il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit (*Housen*, par. 31 et 34-35). L'interprétation contractuelle peut occasionner des erreurs de droit, notamment [TRADUCTION] « appliquer le mauvais principe ou négliger un élément essentiel d'un critère juridique ou un facteur pertinent » (*King*, par. 21). En outre, il est indubitable que nombre d'autres questions se posant en droit des contrats mettent en jeu des règles de droit substantiel : les critères de formation du contrat, la capacité des parties, l'obligation que soient constatés par écrit certains types de contrat, etc.

[54] Le tribunal doit cependant faire preuve de prudence avant d'isoler une question de droit dans un litige portant sur l'interprétation contractuelle. Compte tenu de l'obligation, prévue au par. 31(2) de l'*AA*, que la demande d'autorisation soulève une question de droit, le demandeur et son représentant chercheront à qualifier de question de droit toute erreur qu'ils invoquent. Toutefois, le législateur a pris des mesures visant à limiter ce genre d'appels, et les tribunaux doivent examiner soigneusement le motif d'appel proposé pour déterminer s'il est bien caractérisé. La mise en garde exprimée dans *Housen* qui appelle à la prudence lorsqu'il s'agit d'isoler une question de droit s'applique dans le cas présent :

> Les cours d'appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu'il a conclu à la négligence, puisqu'il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n'est pas facilement isolable, il s'agit alors d'une « question mixte de fait et de droit » . . . [par. 36]

[55] Certes, cette mise en garde a été formulée dans le contexte d'une action pour négligence, mais elle s'applique également à mon avis à l'interprétation contractuelle. Comme je le mentionne précédemment, le but de l'interprétation contractuelle — déterminer l'intention objective des parties — est, de par sa nature même, axé sur les faits. Le rapport

contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les circonstances dans lesquelles il sera possible d'isoler une question de droit au cours de l'exercice d'interprétation. En l'absence d'une erreur de droit du genre de celles décrites plus haut, aucun droit d'appel de l'interprétation par un arbitre d'un contrat n'est prévu à l'*AA*.

(b) *The Role and Nature of the "Surrounding Circumstances"*

b) *Le rôle et la nature des « circonstances »*

[56] I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

[56] Abordons le rôle des circonstances dans l'interprétation du contrat et la nature des éléments admis à l'examen. La présente analyse ne traite que de la démarche d'interprétation contractuelle fondée sur la common law; elle ne se veut ni une application ni une modification du droit relatif à l'interprétation contractuelle régi par le *Code civil du Québec*.

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[57] Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (*Hayes Forest Services*, par. 14; Hall, p. 30). Le décideur examine cette preuve dans le but de mieux saisir les intentions réciproques et objectives des parties exprimées dans les mots du contrat. Une disposition contractuelle doit toujours être interprétée sur le fondement de son libellé et de l'ensemble du contrat (Hall, p. 15 et 30-32). Les circonstances sous-tendent l'interprétation du contrat, mais le tribunal ne saurait fonder sur elles une lecture du texte qui s'écarte de ce dernier au point de créer dans les faits une nouvelle entente (*Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*,

[58] La nature de la preuve susceptible d'appartenir aux « circonstances » variera nécessairement d'une affaire à l'autre. Il y a toutefois certaines limites. Il doit s'agir d'une preuve objective du contexte factuel au moment de la signature du contrat (*King*, par. 66 et 70), c'est-à-dire, les renseignements qui

at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) *Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule*

[59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 341-42, *per* Sopinka J.).

[60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts

appartenaient ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci. Compte tenu de ces exigences et de la règle d'exclusion de la preuve extrinsèque que nous verrons, on entend par « circonstances », pour reprendre les propos du lord Hoffmann [TRADUCTION] « tout ce qui aurait eu une incidence sur la manière dont une personne raisonnable aurait compris les termes du document » (*Investors Compensation Scheme*, p. 114). La question de savoir si quelque chose appartenait ou aurait dû raisonnablement appartenir aux connaissances communes des parties au moment de la signature du contrat est une question de fait.

c) *Tenir compte des circonstances n'est pas contraire à la règle d'exclusion de la preuve extrinsèque*

[59] Quelques mots sur l'examen des circonstances et la règle d'exclusion de la preuve extrinsèque s'imposent. Cette règle empêche l'admission d'éléments de preuve autres que les termes du contrat écrit qui auraient pour effet de modifier ou de contredire un contrat qui a été entièrement consigné par écrit, ou d'y ajouter de nouvelles clauses ou d'en supprimer (*King*, par. 35; Hall, p. 53). À cette fin, la règle interdit notamment les éléments de preuve concernant les intentions subjectives des parties (Hall, p. 64-65; *Eli Lilly & Co. c. Novopharm Ltd.*, [1998] 2 R.C.S. 129, par. 54-59, le juge Iacobucci). La règle vise, premièrement, à donner un caractère définitif et certain aux obligations contractuelles et, deuxièmement, à empêcher qu'une partie puisse utiliser des éléments de preuve fabriqués ou douteux pour attaquer un contrat écrit (*Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 341-342, le juge Sopinka).

[60] La règle d'exclusion de la preuve extrinsèque n'interdit pas au tribunal de tenir compte des circonstances entourant le contrat. Cette preuve est compatible avec les objectifs relatifs au caractère définitif et certain puisqu'elle sert d'outil d'interprétation qui vient éclairer le sens des mots du contrat choisis par les parties, et non le changer ou s'y substituer. Les circonstances sont des faits connus

that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[61] Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

(d) *Application to the Present Case*

[62] In this case, the CA Leave Court granted leave on the following issue: "Whether the Arbitrator erred in law in failing to construe the whole of the Finder's Fee Agreement . . ." (A.R., vol. I, at p. 62).

[63] As will be explained below, while the requirement to construe a contract as a whole is a question of law that could — if extricable — satisfy the threshold requirement under s. 31 of the *AA*, I do not think this question was properly extricated in this case.

[64] I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15). If the arbitrator did not take the "maximum amount" proviso into account, as alleged by Creston, then he did not construe the Agreement as a whole because he ignored a specific and relevant provision of the Agreement. This is a question of law that would be extricable from a finding of mixed fact and law.

[65] However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed,

ou qui auraient raisonnablement dû l'être des deux parties à la date de signature du contrat ou avant celle-ci; par conséquent, le risque que des éléments d'une fiabilité douteuse soient invoqués ne se pose pas.

[61] Selon une certaine jurisprudence et des auteurs, la règle d'exclusion de la preuve extrinsèque serait un anachronisme ou, à tout le moins, d'application restreinte vu la myriade d'exceptions dont elle est assortie (voir par exemple *Gutierrez c. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), par. 19-20; Hall, p. 53-64). Dans le cadre du présent pourvoi, il suffit de dire que la règle d'exclusion de la preuve extrinsèque ne s'oppose pas à la présentation d'une preuve des circonstances entourant le contrat pour l'interprétation de ce dernier.

d) *Application au présent pourvoi*

[62] En l'espèce, la Cour d'appel a accordé l'autorisation d'appel relativement à la question suivante : [TRADUCTION] « L'arbitre a-t-il commis une erreur de droit en n'interprétant pas l'entente relative aux honoraires d'intermédiation dans son ensemble . . . ? » (d.a., vol. I, p. 62)

[63] Comme nous le verrons, l'obligation d'interpréter le contrat dans son ensemble est une question de droit susceptible, si on pouvait l'isoler, de satisfaire au critère minimal exigé à l'art. 31 de l'*AA*. À mon avis, cette question n'a pas été isolée comme il se doit en l'espèce.

[64] Je reconnais qu'il est un principe fondamental de l'interprétation contractuelle selon lequel le contrat doit être interprété dans son ensemble (McCamus, p. 761-762; Hall, p. 15). Si l'arbitre n'a pas tenu compte de la stipulation relative au « plafond », comme le prétend Creston, il n'a alors pas interprété l'entente dans son ensemble, car il en a négligé une clause précise et pertinente. Voilà une question de droit qui pourrait être isolée de la conclusion mixte de fait et de droit.

[65] Or, il semble que l'arbitre a effectivement tenu compte de la stipulation relative au « plafond ».

the CA Leave Court acknowledges that the arbitrator had considered that proviso, since it notes that he turned his mind to the US$1.5 million maximum amount, an amount that can only be calculated by referring to the TSXV policy referenced in the "maximum amount" proviso in s. 3.1 of the Agreement. As I read its reasons, rather than being concerned with whether the arbitrator ignored the maximum amount proviso, which is what Creston alleges in this Court, the CA Leave Court decision focused on how the arbitrator construed s. 3.1 of the Agreement, which included the maximum amount proviso (paras. 25-26). For example, the CA Leave Court expressed concern that the arbitrator did not address the "incongruity" in the fact that the value of the fee would vary "hugely" depending on whether it was taken in cash or shares (para. 25).

En effet, selon la formation de la CA saisie de la demande d'autorisation, l'arbitre a examiné la stipulation, puisqu'elle signale qu'il a envisagé le plafond de 1,5 million $US, un nombre auquel il ne peut être arrivé que s'il a consulté la politique de la Bourse à laquelle renvoie la stipulation relative au « plafond » à l'art. 3.1 de l'entente. À la lumière de ses motifs, j'estime que la formation de la CA saisie de la demande d'autorisation, au lieu de se demander si l'arbitre a négligé la stipulation relative au plafond — ce que Creston prétend devant la Cour —, a axé sa décision sur l'interprétation qu'a donnée l'arbitre de l'art. 3.1 de l'entente, qui contient cette stipulation (par. 25-26). Par exemple, la formation de la CA saisie de la demande d'autorisation s'est dite préoccupée que l'arbitre n'ait pas abordé l'[TRADUCTION] « absurdité » de la variation « considérable » dans la valeur des honoraires selon qu'ils étaient versés en argent ou en actions (par. 25).

[66] With respect, the CA Leave Court erred in finding that the construction of s. 3.1 of the Agreement constituted a question of law. As explained by Justice Armstrong in the SC Appeal Court decision, construing s. 3.1 and taking account of the proviso required relying on the relevant surrounding circumstances, including the sophistication of the parties, the fluctuation in share prices, and the nature of the risk a party assumes when deciding to accept a fee in shares as opposed to cash. Such an exercise raises a question of mixed fact and law. There being no question of law extricable from the mixed fact and law question of how s. 3.1 and the proviso should be interpreted, the CA Leave Court erred in granting leave to appeal.

[66] Avec tout le respect que je lui dois, j'estime que la formation de la CA saisie de la demande d'autorisation a assimilé à tort l'interprétation de l'art. 3.1 de l'entente à une question de droit. Comme l'explique le juge Armstrong dans la décision de la CS sur l'appel, pour interpréter l'art. 3.1 et tenir compte de la stipulation, il fallait examiner les circonstances pertinentes, y compris le fait que les parties étaient des parties avisées, la fluctuation du cours de l'action et la nature du risque qu'une partie assume quand elle opte pour le versement de ses honoraires en actions plutôt qu'en argent. Un tel exercice soulève une question mixte de fait et de droit. Comme aucune question de droit ne peut être isolée de la question mixte de fait et de droit qui porte sur l'interprétation de l'art. 3.1 et de la stipulation, la Cour d'appel a commis une erreur en accueillant la demande d'autorisation d'appel.

[67] The conclusion that Creston's application for leave to appeal raised no question of law would be sufficient to dispose of this appeal. However, as this Court rarely has the opportunity to address appeals of arbitral awards, it is, in my view, useful to explain that, even had the CA Leave Court been correct in finding that construction of s. 3.1 of the Agreement constituted a question of law, it should have nonetheless denied leave to appeal as the

[67] Conclure que la demande d'autorisation d'appel présentée par Creston ne soulevait aucune question de droit suffirait à trancher le présent pourvoi. Toutefois, puisque la Cour a rarement l'occasion de se pencher sur l'appel d'une sentence arbitrale, il est à mon avis utile d'expliquer que même si la formation de la CA saisie de la demande d'autorisation avait conclu à bon droit que l'interprétation de l'art. 3.1 de l'entente constituait une question de

application also failed the miscarriage of justice and residual discretion stages of the leave analysis set out in s. 31(2)(a) of the *AA*.

(4) May Prevent a Miscarriage of Justice

(a) *Miscarriage of Justice for the Purposes of Section 31(2)(a) of the AA*

[68] Once a question of law has been identified, the court must be satisfied that the determination of that point of law on appeal "may prevent a miscarriage of justice" in order for it to grant leave to appeal pursuant to s. 31(2)(a) of the *AA*. The first step in this analysis is defining miscarriage of justice for the purposes of s. 31(2)(a).

[69] In *BCIT*, Justice Saunders discussed the miscarriage of justice requirement under s. 31(2)(a). She affirmed the definition set out in *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (C.A.), which required the error of law in question to be a material issue that, if decided differently, would lead to a different result: ". . . if the point of law were decided differently, the arbitrator would have been led to a different result. In other words, was the alleged error of law material to the decision; does it go to its heart?" (*BCIT*, at para. 28). See also *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, which discusses the test of whether "some substantial wrong or miscarriage of justice has occurred" in the context of a civil jury trial (para. 43).

[70] Having regard to *BCIT* and *Quan*, I am of the opinion that in order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a) of the *AA*, an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case.

droit, elle devait néanmoins rejeter la demande, car il n'était pas satisfait aux autres volets de l'analyse des demandes d'autorisation que requiert l'al. 31(2)(a) de l'*AA*, qui concernent l'erreur judiciaire et le pouvoir discrétionnaire résiduel.

(4) Le règlement de la question de droit peut permettre d'éviter une erreur judiciaire

a) *L'erreur judiciaire pour l'application de l'al. 31(2)(a) de l'AA*

[68] Une fois qu'il a cerné une question de droit, le tribunal doit être convaincu que le fait de statuer sur cette dernière [TRADUCTION] « peut permettre d'éviter une erreur judiciaire » avant d'accorder l'autorisation d'appel en vertu de l'al. 31(2)(a) de l'*AA*. La première étape de l'analyse consiste donc à définir l'erreur judiciaire pour l'application de cette disposition.

[69] Dans *BCIT*, la juge Saunders traite du critère concernant l'erreur judiciaire prévu à l'al. 31(2)(a). Elle confirme la définition énoncée dans l'affaire *Domtar Inc. c. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (C.A.), selon laquelle l'erreur de droit doit toucher une question importante de sorte qu'une conclusion différente aurait abouti à un résultat différent : [TRADUCTION] « . . . si le point de droit avait été tranché différemment, l'arbitre aurait rendu une décision différente. Autrement dit, l'erreur de droit invoquée a-t-elle eu un effet déterminant sur la décision; touche-t-elle au cœur de la décision? » (*BCIT*, par. 28). Voir également l'arrêt *Quan c. Cusson*, 2009 CSC 62, [2009] 3 R.C.S. 712, où la Cour analyse le critère qui sert à déterminer s'il y a « préjudice grave ou [. . .] erreur judiciaire » dans le contexte des procès civils avec jury (par. 43).

[70] Compte tenu des arrêts *BCIT* et *Quan*, je suis d'avis que, pour que l'erreur de droit reprochée soit une erreur judiciaire au sens où il faut l'entendre pour l'application de l'al. 31(2)(a) de l'*AA*, elle doit se rapporter à une question importante en litige qui, si elle était tranchée différemment, aurait une incidence sur le résultat.

[71] According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

[72] At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case.

[73] *BCIT* sets the threshold for this preliminary assessment of the appeal as "more than an arguable point" (para. 30). With respect, once an arguable point has been made out, it is not apparent what more is required to meet the "more than an arguable point" standard. Presumably, the leave judge would have to delve more deeply into the arguments around the question of law on appeal than would be appropriate at the leave stage to find *more* than an arguable point. Requiring this closer examination of the point of law, in my respectful view, blurs the line between the function of the court considering the leave application and the court hearing the appeal.

[74] In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (CanLII), at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174, at para. 11); and "credible

[71] Suivant cette norme, le règlement d'un point de droit « peut permettre d'éviter une erreur judiciaire » seulement lorsqu'il existe une certaine possibilité que l'appel soit accueilli. Un appel qui est voué à l'échec ne saurait « permettre d'éviter une erreur judiciaire » puisque les possibilités que l'issue d'un tel appel joue sur le résultat final du litige sont nulles.

[72] Ce n'est pas à l'étape de l'autorisation qu'il convient d'examiner exhaustivement le fond du litige et de se prononcer définitivement sur l'absence ou l'existence d'une erreur de droit. Cependant, il faut procéder à un examen préliminaire de la question de droit pour déterminer si l'appel a une chance d'être accueilli et, par conséquent, de modifier le résultat du litige.

[73] Selon l'arrêt *BCIT*, le demandeur doit établir [TRADUCTION] « plus qu'un argument défendable » (par. 30) lors de cet examen préliminaire de l'appel. Pourtant, une fois un argument défendable soulevé, que faudrait-il démontrer de plus pour qu'il soit satisfait à cette norme? Vraisemblablement, le juge saisi de la demande d'autorisation devrait alors examiner les arguments se rapportant à la question de droit soulevée en appel de plus près que ce qui serait indiqué à cette étape pour trouver *plus* qu'un argument défendable. À mon humble avis, exiger un examen plus approfondi du point de droit brouille les rôles respectifs de la formation saisie de la demande d'autorisation et de celle saisie de l'appel.

[74] Selon moi, ce qu'il faut démontrer, pour l'application du par. 31(2), c'est que la question de droit invoquée a un fondement défendable. Ce critère s'applique souvent à l'étape de l'autorisation, pour établir sommairement le bien-fondé de l'appel (voir par exemple *Quick Auto Lease Inc. c. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, par. 5; *R. c. Fedossenko*, 2013 ABCA 164 (CanLII), par. 7). Il est bien connu et a été exprimé de diverses façons : [TRADUCTION] « une possibilité raisonnable d'être accueilli » (*a reasonable prospect of success*) (*Quick Auto Lease*, par. 5; *Enns c. Hansey*, 2013 MBCA 23 (CanLII), par. 2); une « certaine chance de succès » (*some hope of success*) et un « fondement suffisant » (*sufficient merit*) (*R. c. Hubley*, 2009 PECA

argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270, at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

[75] Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the applicable standard of review. As I will later explain, reasonableness will almost always apply to commercial arbitrations conducted pursuant to the *AA*, except in the rare circumstances where the question is one that would attract a correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise. Therefore, the leave inquiry will ordinarily ask whether there is any arguable merit to the position that the arbitrator's decision on the question at issue is unreasonable, keeping in mind that the decision-maker is not required to refer to all the arguments, provisions or jurisprudence or to make specific findings on each constituent element, for the decision to be reasonable (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 16). Of course, the leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal. As such, this should not be taken as an invitation to engage in extensive arguments or analysis about the standard of review at the leave stage.

21, 289 Nfld. & P.E.I.R. 174, par. 11); un « argument plausible » (*credible argument*) (*R. c. Will*, 2013 SKCA 4, 405 Sask. R. 270, par. 8). À mon avis, les diverses appellations qui désignent le fondement défendable présentent un élément commun : l'argument soulevé par le demandeur ne peut être rejeté à l'issue d'un examen préliminaire de la question de droit. Pour déterminer s'il faut annuler la sentence arbitrale, un examen approfondi est nécessaire, et c'est au tribunal saisi de l'appel qu'il incombe, une fois l'autorisation accordée.

[75] L'examen visant à décider si la question soulevée dans la demande d'autorisation d'appel a un fondement défendable doit se faire à la lumière de la norme de contrôle applicable à l'analyse du bien-fondé de l'appel. Il faut donc procéder à un examen préliminaire ayant pour objet la norme applicable. Comme nous le verrons, la norme de la décision raisonnable s'appliquera presque toujours aux arbitrages commerciaux régis par l'*AA*, sauf dans les rares circonstances où l'application de la norme de la décision correcte s'imposera, notamment lorsqu'il s'agit d'une question constitutionnelle ou d'une question de droit qui revêt une importance capitale pour le système juridique dans son ensemble et qui est étrangère au domaine d'expertise du décideur administratif. Par conséquent, dans le cadre de l'examen préalable à l'autorisation le tribunal s'interrogera ordinairement quant à savoir si la prétention — selon laquelle la sentence arbitrale sur la question en litige était déraisonnable — a un fondement défendable, compte tenu du fait que le décideur n'est pas tenu de faire référence à tous les arguments, dispositions ou précédents ni de tirer une conclusion précise sur chaque élément constitutif du raisonnement pour que sa décision soit raisonnable (*Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708, par. 16). Certes, le tribunal saisi de la demande d'autorisation ne procède qu'à un examen préliminaire ayant pour objet la norme de contrôle, qui ne lie pas celui qui se penchera sur le bien-fondé de l'appel. Ainsi, il ne faudrait pas considérer qu'il s'agit d'une invitation à se perdre en analyses ou en arguments poussés à propos de la norme de contrôle à l'étape de la demande d'autorisation.

[76] In *BCIT*, Saunders J.A. considered the stage of s. 31(2)(a) of the *AA* at which an examination of the merits of the appeal should occur. At the behest of one of the parties, she considered examining the merits under the miscarriage of justice criterion. However, she decided that a consideration of the merits was best done at the residual discretion stage. Her reasons indicate that this decision was motivated by the desire to take a consistent approach across s. 31(2)(a), (b) and (c):

> Where, then, if anywhere, does consideration of the merits of the appeal belong? Mr. Roberts for the Student Association contends that any consideration of the merits of the appeal belongs in the determination of whether a miscarriage of justice may occur; that is, under the second criterion. I do not agree. In my view, the apparent merit or lack of merit of an appeal is part of the exercise of the residual discretion, and applies equally to all three subsections, (*a*) through (*c*). Just as an appeal woefully lacking in merit should not attract leave under (*b*) (of importance to a class of people including the applicant) or (*c*) (of general or public importance), so too it should not attract leave under (*a*). Consideration of the merits, for consistency in the section as a whole, should be made as part of the exercise of residual discretion. [para. 29]

[77] I acknowledge the consistency rationale. However, in my respectful opinion, the desire for a consistent approach to s. 31(2)(a), (b) and (c) cannot override the text of the legislation. Unlike s. 31(2)(b) and (c), s. 31(2)(a) requires an assessment to determine whether allowing leave to appeal "may prevent a miscarriage of justice". It is my opinion that a preliminary assessment of the question of law is an implicit component in a determination of whether allowing leave "may prevent a miscarriage of justice".

[78] However, in an application for leave to appeal pursuant to s. 31(2)(b) or (c), neither of which contain a miscarriage of justice requirement, I agree with Justice Saunders in *BCIT* that a preliminary

[76] Dans *BCIT*, la juge Saunders s'interroge sur l'étape à laquelle il convient d'examiner le bien-fondé de l'appel dans le cadre de l'analyse requise par l'al. 31(2)(a) de l'*AA*. Contrairement à ce que prétendait une partie, soit que l'évaluation du bien-fondé se rapporte au critère de l'erreur judiciaire, la juge détermine que cet examen se rattache plutôt à l'exercice du pouvoir discrétionnaire. Ses motifs révèlent que sa décision découle de sa volonté d'adopter une approche uniforme à l'égard des al. 31(2)(a), (b) et (c) :

> [TRADUCTION] À quel moment, le cas échéant, faut-il alors examiner le bien-fondé de l'appel? M. Roberts, qui représente l'Association étudiante, prétend qu'il convient de procéder à cet examen lorsqu'on se demande si une erreur judiciaire risque d'être commise, c'est-à-dire, à la deuxième étape. Je ne suis pas d'accord. À mon avis, l'appréciation du bien-fondé ou de l'absence de fondement apparent de l'appel s'inscrit dans l'exercice du pouvoir discrétionnaire résiduel et s'applique également aux trois alinéas, de (*a*) à (*c*). Tout comme un appel manifestement dénué de fondement ne devrait pas être autorisé en vertu de l'al. (*b*) (revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie) ou de l'al. (*c*) (est d'importance publique), un tel appel ne devrait pas non plus être autorisé en vertu de l'al. (*a*). Dans un but d'uniformité à l'égard de l'article entier, l'appréciation du bien-fondé devrait être intégrée à l'exercice du pouvoir discrétionnaire résiduel. [par. 29]

[77] Je reconnais la validité du raisonnement axé sur l'uniformité. Cependant, à mon humble avis, cette volonté d'adopter une démarche semblable au regard des al. 31(2)(a), (b) et (c) ne saurait l'emporter sur le libellé de la disposition. Contrairement aux al. 31(2)(b) et (c), l'al. 31(2)(a) exige que le tribunal détermine si le fait d'autoriser l'appel « peut permettre d'éviter une erreur judiciaire ». J'estime qu'un examen préliminaire de la question de droit s'inscrit implicitement dans l'examen qui vise à déterminer si l'autorisation « peut permettre d'éviter une erreur judiciaire ».

[78] Cependant, lorsqu'il s'agit d'une demande d'autorisation d'appel présentée en vertu des al. 31(2)(b) ou (c) — puisque ces dispositions ne prévoient pas le risque d'erreur judiciaire comme

examination of the merits of the question of law should be assessed at the residual discretion stage of the analysis as considering the merits of the proposed appeal will always be relevant when deciding whether to grant leave to appeal under s. 31.

[79] In sum, in order to establish that "the intervention of the court and the determination of the point of law may prevent a miscarriage of justice" for the purposes of s. 31(2)(a) of the *AA*, an applicant must demonstrate that the point of law on appeal is material to the final result and has arguable merit.

(b) *Application to the Present Case*

[80] The CA Leave Court found that the arbitrator may have erred in law by not interpreting the Agreement as a whole, specifically in ignoring the "maximum amount" proviso. Accepting that this is a question of law for these purposes only, a determination of the question would be material because it could change the ultimate result arrived at by the arbitrator. The arbitrator awarded $4.14 million in damages on the basis that there was an 85 percent chance the TSXV would approve a finder's fee paid in $0.15 shares. If Creston's argument is correct and the $0.15 share price is foreclosed by the "maximum amount" proviso, damages would be reduced to US$1.5 million, a significant reduction from the arbitrator's award of damages.

[81] As s. 31(2)(a) of the *AA* is the relevant provision in this case, a preliminary assessment of the question of law will be conducted in order to determine if a miscarriage of justice could have occurred had Creston been denied leave to appeal. Creston argues that the fact that the arbitrator's conclusion results in Sattva receiving shares valued at considerably more than the US$1.5 million maximum dictated by the "maximum amount" proviso is

critère —, je souscris aux commentaires formulés par la juge Saunders dans *BCIT* selon lesquels l'examen préliminaire du bien-fondé de la question de droit devrait intervenir à l'étape de l'exercice du pouvoir discrétionnaire résiduel dans l'analyse, puisque l'examen du bien-fondé de l'appel proposé demeure pertinent dans la décision d'accorder ou non l'autorisation d'appel en vertu de l'art. 31.

[79] Bref, afin d'établir que l'intervention du tribunal est justifiée [TRADUCTION] « et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire » pour l'application de l'al. 31(2)(a) de l'*AA*, le demandeur doit prouver que le point de droit en appel aura une incidence sur le résultat final et qu'il est défendable.

b) *Application au présent pourvoi*

[80] La formation de la CA saisie de la demande d'autorisation a conclu à la possibilité d'une erreur de droit par l'arbitre qui n'aurait pas interprété l'entente dans son ensemble et, plus particulièrement, aurait fait fi de la stipulation relative au « plafond ». Admettons cette prétention comme question de droit uniquement pour les besoins de la cause. Le règlement de la question est déterminant parce qu'il pourrait avoir pour effet de modifier la sentence de l'arbitre, lequel a accordé 4,14 millions $ en dommages-intérêts au motif qu'il évaluait à 85 p. 100 la probabilité que la Bourse approuve des honoraires d'intermédiation payés en actions, à raison de 0,15 $ l'unité. Si l'argument invoqué par Creston est correct et que le cours de l'action ne peut s'établir à 0,15 $ en raison de la stipulation relative au « plafond », les dommages-intérêts seraient réduits à 1,5 million $US, une amputation considérable de la somme initiale accordée.

[81] Comme l'al. 31(2)(a) de l'*AA* est la disposition pertinente en l'espèce, il doit être procédé à un examen préliminaire de la question de droit pour déterminer le risque qu'une erreur judiciaire découle du rejet de la demande d'autorisation d'appel présentée par Creston. Cette dernière soutient que le fait que Sattva reçoive un portefeuille d'actions dont la valeur est très supérieure au plafond de 1,5 million $US en exécution de la sentence arbitrale

evidence of the arbitrator's failure to consider that proviso.

[82] However, the arbitrator did refer to s. 3.1, the "maximum amount" proviso, at two points in his decision: paras. 18 and 23(a). For example, at para. 23 he stated:

> In summary, then, as of March 27, 2007 it was clear and beyond argument that under the Agreement:
>
> (a) Sattva was entitled to a fee equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange – section 3.1. It is common ground that the quantum of this fee is US$1,500,000.
>
> (b) The fee was payable in shares based on the Market Price, as defined in the Agreement, unless Sattva elected to take it in cash or a combination of cash and shares.
>
> (c) The Market Price, as defined in the Agreement, was $0.15. [Emphasis added.]

[83] Although the arbitrator provided no express indication that he considered how the "maximum amount" proviso interacted with the Market Price definition, such consideration is implicit in his decision. The only place in the contract that specifies that the amount of the fee is calculated as US$1.5 million is the "maximum amount" proviso's reference to s. 3.3 of the TSXV Policy 5.1. The arbitrator acknowledged that the quantum of the fee is US$1.5 million and awarded Sattva US$1.5 million in shares priced at $0.15. Contrary to Creston's argument that the arbitrator failed to consider the proviso in construing the Agreement, it is apparent on a preliminary examination of the question that the arbitrator did in fact consider the "maximum amount" proviso.

[84] Accordingly, even had the CA Leave Court properly identified a question of law, leave to appeal should have been denied. The requirement that there be arguable merit that the arbitrator's decision was unreasonable is not met and the miscarriage of justice threshold was not satisfied.

prouve que l'arbitre n'a pas tenu compte de la stipulation relative au « plafond ».

[82] Or, l'arbitre renvoie effectivement à l'art. 3.1, la stipulation relative au « plafond », à deux reprises dans sa décision, soit aux par. 18 et 23(a). Par exemple, il affirme ce qui suit au par. 23 :

> [TRADUCTION]
>
> Bref, à partir du 27 mars 2007, il était clair et incontestable qu'aux termes de l'entente :
>
> (a) Sattva avait le droit de recevoir des honoraires équivalant au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX – article 3.1. Les parties conviennent que le montant des honoraires s'établit à 1 500 000 $US.
>
> (b) La commission était payable en actions, en fonction du cours, tel qu'il est défini dans l'entente, à moins que Sattva n'opte pour le versement des honoraires en argent ou en argent et en actions.
>
> (c) Le cours de l'action, tel qu'il est défini dans l'entente, s'établissait à 0,15 $. [Je souligne.]

[83] Ainsi, même si l'arbitre n'indique pas expressément avoir examiné le jeu de la stipulation relative au « plafond » et de la définition du cours, cet examen ressort implicitement de sa sentence. La seule clause de l'entente qui prévoit le montant des honoraires, soit 1,5 million $US, est la stipulation relative au « plafond », qui renvoie au point 3.3 de la politique 5.1 de la Bourse. Reconnaissant que le montant des honoraires s'élève à 1,5 million $US, l'arbitre a accordé à Sattva pareille somme, payable en actions, à raison de 0,15 $ l'unité. Contrairement à l'argument avancé par Creston, selon qui l'arbitre aurait négligé la stipulation dans son interprétation de l'entente, il ressort de l'examen préliminaire de la question que l'arbitre a effectivement tenu compte de la stipulation relative au « plafond ».

[84] Par conséquent, même si la Cour d'appel avait cerné à juste titre une question de droit, elle aurait dû rejeter la demande d'autorisation. Il n'était pas satisfait au critère qui exige que le caractère déraisonnable de la sentence arbitrale ait un fondement défendable, ni à celui de l'erreur judiciaire.

(5) Residual Discretion to Deny Leave

(a) *Considerations in Exercising Residual Discretion in a Section 31(2)(a) Leave Application*

[85] The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met (*BCIT*, at paras. 9 and 26). In *BCIT*, Saunders J.A. sets out a non-exhaustive list of considerations that would be applicable to the exercise of discretion (para. 31):

1. "the apparent merits of the appeal";

2. "the degree of significance of the issue to the parties, to third parties and to the community at large";

3. "the circumstances surrounding the dispute and adjudication including the urgency of a final answer";

4. "other temporal considerations including the opportunity for either party to address the result through other avenues";

5. "the conduct of the parties";

6. "the stage of the process at which the appealed decision was made";

7. "respect for the forum of arbitration, chosen by the parties as their means of resolving disputes"; and

8. "recognition that arbitration is often intended to provide a speedy and final dispute mechanism, tailor-made for the issues which may face the parties to the arbitration agreement".

(5) Le pouvoir discrétionnaire résiduel qui habilite à refuser l'autorisation

a) *Éléments à examiner dans l'exercice du pouvoir discrétionnaire résiduel à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a)*

[85] Les tribunaux de la C.-B. ont conclu que les termes [TRADUCTION] « peut accorder l'autorisation » figurant au par. 31(2) de l'*AA* confèrent au tribunal un pouvoir discrétionnaire résiduel qui lui permet de refuser l'autorisation même quand les critères prévus par la disposition sont respectés (*BCIT*, par. 9 et 26). Dans *BCIT*, la juge Saunders énumère des facteurs à considérer dans l'exercice de ce pouvoir discrétionnaire (par. 31) :

1. [TRADUCTION] « le bien-fondé apparent de l'appel »;

2. « l'importance de la question pour les parties, les tiers et la société en général »;

3. « les circonstances qui sont à l'origine du différend et de l'arbitrage, y compris le besoin urgent d'obtenir un règlement définitif »;

4. « d'autres considérations temporelles, y compris la possibilité pour l'une ou l'autre des parties de remédier autrement aux conséquences »;

5. « la conduite des parties »;

6. « l'étape à laquelle la décision qui a été portée en appel avait été prise »;

7. « le respect du choix des parties d'avoir recours à l'arbitrage pour résoudre leurs différends »;

8. « la reconnaissance du fait que l'arbitrage constitue souvent un moyen expéditif et définitif de régler les différends, spécialement conçu pour traiter les enjeux susceptibles de toucher les parties à la convention d'arbitrage ».

[86] I agree with Justice Saunders that it is not appropriate to create what she refers to as an "immutable checklist" of factors to consider in exercising discretion under s. 31(2) (*BCIT*, at para. 32). However, I am unable to agree that all the listed considerations are applicable at this stage of the analysis.

[87] In exercising its statutorily conferred discretion to deny leave to appeal pursuant to s. 31(2)(a), a court should have regard to the traditional bases for refusing discretionary relief: the parties' conduct, the existence of alternative remedies, and any undue delay (*Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 52). This would include the urgent need for a final answer.

[88] With respect to the other listed considerations and addressed in turn below, it is my opinion that they have already been considered elsewhere in the s. 31(2)(a) analysis or are more appropriately considered elsewhere under s. 31(2). Once considered, these matters should not be assessed again under the court's residual discretion.

[89] As discussed above, in s. 31(2)(a), a preliminary assessment of the merits of the question of law at issue in the leave application is to be considered in determining the miscarriage of justice question. The degree of significance of the issue to the parties is covered by the "importance of the result of the arbitration to the parties" criterion in s. 31(2)(a). The degree of significance of the issue to third parties and to the community at large should not be considered under s. 31(2)(a) as the *AA* sets these out as separate grounds for granting leave to appeal under s. 31(2)(b) and (c). Furthermore, respect for the forum of arbitration chosen by the parties is a consideration that animates the legislation itself and

[86] Je conviens avec la juge Saunders pour dire qu'il n'est pas opportun de dresser ce qu'elle appelle une [TRADUCTION] « liste immuable » de facteurs à considérer dans l'exercice du pouvoir discrétionnaire prévu au par. 31(2) (*BCIT*, par. 32). Cependant, je ne peux convenir que tous les facteurs qui figurent sur la liste qu'elle a dressée sont applicables à cette étape de l'analyse.

[87] Dans l'exercice du pouvoir discrétionnaire que lui confère l'al. 31(2)(a) et qui l'habilite à rejeter la demande d'autorisation, le tribunal devrait examiner les motifs traditionnels justifiant le refus d'une réparation discrétionnaire : la conduite des parties, l'existence d'autres recours et tout retard indu (*Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326, p. 364-367). L'exercice du pouvoir discrétionnaire qui permet de refuser une réparation fait intervenir des considérations relatives à la prépondérance des inconvénients (*Mines Alerte Canada c. Canada (Pêches et Océans)*, 2010 CSC 2, [2010] 1 R.C.S. 6, par. 52). Parmi celles-ci se trouve le besoin urgent d'obtenir un règlement définitif.

[88] Quant aux autres facteurs mentionnés dans la liste et dont je traite successivement ci-après, j'estime qu'ils ont déjà été examinés dans le cadre de l'analyse fondée sur l'al. 31(2)(a) ou qu'il conviendrait mieux de les examiner à un autre volet du critère énoncé au par. 31(2). Une fois examinés, ces facteurs ne devraient pas être réexaminés par le tribunal au moment de l'exercice de son pouvoir discrétionnaire résiduel.

[89] Je le rappelle, dans l'analyse fondée sur l'al. 31(2)(a), il faut procéder à l'examen préliminaire du bien-fondé de la question de droit soulevée dans la demande d'autorisation pour déterminer s'il y a risque d'erreur judiciaire. La question de l'importance pour les parties se règle à l'al. 31(2)(a) : [TRADUCTION] « l'importance de l'issue de l'arbitrage pour les parties ». L'importance de la question pour les tiers et pour la société en général ne doit pas être examinée à l'al. 31(2)(a), car l'*AA* prévoit ces motifs à des dispositions distinctes, soit les al. 31(2)(b) et (c). En outre, le respect du choix des parties d'avoir recours à l'arbitrage sous-tend la loi elle-même, ce dont témoigne le seuil élevé auquel l'autorisation

can be seen in the high threshold to obtain leave under s. 31(2)(a). Recognition that arbitration is often chosen as a means to obtain a fast and final resolution tailor-made for the issues is already reflected in the urgent need for a final answer.

[90] As for the stage of the process at which the decision sought to be appealed was made, it is not a consideration relevant to the exercise of the court's residual discretion to deny leave under s. 31(2)(a). This factor seeks to address the concern that granting leave to appeal an interlocutory decision may be premature and result in unnecessary fragmentation and delay of the legal process (D. J. M. Brown and J. M. Evans, with the assistance of C. E. Deacon, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 3-67 to 3-76). However, any such concern will have been previously addressed by the leave court in its analysis of whether a miscarriage of justice may arise; more specifically, whether the interlocutory issue has the potential to affect the final result. As such, the above-mentioned concerns should not be considered anew.

[91] In sum, a non-exhaustive list of discretionary factors to consider in a leave application under s. 31(2)(a) of the *AA* would include:

- conduct of the parties;
- existence of alternative remedies;
- undue delay; and
- the urgent need for a final answer.

[92] These considerations could, where applicable, be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria of s. 31(2)(a) have been met. However, courts should

est subordonnée aux termes de l'al. 31(2)(a). La reconnaissance du fait que l'arbitrage constitue souvent un moyen expéditif et définitif de régler les différends et spécialement conçu pour traiter les enjeux susceptibles de toucher les parties à la convention d'arbitrage s'inscrit dans le besoin urgent d'obtenir un règlement définitif.

[90] Quant à l'étape du processus à laquelle la décision dont on veut faire appel a été rendue, ce n'est pas un facteur pertinent pour l'exercice par le tribunal du pouvoir discrétionnaire résiduel conféré par l'al. 31(2)(a) qui lui permet de refuser l'autorisation. Ce facteur a été défini en réponse à des préoccupations selon lesquelles l'autorisation d'appeler d'une décision interlocutoire risque d'être prématurée et d'entraîner des retards indus ainsi qu'une fragmentation inutile du processus judiciaire (D. J. M. Brown et J. M. Evans, avec la collaboration de C. E. Deacon, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), p. 3-67 à 3-76). Or, ces préoccupations auront été dissipées par la formation saisie de la demande d'autorisation lorsqu'elle se sera penchée sur le risque d'erreur judiciaire, et, plus précisément, sur la possibilité que la question interlocutoire ait une incidence sur le résultat final. Ainsi, les préoccupations mentionnées précédemment ne devraient donc pas être réexaminées.

[91] En résumé, une liste non exhaustive des facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a) de l'*AA* comprendrait :

- la conduite des parties;
- l'existence d'autres recours;
- un retard indu;
- le besoin urgent d'obtenir un règlement définitif.

[92] Ces facteurs pourraient, le cas échéant, justifier le rejet de la demande sollicitant l'autorisation d'interjeter appel d'une sentence arbitrale même dans le cas où il est satisfait aux critères prévus à

exercise such discretion with caution. Having found an error of law and, at least with respect to s. 31(2)(a), a potential miscarriage of justice, these discretionary factors must be weighed carefully before an otherwise eligible appeal is rejected on discretionary grounds.

(b) *Application to the Present Case*

[93] The SC Leave Court judge denied leave on the basis that there was no question of law. Even had he found a question of law, the SC Leave Court judge stated that he would have exercised his residual discretion to deny leave for two reasons: first, because of Creston's conduct in misrepresenting the status of the finder's fee issue to the TSXV and Sattva; and second, "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41). The CA Leave Court overruled the SC Leave Court on both of these discretionary grounds.

[94] For the reasons discussed above, fostering and preserving the integrity of the arbitral system should not be a discrete discretionary consideration under s. 31(2)(a). While the scheme of s. 31(2) recognizes this objective, the exercise of discretion must pertain to the facts and circumstances of a particular case. This general objective is not a discretionary matter for the purposes of denying leave.

[95] However, conduct of the parties is a valid consideration in the exercise of the court's residual discretion under s. 31(2)(a). A discretionary decision to deny leave is to be reviewed with deference by an appellate court. A discretionary decision should not be interfered with merely because an appellate court would have exercised the discretion differently (*R. v. Bellusci*, 2012 SCC 44, [2012]

l'al. 31(2)(a). Cependant, les tribunaux devraient faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire. Après avoir conclu à l'existence d'une erreur de droit et, au moins en ce qui concerne l'al. 31(2)(a), d'un risque d'erreur judiciaire, le tribunal doit soupeser ces facteurs avec soin avant de décider s'il va rejeter ou non pour des motifs discrétionnaires une demande par ailleurs admissible.

b) *Application au présent pourvoi*

[93] Le juge de la CS saisi de la demande d'autorisation a rejeté cette dernière au motif qu'elle ne soulevait aucune question de droit. Il a indiqué que, même s'il avait conclu à l'existence d'une telle question, il aurait refusé l'autorisation en vertu de son pouvoir discrétionnaire résiduel, et ce, pour deux raisons : premièrement, à cause de la conduite de Creston qui a présenté inexactement les faits relatifs aux honoraires d'intermédiation à la Bourse et à Sattva; deuxièmement, [TRADUCTION] « par égard pour le principe selon lequel l'[*AA*] a notamment pour objectif de favoriser et de préserver l'intégrité du système d'arbitrage » (par. 41). La formation de la CA saisie de la demande d'autorisation a écarté la décision de la CS pour ces deux raisons discrétionnaires.

[94] Pour les motifs énoncés précédemment, l'objectif qui vise à favoriser et à préserver l'intégrité du système d'arbitrage ne devrait pas constituer une considération distincte dans l'analyse que requiert l'al. 31(2)(a) préalable à l'exercice du pouvoir discrétionnaire. Bien que le régime instauré par le par. 31(2) reconnaît cet objectif, l'exercice du pouvoir discrétionnaire doit se rapporter aux faits et aux circonstances de l'affaire. Cet objectif général ne fait pas partie des considérations susceptibles de justifier le refus discrétionnaire de l'autorisation.

[95] Toutefois, la conduite des parties est un facteur que le tribunal peut prendre en considération dans l'exercice du pouvoir discrétionnaire résiduel que lui confère l'al. 31(2)(a). La cour d'appel doit faire preuve de déférence lorsqu'elle contrôle la décision discrétionnaire de refuser l'autorisation d'interjeter appel. Elle doit se garder d'intervenir seulement parce qu'elle aurait exercé son pouvoir

2 S.C.R. 509, at paras. 18 and 30). An appellate court is only justified in interfering with a lower court judge's exercise of discretion if that judge misdirected himself or if his decision is so clearly wrong as to amount to an injustice (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 15; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117).

[96] Here, the SC Leave Court relied upon a well-accepted consideration in deciding to deny discretionary relief: the misconduct of Creston. The CA Leave Court overturned this decision on the grounds that Creston's conduct was "not directly relevant to the question of law" advanced on appeal (at para. 27).

[97] The CA Leave Court did not explain why misconduct need be directly relevant to a question of law for the purpose of denying leave. I see nothing in s. 31(2) of the *AA* that would limit a leave judge's exercise of discretion in the manner suggested by the CA Leave Court. My reading of the jurisprudence does not support the view that misconduct must be directly relevant to the question to be decided by the court.

[98] In *Homex Realty and Development Co. v. Corporation of the Village of Wyoming*, [1980] 2 S.C.R. 1011, at pp. 1037-38, misconduct by a party not directly relevant to the question at issue before the court resulted in denial of a remedy. The litigation in *Homex* arose out of a disagreement regarding whether the purchaser of lots in a subdivision, Homex, had assumed the obligations of the vendor under a subdivision agreement to provide "all the requirements, financial and otherwise" for the installation of municipal services on a parcel of land that had been subdivided (pp. 1015-16). This Court determined that Homex had not been accorded procedural fairness when the municipality passed a by-law related to the dispute (p. 1032). Nevertheless, discretionary relief to quash the by-law was denied because, among other things, Homex had sought "throughout all these proceedings to

discrétionnaire différemment (*R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509, par. 18 et 30). La cour d'appel ne saurait intervenir à l'égard de l'exercice du pouvoir discrétionnaire par le juge de l'instance inférieure que si celui-ci s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice (*R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651, par. 15; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 117).

[96] En l'espèce, la formation de la CS saisie de la demande d'autorisation a fondé sur un facteur reconnu sa décision de refuser la réparation discrétionnaire : l'inconduite de Creston. La formation de la CA saisie de la demande d'autorisation a infirmé cette décision au motif que [TRADUCTION] « ces faits [la conduite de Creston] n'intéressent pas directement la question de droit » soulevée en appel (par. 27).

[97] La formation de la CA saisie de la demande d'autorisation n'a pas expliqué pourquoi l'inconduite doit se rapporter directement à une question de droit pour que l'autorisation soit refusée. Rien dans le par. 31(2) de l'*AA* ne limite l'exercice du pouvoir discrétionnaire du juge saisi de la demande d'autorisation de la façon avancée par la Cour d'appel. Mon interprétation de la jurisprudence ne cadre pas avec le point de vue selon lequel l'inconduite d'une partie doit se rapporter directement à la question devant être tranchée par la cour.

[98] Dans l'arrêt *Homex Realty and Development Co. c. Corporation of the Village of Wyoming*, [1980] 2 R.C.S. 1011, p. 1037-1038, l'inconduite d'une partie ne se rapportait pas directement à la question en cause devant la Cour, mais cette dernière a néanmoins refusé d'accorder la réparation. Le litige tirait son origine d'un désaccord sur la question de savoir si l'acheteur de lots sur un lotissement, Homex, avait assumé les obligations du vendeur prévues à la convention de lotissement, c'est-à-dire de satisfaire à « toutes les exigences, financières ou autres » relativement à l'installation des services d'utilité publique sur un lotissement (p. 1015-1016). La Cour décide qu'Homex n'a pas bénéficié de l'équité procédurale lorsque la municipalité avait adopté un règlement se rapportant au litige (p. 1032). Néanmoins, la demande visant à obtenir l'annulation discrétionnaire du règlement a été rejetée notamment

avoid the burden associated with the subdivision of the lands" that it owned (p. 1037), even though the Court held that Homex knew this obligation was its responsibility (pp. 1017-19). This conduct was related to the dispute that gave rise to the litigation, but not to the question of whether the by-law was enacted in a procedurally fair manner. Accordingly, I read *Homex* as authority for the proposition that misconduct related to the dispute that gave rise to the proceedings may justify the exercise of discretion to refuse the relief sought, in this case refusing to grant leave to appeal.

[99] Here, the arbitrator found as a fact that Creston misled the TSXV and Sattva regarding "the nature of the obligation it had undertaken to Sattva by representing that the finder's fee was payable in cash" (para. 56(k)). While this conduct is not tied to the question of law found by the CA Leave Court, it is tied to the arbitration proceeding convened to determine which share price should be used to pay Sattva's finder's fee. The SC Leave Court was entitled to rely upon such conduct as a basis for denying leave pursuant to its residual discretion.

[100] In the result, in my respectful opinion, even if the CA Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the SC Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion.

[101] Although the CA Leave Court erred in granting leave, these protracted proceedings have nonetheless now reached this Court. In light of the fact that the true concern between the parties is the merits of the appeal — that is, how much the Agreement requires Creston to pay Sattva — and that the courts below differed significantly in their interpretation of the Agreement, it would be

parce que « [t]out au long de ces procédures, Homex a cherché à éviter les obligations qui se rattachent au lotissement des terrains » qu'elle détenait (p. 1037), même si Homex savait, de l'avis de la Cour, qu'elle devait assumer cette obligation (p. 1017-1019). Cette conduite se rapportait, non pas à la question de savoir si le règlement avait été adopté d'une manière équitable sur le plan de la procédure, mais au désaccord à l'origine du litige. Par conséquent, je crois que l'arrêt *Homex* étaye la proposition selon laquelle une conduite répréhensible se rapportant au différend à l'origine du litige peut justifier le refus de la réparation discrétionnaire sollicitée, en l'occurrence l'autorisation d'interjeter appel.

[99] En l'espèce, l'arbitre a tiré la conclusion de fait suivante : Creston a induit la Bourse et Sattva en erreur en ce qui concerne [TRADUCTION] « la nature de l'obligation qu'elle avait contractée envers Sattva en affirmant que les honoraires d'intermédiation étaient payables en argent » (par. 56(k)). Bien que cette conduite ne soit pas reliée à la question de droit énoncée par la formation de la CA saisie de la demande d'autorisation, elle est reliée à l'arbitrage visant à déterminer le cours de l'action applicable aux fins du versement des honoraires d'intermédiation de Sattva. La Cour suprême pouvait à bon droit fonder sur une telle conduite sa décision de refuser l'autorisation, en vertu de son pouvoir discrétionnaire.

[100] Par conséquent, à mon humble avis, même si la formation de la CA saisie de la demande d'autorisation avait défini une question de droit et qu'il avait été satisfait au critère du risque d'erreur judiciaire, elle aurait dû confirmer la décision de la formation de la CS saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour.

[101] S'il est vrai que la formation de la CA saisie de la demande d'autorisation a commis une erreur en autorisant l'appel, ces interminables procédures ne s'en trouvent pas moins à l'heure actuelle devant nous. Puisque, par ailleurs, c'est la question de fond de l'appel — soit celle de savoir combien l'entente exige que Creston paie à Sattva — qui intéresse réellement les parties, et que les tribunaux d'instance

unsatisfactory not to address the very dispute that has given rise to these proceedings. I will therefore proceed to consider the three remaining questions on appeal as if leave to appeal had been properly granted.

C. *Standard of Review Under the AA*

[102] I now turn to consideration of the decisions of the appeal courts. It is first necessary to determine the standard of review of the arbitrator's decision in respect of the question on which the CA Leave Court granted leave: whether the arbitrator construed the finder's fee provision in light of the Agreement as a whole, particularly, whether the finder's fee provision was interpreted having regard for the "maximum amount" proviso.

[103] At the outset, it is important to note that the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which sets out standards of review of the decisions of many statutory tribunals in British Columbia (see ss. 58 and 59), does not apply in the case of arbitrations under the *AA*.

[104] Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it, is not entirely applicable to the commercial arbitration context. For example, the *AA* forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the

inférieure ont considérablement divergé d'opinion quant à l'interprétation qu'il faut donner à l'entente, il serait bien peu satisfaisant que le véritable litige à l'origine de cette instance ne soit pas réglé. Je vais donc examiner les trois autres questions soulevées en appel comme si l'autorisation d'interjeter appel avait été accordée à bon droit.

C. *Norme de contrôle applicable aux affaires régies par l'AA*

[102] Abordons les décisions des tribunaux siégeant en appel. Tout d'abord, il est nécessaire de déterminer la norme applicable au contrôle de la sentence arbitrale en fonction de la question à l'égard de laquelle la formation de la CA saisie de la demande d'autorisation a accordé cette dernière : l'arbitre a-t-il interprété la disposition sur les honoraires d'intermédiation à la lumière de l'entente dans son ensemble? Plus particulièrement, l'a-t-il interprétée en tenant compte de la stipulation relative au « plafond »?

[103] D'entrée de jeu, il convient de souligner que l'*Administrative Tribunals Act*, S.B.C. 2004, ch. 45, laquelle prévoit les normes de contrôle applicables aux décisions rendues par de nombreux tribunaux administratifs de la Colombie-Britannique (art. 58 et 59), ne s'applique pas aux arbitrages régis par l'*AA*.

[104] L'examen en appel des sentences arbitrales commerciales s'inscrit dans un régime, strictement défini et adapté aux objectifs de l'arbitrage commercial, qui diffère du contrôle judiciaire d'une décision rendue par un tribunal administratif. Par exemple, la plupart du temps, les parties décident d'un commun accord de soumettre leur différend à l'arbitrage. Il ne s'agit pas d'un processus imposé par la loi. De plus, contrairement à la procédure devant un tribunal administratif, dans le cas d'un arbitrage les parties à la convention choisissent le nombre d'arbitres et l'identité de chacun. Ces différences révèlent que le cadre relatif au contrôle judiciaire établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts rendus depuis, ne peut être tout à fait transposé dans le contexte de l'arbitrage commercial. Par exemple, l'*AA* interdit

Dunsmuir judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).

[105] Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

[106] *Dunsmuir* and the post-*Dunsmuir* jurisprudence confirm that it will often be possible to determine the standard of review by focusing on the nature of the question at issue (see for example *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 44). In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*Alberta Teachers' Association*, at para. 30). The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case.

le contrôle des conclusions de fait tirées par l'arbitre. En matière d'arbitrage commercial, une telle disposition est absolue. Suivant le cadre établi dans *Dunsmuir*, l'existence d'une disposition d'inattaquabilité (aussi appelée clause privative) n'empêche pas le tribunal judiciaire de procéder au contrôle d'une décision administrative, elle signale simplement que la déférence est de mise (*Dunsmuir*, par. 31).

[105] Il demeure que le contrôle judiciaire d'une décision rendue par un tribunal administratif et l'appel d'une sentence arbitrale se ressemblent dans une certaine mesure. Dans les deux cas, le tribunal examine la décision rendue par un décideur administratif. En outre, l'expertise constitue un facteur tant en matière de contrôle judiciaire qu'en matière d'arbitrage commercial : quand les parties choisissent leur propre décideur, on peut présumer qu'elles fondent leur choix sur l'expertise de l'arbitre dans le domaine faisant l'objet du litige ou jugent sa compétence acceptable. Pour ces raisons, j'estime que certains éléments du cadre établi dans l'arrêt *Dunsmuir* aident à déterminer le degré de déférence qu'il convient d'accorder aux sentences rendues en matière d'arbitrage commercial.

[106] La jurisprudence depuis l'arrêt *Dunsmuir* vient confirmer qu'il est souvent possible de déterminer la norme de contrôle applicable suivant la nature de la question en litige (voir par exemple *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 44). En matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte, comme les questions constitutionnelles ou les questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur (*Alberta Teachers' Association*, par. 30). La question dont nous sommes saisis, à savoir si l'arbitre a interprété l'entente dans son ensemble, n'appartient pas à l'une ou l'autre de ces catégories. Compte tenu des éléments pertinents de l'analyse établie dans l'arrêt *Dunsmuir*, la norme de la décision raisonnable s'applique en l'espèce.

D. *The Arbitrator Reasonably Construed the Agreement as a Whole*

[107] For largely the reasons outlined by Justice Armstrong in paras. 57-75 of the SC Appeal Court decision, in my respectful opinion, in determining that Sattva is entitled to be paid its finder's fee in shares priced at $0.15 per share, the arbitrator reasonably construed the Agreement as a whole. Although Justice Armstrong conducted a correctness review of the arbitrator's decision, his reasons amply demonstrate the reasonableness of that decision. The following analysis is largely based upon his reasoning.

[108] The question that the arbitrator had to decide was which date should be used to determine the price of the shares used to pay the finder's fee: the date specified in the Market Price definition in the Agreement or the date the finder's fee was to be paid?

[109] The arbitrator concluded that the price determined by the Market Price definition prevailed, i.e. $0.15 per share. In his view, this conclusion followed from the words of the Agreement and was "clear and beyond argument" (para. 23). Apparently, because he considered this issue clear, he did not offer extensive reasons in support of his conclusion.

[110] In *Newfoundland and Labrador Nurses' Union*, Abella J. cites Professor David Dyzenhaus to explain that, when conducting a reasonableness review, it is permissible for reviewing courts to supplement the reasons of the original decision-maker as part of the reasonableness analysis:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc., then it is also the case that its decision should be presumed to be correct even if its reasons are in

D. *L'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble*

[107] Essentiellement pour les mêmes motifs que ceux exprimés par le juge Armstrong aux par. 57-75 de la décision de la CS sur l'appel, je suis d'avis que l'arbitre, en déterminant que Sattva était en droit de recevoir ses honoraires d'intermédiation en actions, à raison de 0,15 $ l'action, a donné une interprétation raisonnable de l'entente considérée dans son ensemble. Le juge Armstrong a contrôlé la décision de l'arbitre selon la norme de la décision correcte, mais ses motifs démontrent amplement le caractère raisonnable de cette décision. L'analyse qui suit est largement fondée sur son raisonnement.

[108] La question que devait trancher l'arbitre portait sur la date qui doit être retenue pour évaluer le cours de l'action aux fins du versement des honoraires d'intermédiation : la date établie selon la définition du cours qui figure dans l'entente ou la date du versement des honoraires d'intermédiation.

[109] L'arbitre a conclu que la valeur calculée selon la définition du cours l'emportait, soit 0,15 $ l'action. Selon lui, tel constat découlait des termes de l'entente et était [TRADUCTION] « clair et incontestable » (par. 23). Apparemment, comme il estimait que ce point était clair, il ne l'a pas motivé abondamment.

[110] Dans l'arrêt *Newfoundland and Labrador Nurses' Union*, la juge Abella cite le professeur David Dyzenhaus pour expliquer que les tribunaux siégeant en révision peuvent compléter les motifs du décideur de première ligne dans le cadre de l'analyse du caractère raisonnable :

> [TRADUCTION] Le « caractère raisonnable » s'entend ici du fait que les motifs étayent, effectivement ou en principe, la conclusion. Autrement dit, même si les motifs qui ont en fait été donnés ne semblent pas tout à fait convenables pour étayer la décision, la cour de justice doit d'abord chercher à les compléter avant de tenter de les contrecarrer. Car s'il est vrai que parmi les motifs pour lesquels il y a lieu de faire preuve de retenue on compte le fait que c'est le tribunal, et non la cour de justice, qui a été désigné comme décideur de

some respects defective. [Emphasis added by Abella J.; para. 12.]

(Quotation from D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

Accordingly, Justice Armstrong's explanation of the interaction between the Market Price definition and the "maximum amount" proviso can be considered a supplement to the arbitrator's reasons.

[111] The two provisions at issue here are the Market Price definition and the "maximum amount" proviso:

2. DEFINITIONS

"Market Price" for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

And:

3. FINDER'S FEE

3.1 . . . the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations. [Emphasis added.]

première ligne, la connaissance directe qu'a le tribunal du différend, son expertise, etc., il est aussi vrai qu'on doit présumer du bien-fondé de sa décision même si ses motifs sont lacunaires à certains égards. [Soulignement ajouté par la juge Abella; par. 12.]

(Citation de D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 304)

Par conséquent, on peut supposer que l'explication donnée par le juge Armstrong du jeu de la définition du cours et de la stipulation relative au « plafond » complète les motifs de l'arbitre.

[111] Les deux clauses en cause sont la définition du cours et la stipulation relative au « plafond » :

[TRADUCTION]

2. DÉFINITIONS

« **cours** », pour les sociétés dont les titres sont inscrits à la cote de la Bourse de croissance TSX, a le sens qui lui est attribué dans le Guide du financement des sociétés de la Bourse de croissance TSX, c'est-à-dire qu'il s'entend du cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition. Pour les sociétés cotées à la Bourse TSX, le cours s'entend du cours de clôture moyen des actions de la société à une bourse reconnue cinq jours de bourse avant la publication du communiqué de presse annonçant l'acquisition.

Et :

3. HONORAIRES D'INTERMÉDIATION

3.1 . . . la société convient qu'à la conclusion d'une acquisition qui lui a été présentée par l'intermédiaire, elle verse à l'intermédiaire des honoraires (des « honoraires d'intermédiation »), calculés en fonction de la contrepartie versée au vendeur, dont le montant est égal au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX. Ces honoraires d'intermédiation sont versés en actions de la société en fonction du cours ou, au choix de l'intermédiaire, en actions et en argent, dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation. [Je souligne.]

[112] Section 3.1 entitles Sattva to be paid a finder's fee in shares based on the "Market Price". Section 2 of the Agreement states that Market Price for companies listed on the TSXV should be "calculated on close of business day before the issuance of the press release announcing the Acquisition". In this case, shares priced on the basis of the Market Price definition would be $0.15 per share. The words "provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations" in s. 3.1 of the Agreement constitute the "maximum amount" proviso. This proviso limits the amount of the finder's fee. The maximum finder's fee in this case is US$1.5 million (see s. 3.3 of the TSXV Policy 5.1 in Appendix II).

[113] While the "maximum amount" proviso limits the amount of the finder's fee, it does not affect the Market Price definition. As Justice Armstrong explained, the Market Price definition acts to fix the date at which one medium of payment (US$) is transferred into another (shares):

> The medium for payment of the finder's fee is clearly established by the fee agreement. The market value of those shares at the time that the parties entered into the fee agreement was unknown. The respondent analogizes between payment of the $1.5 million US finder's fee in shares and a hypothetical agreement permitting payment of $1.5 million US in Canadian dollars. Both agreements would contemplate a fee paid in different currencies. The exchange rate of the US and Canadian dollar would be fixed to a particulate date, as is the value of the shares by way of the Market Price in the fee agreement. That exchange rate would determine the number of Canadian dollars paid in order to satisfy the $1.5 million US fee, as the Market Price does for the number of shares paid in relation to the fee. The Canadian dollar is the form of the fee payment, as are the shares. Whether the Canadian dollar increased or decreased in value after the date on which the exchange rate is based is irrelevant. The amount of the fee paid remains $1.5 million US, payable in the number of Canadian dollars (or shares) equal to the

[112] L'article 3.1 de l'entente permet à Sattva de recevoir ses honoraires d'intermédiation en actions en fonction du « cours ». Aux termes de l'art. 2 de l'entente, le cours des titres des sociétés cotées à la Bourse de croissance TSX est égal au « cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition ». En l'espèce, compte tenu de la définition du cours, l'action vaudrait 0,15 $. Le passage « dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation » tiré de l'art. 3.1 de l'entente constitue la stipulation relative au « plafond ». Cette stipulation limite le montant des honoraires d'intermédiation. Le plafond correspond dans le cas qui nous occupe à 1,5 million $US (voir le point 3.3 de la politique 5.1 de la Bourse à l'annexe II).

[113] La stipulation relative au « plafond » limite le montant des honoraires d'intermédiation, mais elle ne change rien à la définition du cours. Comme l'explique le juge Armstrong, la définition du cours fixe la date à laquelle un moyen de paiement (dollars américains) est converti en un autre (actions) :

> [TRADUCTION] Le moyen de paiement des honoraires d'intermédiation est clairement établi par l'entente conclue en ce sens. La valeur marchande de ces actions au moment où les parties ont conclu cette entente était inconnue. L'intimée établit une analogie entre le paiement en actions des honoraires d'intermédiation de 1,5 million $US et une entente hypothétique en vertu de laquelle la somme de 1,5 million $US serait convertie en dollars canadiens. Dans les deux cas, les honoraires seraient payés en devises différentes. Le taux de change d'une à l'autre serait fixé à une date précise, tout comme l'est le cours de l'action dans l'entente relative aux honoraires. Ce taux de change permettrait de calculer la somme à verser en dollars canadiens en règlement des honoraires de 1,5 million $US, tout comme le cours permet de déterminer le nombre d'actions cédées en règlement des honoraires. Le dollar canadien est une forme de paiement, au même titre que l'action. Il importe peu que la valeur du dollar canadien augmente ou diminue après la date fixée pour établir le taux de change. Le

amount of the fee based on the value of that currency on the date that the value is determined.

(SC Appeal Court decision, at para. 71)

[114] Justice Armstrong explained that Creston's position requires the Market Price definition to be ignored and for the shares to be priced based on the valuation done in anticipation of a private placement.

[115] However, nothing in the Agreement expresses or implies that compliance with the "maximum amount" proviso should be reassessed at a date closer to the payment of the finder's fee. Nor is the basis for the new valuation, in this case a private placement, mentioned or implied in the Agreement. To accept Creston's interpretation would be to ignore the words of the Agreement which provide that the "finder's fee is to be paid in shares of the Company based on Market Price".

[116] The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both the Market Price definition and the "maximum amount" proviso. The arbitrator's interpretation of the Agreement, as explained by Justice Armstrong, achieves this goal by reconciling the Market Price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

[117] As Justice Armstrong explained, setting the share price in advance creates a risk that makes selecting payment in shares qualitatively different from choosing payment in cash. There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient

montant des honoraires payé est toujours égal à 1,5 million $US. Il est converti en un certain nombre de dollars canadiens (ou d'actions) équivalant au montant des honoraires en fonction de la valeur de la devise à la date à laquelle cette valeur est déterminée.

(Décision de la CS sur l'appel, par. 71)

[114] Comme l'explique le juge Armstrong, accepter la position de Creston revient à ne pas tenir compte de la définition du cours et à fixer le cours de l'action en fonction de l'évaluation faite en prévision d'un placement privé.

[115] Cependant, rien dans l'entente n'indique, expressément ou implicitement, qu'il faille réévaluer avant la date du versement des honoraires d'intermédiation la conformité à la stipulation relative au « plafond ». L'entente ne précise pas non plus — ni expressément, ni implicitement — la base sur laquelle il faudrait procéder à une telle réévaluation — en l'occurrence un placement privé. Accepter l'interprétation de Creston reviendrait à faire fi du libellé de l'entente selon lequel les « honoraires d'intermédiation sont versés en actions de la société en fonction du cours ».

[116] La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donne effet à cette dernière et à la stipulation relative au « plafond ». Comme l'explique le juge Armstrong, l'interprétation par l'arbitre de l'entente atteint cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne peut être considérée comme déraisonnable.

[117] Comme l'explique le juge Armstrong, fixer le cours de l'action en avance engendre un risque qui rend le paiement en actions qualitativement différent du paiement en argent. Le versement des honoraires sous forme d'actions présente un risque inhérent, qui ne se pose pas dans le cas du versement en argent. Les honoraires payés en argent ont une valeur prédéterminée. Par contre, quand les honoraires sont versés en actions, le cours de l'action (ou le mécanisme permettant de le déterminer) est fixé à l'avance. Cependant, le cours de l'action

of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both Creston and Sattva would have been aware of this as sophisticated business parties.

[118] By accepting payment in shares, Sattva was accepting that it was subject to the volatility of the market. If Creston's share price had fallen, Sattva would still have been bound by the share price determined according to the Market Price definition resulting in it receiving a fee paid in shares with a market value of less than the maximum amount of US$1.5 million. It would make little sense to accept the risk of the share price decreasing without the possibility of benefitting from the share price increasing. As Justice Armstrong stated:

> It would be inconsistent with sound commercial principles to insulate the appellant from a rise in share prices that benefitted the respondent at the date that the fee became payable, when such a rise was foreseeable and ought to have been addressed by the appellant, just as it would be inconsistent with sound commercial principles, and the terms of the fee agreement, to increase the number of shares allocated to the respondent had their value decreased relative to the Market Price by the date that the fee became payable. Both parties accepted the possibility of a change in the value of the shares after the Market Price was determined when entering into the fee agreement.
>
> (SC Appeal Court decision, at para. 70)

[119] For these reasons, the arbitrator did not ignore the "maximum amount" proviso. The arbitrator's reasoning, as explained by Justice Armstrong, meets the reasonableness threshold of justifiability, transparency and intelligibility (*Dunsmuir*, at para. 47).

fluctue avec le temps. La personne qui reçoit des honoraires payés en actions espère une augmentation du cours, de sorte que ses actions auront une valeur marchande supérieure à celle qui est établie selon le cours prédéterminé. En revanche, si le cours chute, cette personne reçoit des actions dont la valeur est inférieure à celle des actions selon le cours prédéterminé. Ce risque est bien connu de ceux qui évoluent dans ce milieu, et Creston et Sattva, des parties avisées, en auraient eu connaissance.

[118] En acceptant un paiement en actions, Sattva acceptait de se soumettre à la volatilité du marché. Si l'action de Creston avait chuté, Sattva aurait tout de même été liée par la valeur déterminée en application de la définition du cours, de sorte qu'elle aurait reçu des actions d'une valeur marchande inférieure au plafond de 1,5 million $US. Il ne serait guère logique d'accepter le risque d'une baisse du cours de l'action sans avoir la possibilité de bénéficier d'une hausse. Pour reprendre les propos du juge Armstrong :

> [TRADUCTION] Il serait contraire aux principes commerciaux reconnus de protéger l'appelante de la hausse du cours de l'action dont bénéficiait l'intimée à la date de versement des honoraires, alors qu'une telle augmentation était prévisible et aurait dû être soulevée par l'appelante, tout comme il serait contraire aux principes commerciaux reconnus, et aux termes de l'entente relative aux honoraires, d'augmenter le nombre d'actions cédées à l'intimée dans le cas où leur valeur aurait baissé par rapport au cours en vigueur à la date du versement des honoraires. Les deux parties ont reconnu, quand elles ont conclu l'entente relative aux honoraires, la possibilité de fluctuation de la valeur de l'action après la définition du cours.
>
> (Décision de la CS sur l'appel, par. 70)

[119] Pour ces raisons, on ne peut prétendre que l'arbitre n'a pas tenu compte de la stipulation de l'entente relative au « plafond ». Le raisonnement de l'arbitre, que le juge Armstrong explique, satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité (*Dunsmuir*, par. 47).

E. *Appeal Courts Are Not Bound by Comments on the Merits of the Appeal Made by Leave Courts*

[120] The CA Appeal Court held that it and the SC Appeal Court were bound by the findings made by the CA Leave Court regarding not simply the decision to grant leave to appeal, but also the merits of the appeal. In other words, it found that the SC Appeal Court erred in law by ignoring the findings of the CA Leave Court regarding the merits of the appeal.

[121] The CA Appeal Court noted two specific findings regarding the merits of the appeal that it held were binding on it and the SC Appeal Court: (1) it would be anomalous if the Agreement allowed Sattva to receive US$1.5 million if it received its fee in cash, but allowed it to receive shares valued at approximately $8 million if Sattva received its fee in shares; and (2) that the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement:

> The [SC Appeal Court] judge found the arbitrator had expressly addressed the maximum amount payable under paragraph 3.1 of the Agreement and that he was correct.
>
> This finding is contrary to the remarks of Madam Justice Newbury in the earlier appeal that, if Sattva took its fee in shares valued at $0.15, it would receive a fee having a value at the time the fee became payable of over $8 million. If the fee were taken in cash, the amount payable would be $1.5 million US. Newbury J.A. specifically held that the arbitrator did not note this anomaly and did not address the meaning of paragraph 3.1 of the Agreement.
>
> The [SC Appeal Court] judge was bound to accept those findings. Similarly, absent a five-judge division in this appeal, we must also accept those findings. [paras. 42-44]

E. *La formation saisie de l'appel n'est pas liée par les observations formulées par la formation saisie de la demande d'autorisation sur le bien-fondé de l'appel*

[120] La Cour d'appel a conclu qu'elle-même et la formation de la CS saisie de l'appel étaient liées par les conclusions tirées par la formation de la CA saisie de la demande d'autorisation en ce qui a trait non seulement à la décision d'autoriser l'appel, mais aussi au bien-fondé de l'appel. Autrement dit, elle a conclu que la formation de la CS saisie de l'appel avait commis une erreur de droit en faisant fi des conclusions de la formation de la CA saisie de la demande d'autorisation quant au bien-fondé de l'appel.

[121] La formation de la CA saisie de l'appel a mis en relief deux conclusions précises quant au bien-fondé de l'appel qui, à son avis, la liaient elle, et aussi la formation de la CS saisie de l'appel : 1° il serait incongru que l'entente permette à Sattva, si elle opte pour le versement de ses honoraires en argent, de toucher 1,5 million $US alors que, si elle opte pour le versement sous forme d'actions, elle recevra un portefeuille valant environ 8 millions $ et 2° l'arbitre n'a pas tenu compte de cette anomalie et a fait fi de l'art. 3.1 de l'entente :

> [TRADUCTION] Le juge [de la CS saisi de l'appel] a conclu que l'arbitre avait expressément tenu compte du plafond des honoraires payables conformément au paragraphe 3.1 de l'entente et que sa sentence était correcte.
>
> Cette conclusion est contraire aux remarques formulées par la juge Newbury dans l'appel antérieur selon lesquelles, si ses honoraires étaient versés en actions, à raison de 0,15 $ l'unité, Sattva obtiendrait des honoraires d'une valeur, à la date du versement des honoraires, de plus de 8 millions $. Si elle optait pour le versement en argent, elle recevrait un montant de 1,5 million $US. La juge Newbury a statué expressément que l'arbitre n'avait pas soulevé cette anomalie et qu'il n'avait pas tenu compte du sens du paragraphe 3.1 de l'entente.
>
> Le juge [de la CS saisi de l'appel] était tenu d'accepter ces conclusions. De même, à défaut d'une décision d'une formation de cinq juges en l'espèce, nous devons aussi accepter ces conclusions. [par. 42-44]

[122] With respect, the CA Appeal Court erred in holding that the CA Leave Court's comments on the merits of the appeal were binding on it and on the SC Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 88). A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful (*Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, at para. 27, leave to appeal refused, [2013] 3 S.C.R. viii). This is true even where the determination of whether to grant leave involves, as in this case, a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal (*Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), at para. 32).

[123] Creston concedes this point but argues that the CA Appeal Court's finding that it was bound by the CA Leave Court was inconsequential because the CA Appeal Court came to the same conclusion on the merits as the CA Leave Court based on separate and independent reasoning.

[124] The fact that the CA Appeal Court provided its own reasoning as to why it came to the same conclusion as the CA Leave Court does not vitiate the error. Once the CA Appeal Court treated the CA Leave Court's reasons on the merits as binding, it could hardly have come to any other decision. As counsel for Sattva pointed out, treating the leave decision as binding would render an appeal futile.

[122] Avec tout le respect que je lui dois, j'estime que la formation de la CA saisie de l'appel a commis une erreur en concluant que les commentaires sur le bien-fondé de l'appel formulés par la formation de la CA saisie de la demande d'autorisation la liaient elle, de même que la formation de la CS saisie de l'appel. Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 88). Il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli (*Pacifica Mortgage Investment Corp. c. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, par. 27, autorisation d'appel refusée, [2013] 3 R.C.S. viii). Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause, comme c'est le cas en l'espèce. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs (*Tamil Co-operative Homes Inc. c. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), par. 32).

[123] Creston concède ce point, mais prétend que la conclusion tirée par la formation de la CA saisie de l'appel selon laquelle elle était liée par les conclusions de celle saisie de la demande d'autorisation était sans conséquence parce que la première est arrivée à la même conclusion que la seconde sur le bien-fondé, à l'issue d'un raisonnement distinct et indépendant.

[124] Le fait que la formation de la CA saisie de l'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur. Dès lors que la formation de la CA saisie de l'appel a accordé un caractère obligatoire aux motifs concernant le bien-fondé de l'appel énoncés par celle saisie de la demande d'autorisation, elle ne pouvait guère arriver à une autre décision. Comme le souligne l'avocat de Sattva, considérer comme impérative la décision relative à la demande d'autorisation rendrait l'appel futile.

VI. Conclusion

[125] The CA Leave Court erred in granting leave to appeal in this case. In any event, the arbitrator's decision was reasonable. The appeal from the judgments of the Court of Appeal for British Columbia dated May 14, 2010 and August 7, 2012 is allowed with costs throughout and the arbitrator's award is reinstated.

APPENDIX I

Relevant Provisions of the Sattva-Creston Finder's Fee Agreement

(a) "Market Price" definition:

2. DEFINITIONS

"Market Price" for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

(b) Finder's fee provision (which contains the "maximum amount" proviso):

3. FINDER'S FEE

3.1 . . . the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee

VI. Conclusion

[125] La formation de la CA saisie de la demande d'autorisation a commis une erreur en accordant l'autorisation d'interjeter appel en l'espèce. Quoi qu'il en soit, la sentence arbitrale était raisonnable. L'appel interjeté à l'encontre des décisions de la Cour d'appel de la Colombie-Britannique datées du 14 mai 2010 et du 7 août 2012 est accueilli avec dépens devant toutes les cours. La sentence arbitrale est rétablie.

ANNEXE I

Dispositions pertinentes de l'entente relative aux honoraires d'intermédiation conclue entre Sattva et Creston

a) Définition du « cours » :

[TRADUCTION]

2. DÉFINITIONS

« cours », pour les sociétés dont les titres sont inscrits à la cote de la Bourse de croissance TSX, a le sens qui lui est attribué dans le Guide du financement des sociétés de la Bourse de croissance TSX, c'est-à-dire qu'il s'entend du cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition. Pour les sociétés cotées à la Bourse TSX, le cours s'entend du cours de clôture moyen des actions de la société à une bourse reconnue cinq jours de bourse avant la publication du communiqué de presse annonçant l'acquisition.

b) Disposition relative aux honoraires d'intermédiation (laquelle contient la stipulation relative au « plafond ») :

[TRADUCTION]

3. HONORAIRES D'INTERMÉDIATION

3.1 . . . la société convient qu'à la conclusion d'une acquisition qui lui a été présentée par l'intermédiaire, elle verse à l'intermédiaire des honoraires (des « honoraires d'intermédiation »), calculés en fonction de la contrepartie versée au vendeur, dont le montant est égal au plafond payable conformément aux règles et politiques

is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.

APPENDIX II

Section 3.3 of TSX Venture Exchange Policy 5.1: Loans, Bonuses, Finder's Fees and Commissions

3.3 Finder's Fee Limitations

The finder's fee limitations apply if the benefit to the Issuer is an asset purchase or sale, joint venture agreement, or if the benefit to the Issuer is not a specific financing. The consideration should be stated both in dollars and as a percentage of the value of the benefit received. Unless there are unusual circumstances, the finder's fee should not exceed the following percentages:

Benefit	Finder's Fee
On the first $300,000	Up to 10%
From $300,000 to $1,000,000	Up to 7.5%
From $1,000,000 and over	Up to 5%

As the dollar value of the benefit increases, the fee or commission, as a percentage of that dollar value should generally decrease.

APPENDIX III

Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (as it read on January 12, 2007) (now the *Arbitration Act*)

Appeal to the court

31 (1) A party to an arbitration may appeal to the court on any question of law arising out of the award if

de la Bourse de croissance TSX. Ces honoraires d'intermédiation sont versés en actions de la société en fonction du cours ou, au choix de l'intermédiaire, en actions et en argent, dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation.

ANNEXE II

Point 3.3 de la politique 5.1 de la Bourse de croissance TSX : Emprunts, primes, honoraires d'intermédiation et commissions

3.3 Plafond des honoraires d'intermédiation

Les honoraires d'intermédiation sont assujettis à un plafond si l'avantage que retire l'émetteur prend la forme d'un achat ou d'une vente d'actifs ou d'une convention de coentreprise, ou si son avantage n'est pas lié à un financement précis. La contrepartie devrait être exprimée à la fois en valeur monétaire et en pourcentage de la valeur de l'avantage reçu. Sauf dans des circonstances exceptionnelles, les honoraires d'intermédiation ne doivent pas dépasser les pourcentages suivants :

Avantage	Honoraires d'intermédiation
300 000 $ et moins	Jusqu'à 10 %
Entre 300 000 $ et 1 000 000 $	Jusqu'à 7,5 %
1 000 000 $ et plus	Jusqu'à 5 %

De façon générale, les honoraires ou la commission, exprimés en pourcentage de la valeur monétaire de l'avantage, devraient être inversement proportionnels à cette valeur.

ANNEXE III

Commercial Arbitration Act, R.S.B.C. 1996, ch. 55 (dans sa version du 12 janvier 2007) (maintenant l'*Arbitration Act*)

[TRADUCTION]

Appel devant le tribunal

31 (1) Une partie à l'arbitrage peut interjeter appel au tribunal sur toute question de droit découlant de la sentence si, selon le cas :

(a) all of the parties to the arbitration consent, or

(b) the court grants leave to appeal.

(2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

(3) If the court grants leave to appeal under this section, it may attach conditions to the order granting leave that it considers just.

(4) On an appeal to the court, the court may

(a) confirm, amend or set aside the award, or

(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

Appeal allowed with costs throughout.

Solicitors for the appellant: McCarthy Tétrault, Vancouver.

Solicitors for the respondent: Miller Thomson, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener the BCICAC Foundation: Fasken Martineau DuMoulin, Vancouver.

(a) toutes les parties à l'arbitrage y consentent,

(b) le tribunal accorde l'autorisation.

(2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :

(a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,

(b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,

(c) la question de droit est d'importance publique.

(3) Si le tribunal accorde l'autorisation en vertu du présent article, il peut assortir des conditions qu'il estime équitables l'ordonnance accordant l'autorisation.

(4) En appel, le tribunal peut, selon le cas :

(a) confirmer, modifier ou annuler la sentence,

(b) renvoyer la sentence à l'arbitre avec l'opinion du tribunal sur la question de droit qui a fait l'objet de l'appel.

Pourvoi accueilli avec dépens devant toutes les cours.

Procureurs de l'appelante : McCarthy Tétrault, Vancouver.

Procureurs de l'intimée : Miller Thomson, Vancouver.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intervenante BCICAC Foundation : Fasken Martineau DuMoulin, Vancouver.

TAB 4

2014 SCC 71, 2014 CSC 71
Supreme Court of Canada

Bhasin v. Hrynew

2014 CarswellAlta 2046, 2014 CarswellAlta 2047, 2014 SCC 71, 2014 CSC 71, [2014] 11 W.W.R. 641, [2014] 3 S.C.R. 494, [2014] A.W.L.D. 4738, [2014] A.W.L.D. 4740, [2014] A.W.L.D. 4828, [2014] A.W.L.D. 4829, [2014] S.C.J. No. 71, 20 C.C.E.L. (4th) 1, 245 A.C.W.S. (3d) 832, 27 B.L.R. (5th) 1, 379 D.L.R. (4th) 385, 464 N.R. 254, J.E. 2014-1992

Harish Bhasin, carrying on business as Bhasin & Associates, Appellant and Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited), Respondents

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

Heard: February 12, 2014
Judgment: November 13, 2014
Docket: 35380

Proceedings: reversing in part *Bhasin v. Hrynew* (2013), [2013] 11 W.W.R. 459, 84 Alta. L.R. (5th) 68, 12 B.L.R. (5th) 175, 567 W.A.C. 28, 544 A.R. 28, 2013 CarswellAlta 822, 2013 ABCA 98, 362 D.L.R. (4th) 18, Jean Côté J.A., Marina Paperny J.A., R. Paul Belzil J. (Alta. C.A.); reversing *Bhasin v. Hrynew* (2011), [2012] 9 W.W.R. 728, 96 B.L.R. (4th) 73, 2011 ABQB 637, 2011 CarswellAlta 1905, A.B. Moen J. (Alta. Q.B.)

Counsel: Neil Finkelstein, Brandon Kain, John McCamus, Stephen Moreau, for Appellant
Eli S. Lederman, Jon Laxer, Constanza Pauchulo, for Respondents

Subject: Civil Practice and Procedure; Contracts; Torts

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Aleyn v. Belchier (1758), 28 E.R. 634, 1 Eden 132 (Eng. Ch.) — considered

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Atlantic Richfield Co. v. Razumic (1978), 390 A.2d 736, 480 Pa. 366 (U.S. Pa. S.C.) — referred to

Bank of America Canada v. Mutual Trust Co. (2002), 287 N.R. 171, 211 D.L.R. (4th) 385, 49 R.P.R. (3d) 1, 159 O.A.C. 1, 2002 SCC 43, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, [2002] 2 S.C.R. 601, 2002 CSC 43 (S.C.C.) — referred to

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Banque de Montréal c. Ng (1989), 62 D.L.R. (4th) 1, [1989] 2 S.C.R. 429, 100 N.R. 203, 26 Q.A.C. 20, 1989 CarswellQue 126, 28 C.C.E.L. 1, 1989 CarswellQue 1818 (S.C.C.) — referred to

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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, 3 O.R. (3d) 510, 1991 CarswellOnt 450, 3 O.R. (3d) 510 (note), 1991 CarswellOnt 1019 (S.C.C.) — referred to

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art. 7 — referred to

art. 1375 — referred to

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s. 7 — referred to

Uniform Commercial Code, 2012
Generally — referred to

Aricle 1-201(b)(20) "Good faith" — considered

Aricle 1-302(b) — considered

Article 1-304 — considered

APPEAL by plaintiff from judgment reported at *Bhasin v. Hrynew* (2013), 2013 ABCA 98, 2013 CarswellAlta 822, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, 84 Alta. L.R. (5th) 68, [2013] 11 W.W.R. 459 (Alta. C.A.), allowing appeal from decision by trial judge allowing plaintiff's action for damages.

POURVOI formé par la partie demanderesse à l'encontre d'un jugement publié à *Bhasin v. Hrynew* (2013), 2013 ABCA 98, 2013 CarswellAlta 822, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, 84 Alta. L.R. (5th) 68, [2013] 11 W.W.R. 459 (Alta. C.A.), ayant accueilli l'appel interjeté à l'encontre de la décision de la juge de première instance d'accueillir l'action en dommages-intérêts de la partie demanderesse.

***Cromwell J.* (McLachlin C.J.C. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring):**

I. Introduction

1 The key issues on this appeal come down to two, straightforward questions: Does Canadian common law impose a duty on parties to perform their contractual obligations honestly? And, if so, did either of the respondents breach that duty? I would answer both questions in the affirmative. Finding that there is a duty to perform contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations. It will also bring a measure of justice to the appellant, Mr. Bhasin, who was misled and lost the value of his business as a result.

II. Facts and Judicial History

Overview and Issues

2 The appellant, Mr. Bhasin, through his business Bhasin & Associates, was an enrollment director for Canadian American Financial Corp. ("Can-Am") beginning in 1989. The relationship between Mr. Bhasin and Can-Am soured in 1999 and ultimately Can-Am decided not to renew the dealership agreement with him. The litigation leading to this appeal ensued.

3 Can-Am markets education savings plans ("ESPs") to investors through retail dealers, known as enrollment directors, such as Mr. Bhasin. It pays the enrollment directors compensation and bonuses for selling ESPs. The enrollment directors are in effect small business owners and the success of their businesses depends on them building a sales force. It took Mr. Bhasin approximately 10 years to build his sales force, but his business thrived and Can-Am gave him numerous awards and prizes recognizing him as one of their top enrollment directors in Canada: 2011 ABQB 637, 544 A.R. 28 (Alta. Q.B.), at paras. 51, 238 and 474.

4 An enrollment director's agreement that took effect in 1998 governed the relationship between Can-Am and Mr. Bhasin. (That Agreement replaced a previous agreement of an indefinite term that had governed their relationship since the outset in 1989.) The Agreement was a commercial dealership agreement, not a franchise agreement. There was no franchise fee and it was not covered by the statutory duty of fair dealing such as that provided for in s. 7 of the *Franchises Act*, R.S.A. 2000, c. F-23.

5 That said, there were some features of the 1998 Agreement that are similar to provisions typically found in franchise agreements. Mr. Bhasin was obliged to sell Can-Am investment products exclusively and owed it a fiduciary duty. Can-Am owned the client lists, was responsible for branding and implemented central policies that applied to all enrollment directors: see cls. 4.1, 5.2, 5.3 and 4.7. Mr. Bhasin could not sell, transfer, or merge his operation without Can-Am's consent, which was not to be withheld unreasonably: see cls. 4.5 and 11.4.

6 The term of the contract was three years. Clauses 8.3 and 8.4 allowed termination on short notice for misconduct or other cause. Clause 3.3 — the provision at the centre of this case — provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary.

7 Mr. Hrynew, one of the respondents and another enrollment director, was a competitor of Mr. Bhasin and there was considerable animosity between them: trial reasons, at para. 461. The trial judge found, in effect, that Mr. Hrynew pressured Can-Am not to renew its Agreement with Mr. Bhasin and that Can-Am dealt dishonestly with Mr. Bhasin and ultimately gave in to that pressure.

8 When Mr. Hrynew moved his agency to Can-Am from one of its competitors many years before the events in question, Can-Am promised him that he would be given consideration for mergers that would take place and he in fact merged with other agencies in Calgary after joining Can-Am: trial reasons, at para. 238. He was in a strong position with Can-Am because he had the largest agency in Alberta and a good working relationship with the Alberta Securities Commission which regulated Can-Am's business: para. 284.

9 Mr. Hrynew wanted to capture Mr. Bhasin's lucrative niche market around which he had built his business: trial reasons, at para. 303. Mr. Hrynew personally approached Mr. Bhasin to propose a merger of their agencies on numerous occasions: para. 238. He also actively encouraged Can-Am to force the merger and made "veiled threats" that he would leave if no merger took place: para. 282; see also paras. 251 and 287. The trial judge found that the proposed "merger" was in effect a hostile takeover of Mr. Bhasin's agency by Mr. Hrynew: para. 240. Mr. Bhasin steadfastly refused to participate in such a merger: para. 247.

10 The Alberta Securities Commission raised concerns about compliance issues among Can-Am's enrollment directors. In late 1999, the Commission required Can-Am to appoint a single provincial trading officer ("PTO") to review its enrollment directors for compliance with securities laws: trial reasons, at paras. 149, 152 and 160. Can-Am appointed Mr. Hrynew to that position in September of that year. The role required him to conduct audits of Can-Am's enrollment directors. Mr. Bhasin and Mr. Hon, another enrollment director, objected to having Mr. Hrynew, a competitor, review their confidential business records: paras. 189-196.

11 Can-Am became worried that the Commission might revoke its licence and, in 1999 and 2000, it had many discussions with the Commission about compliance. During those discussions, it was clear that Can-Am was considering a restructuring of its agencies in Alberta that involved Mr. Bhasin. In June 2000, Can-Am outlined its plans to the Commission and they included Mr. Bhasin working for Mr. Hrynew's agency. The trial judge found that this plan had been formulated before June 2000: trial reasons, at para. 256. None of this was known by Mr. Bhasin: paras. 243-46.

12 In fact, Can-Am repeatedly misled Mr. Bhasin by telling him that Mr. Hrynew, as PTO, was under an obligation to treat the information confidentially and that the Commission had rejected a proposal to have an outside PTO, neither of which was true: trial reasons at para. 195. It also responded equivocally when Mr. Bhasin asked in August 2000 whether the merger was a "done deal": para. 247. When Mr. Bhasin continued to refuse to allow Mr. Hrynew to audit his records, Can-Am threatened to terminate the 1998 Agreement and in May 2001 gave notice of non-renewal under the Agreement: paras. 207-11.

13 At the expiry of the contract term, Mr. Bhasin lost the value in his business in his assembled workforce. The majority of his sales agents were successfully solicited by Mr. Hrynew's agency. Mr. Bhasin was obliged to take less remunerative work with one of Can-Am's competitors.

14 Mr. Bhasin sued Can-Am and Mr. Hrynew. Moen J. in the Alberta Court of Queen's Bench found that it was an implied term of the contract that decisions about whether to renew the contract would be made in good faith. The court held that the corporate respondent was in breach of the implied term of good faith, Mr. Hrynew had intentionally induced breach of contract, and the respondents were liable for civil conspiracy.

15 The trial judge found that Can-Am acted dishonestly with Mr. Bhasin throughout the events leading up to the non-renewal: it misled him about its intentions with respect to the merger and about the fact that it had already proposed the new structure to the Commission; it did not communicate to him that the decision was already made and final, even though he asked; and it did not communicate with him that it was working closely with Mr. Hrynew to bring about a new corporate structure with Hrynew's being the main agency in Alberta. The trial judge also found that, had Can-Am acted honestly, Mr. Bhasin could have "governed himself accordingly so as to retain the value in his agency": para. 258.

16 The Alberta Court of Appeal allowed the respondents' appeal and dismissed Mr. Bhasin's lawsuit. The court found his pleadings to be insufficient and held that the lower court erred by implying a term of good faith in the context of an unambiguous contract containing an entire agreement clause: *Bhasin v. Hrynew*, 2013 ABCA 98, 84 Alta. L.R. (5th) 68 (Alta. C.A.).

17 The appeal raises four issues:

(a) Did Mr. Bhasin properly plead breach of the duty of good faith?

(b) Did Can-Am owe Mr. Bhasin a duty of good faith? If so, did it breach that duty?

(c) Are the respondents liable for the torts of inducing breach of contract or civil conspiracy?

(d) If there was a breach, what is the appropriate measure of damages?

III. Analysis

A. Did Mr. Bhasin Properly Plead Breach of the Duty of Good Faith?

18 The Court of Appeal held that Mr. Bhasin had not properly pleaded the good faith issue and that the trial judge had therefore erred in considering it. Mr. Bhasin contests this conclusion, while the respondents support it. I agree with Mr. Bhasin.

19 The allegations in the statement of claim clearly put the questions of improper purpose and dishonesty in issue. These facts are sufficient to put Can-Am's good faith in issue. The question of whether this conduct amounted to a breach of the duty of good faith is a legal conclusion that did not need to be pleaded separately. The defendants did not move to strike the pleadings or seek particulars of the allegation of wrongful termination in the statement of claim. Good faith was a live issue that was fully canvassed in a lengthy trial: A.F., at paras. 92-94. Written submissions by both parties at trial referred to the good faith issue and even in his opening at trial, Mr. Bhasin's counsel raised the issue of good faith.

20 The trial judge held that any deficiency in the pleadings did not cause prejudice to the respondents: paras. 23 and 48. This is an assessment she was uniquely positioned to make and her conclusion ought to be treated with deference on appeal. The good faith issue was fully argued in and addressed by the Court of Appeal and has been fully argued on the merits in this Court.

21 In my view, the trial judge did not make a reversible error by adjudicating the issue of good faith and we should address the merits of that issue.

B. Did Can-Am Owe Mr. Bhasin a Duty of Good Faith?

(1) Decisions and Positions of the Parties

(a) Decisions

22 The trial judge accepted Mr. Bhasin's position that there was a duty of good faith in this case and that it had been breached. In brief, her reasoning was as follows.

23 First, the trial judge decided that the 1998 Agreement was a type of agreement which as a matter of law requires good faith performance. She recognized that the 1998 Agreement did not fall within any of the existing categories of contract, such as employment, insurance and franchise agreements, which have been held to require good faith performance. She concluded, however, that the Agreement was analogous to a franchise or employment contract, and so by analogy to these cases, she implied a term of good faith performance as a matter of law. The contract was not balanced from its inception and the relationship placed the enrollment director in a position of inherent and predictable vulnerability: paras. 67-86.

24 Second and in the alternative, the trial judge held that a term of good faith performance should be implied based on the intentions of the parties in order to give business efficacy to the agreement. She concluded that "[w]hen one considers the whole

of the relationship ... it is clear that the parties had to operate in good faith and there was a requirement of fairness between them. In other words, good faith was necessary to give business efficacy to the whole 1998 Agreement": para. 101.

25 The 1998 Agreement contained an "entire agreement clause" stating that there were no "agreements, express, implied or statutory, other than expressly set out" in it: cl. 11.2. The trial judge held, however, that this clause did not preclude the implication of a duty of good faith. The parties, she reasoned, cannot rely on exclusion clauses to avoid contractual obligations where there is an imbalance of power and that courts refuse to let parties shelter under entire agreement clauses where it would be unjust or inequitable to do so: paras. 116-18.

26 Turning to the issue of breach, the trial judge found that Can-Am had breached the agreement, first by requiring Mr. Bhasin to submit to an audit by Mr. Hrynew and to provide the latter with access to his business records, and second by exercising the non-renewal clause in a dishonest and misleading manner and for an improper purpose. The non-renewal clause was not intended to permit Can-Am to force a merger of the Bhasin and Hrynew agencies, but that was the purpose for which Can-Am exercised this power: para. 261. The trial judge also found both respondents liable for unlawful means conspiracy and found Mr. Hrynew liable for inducing Can-Am's breach of its contract with Mr. Bhasin.

27 The Court of Appeal reversed and held that there had been no breach of contract. The duty of good faith in employment contracts could not be extended by analogy to other types of contract. In any event, the duty of good faith in the employment context is limited to the manner of termination and does not include reasons for non-renewal: C.A. reasons, at paras. 27 and 31. Nor was this a circumstance in which a term could be implied because it was so obvious it was not thought necessary to mention or was necessary to make the contract work: para. 32. Even if there were an implied duty of good faith in this case, the impugned conduct concerned the non-renewal of a contract, which occurs on expiry, unlike a termination clause: para. 31.

28 Moreover, the Court of Appeal held that a term cannot be implied where it goes against an express term of the contract. Here, the parties did not intend a perpetual contract, since they included a term allowing either party to unilaterally trigger its expiration prior to the end of each three-year term. The trial judge's approach was inconsistent with the non-renewal provision of the contract. The motive for triggering expiration was not restricted under the Agreement. The implication of a term of good faith also violated the entire agreement clause. The court held that the evidence of assurances given by Can-Am as to how the non-renewal power would be exercised fell afoul of the parol evidence rule and should not have been considered. Since the Court of Appeal held there was no breach of contract, the basis for the claims in unlawful means conspiracy and inducing breach of contract also disappeared.

(b) Positions of the Parties

29 Mr. Bhasin advances two related positions on appeal. His broad submission is that the Court should recognize a general duty of good faith in contract. The duty arises where the agreement gives the defendant the power to unilaterally defeat a legitimate contractual objective of the plaintiff and it does not clearly allow the defendant to exercise its power without regard for that objective: A.F., at para. 51. This duty of good faith prevents conduct which, while consonant with the letter of a contract, exhibits dishonesty, ill will, improper motive or similar departures from reasonable business expectations. Mr. Bhasin contends that common law in Canada is increasingly isolated as other jurisdictions embrace a greater role for good faith in contract law: A.F., at paras. 27-32. The recognition of a general duty of good faith would constitute an incremental advance in the law, given the numerous specific situations that already give rise to a duty of good faith. Mr. Bhasin relies on the findings of the trial judge that the respondents improperly and dishonestly used its non-renewal right to compel Mr. Bhasin to merge with his competitor. Mr. Bhasin contends that the respondents had no legitimate business reason for not renewing the contract. He also says that the entire agreement clause should be construed narrowly, and that express language is needed for such a clause to derogate from a duty of good faith: A.F., at para. 83.

30 Mr. Bhasin's second position, emphasized in oral argument, is that the Court should at least recognize a duty of honest performance of contractual obligations: transcript, at pp. 8, 10 and 24. Mr. Bhasin relies on the trial judge's findings that Can-Am acted dishonestly towards Mr. Bhasin throughout the period leading up to the non-renewal. It repeatedly lied to him about the nature of the organizational changes required by the Alberta Securities Commission, the nature of the audits that were to

be carried out by Mr. Hrynew, and was dishonest about its intention to force him out: trial reasons, at paras. 195, 221, 246-47 and 267.

31 Unsurprisingly, the respondents see things very differently. While they accept that good faith plays a role in Canadian contract law, they submit that this role is much more modest than Mr. Bhasin suggests. They say that such a duty arises only in certain classes of contract, such as employment contracts, and in contracts involving discretionary powers: R.F., at para. 52. In the employment context, the duty applies only to the manner in which a contract is terminated. The contract in this case was negotiated between commercial parties to whom the policy considerations underlying employment law doctrine do not apply. Mr. Bhasin is alleging a right to a perpetual, or at least indefinite, contract with the respondents. The contract in this case could not be said to be discretionary, because it provided simply that on six months notice either party could terminate the Agreement. The respondents submit that there is no ambiguity in the wording of the non-renewal clause of the contract and so there is no basis for implying other terms or for relying on extrinsic evidence of the parties' intentions. The entire agreement clause specifically precluded the implication of any terms other than the express terms of the contract.

(2) Analysis

(a) Overview

32 The notion of good faith has deep roots in contract law and permeates many of its rules. Nonetheless, Anglo-Canadian common law has resisted acknowledging any generalized and independent doctrine of good faith performance of contracts. The result is an "unsettled and incoherent body of law" that has developed "piecemeal" and which is "difficult to analyze": Ontario Law Reform Commission ("OLRC"), *Report on Amendment of the Law of Contract* (1987), at p. 169. This approach is out of step with the civil law of Quebec and most jurisdictions in the United States and produces results that are not consistent with the reasonable expectations of commercial parties.

33 In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

34 In my view, taking these two steps is perfectly consistent with the Court's responsibility to make incremental changes in the common law when appropriate. Doing so will put in place a duty that is just, that accords with the reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

(b) Good Faith as a General Organizing Principle

(i) Background

35 The doctrine of good faith traces its history to Roman law and found acceptance in earlier English contract law. For example, Lord Northington wrote in *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634 (Eng. Ch.), at p. 138, cited in *Mills v. Mills* (1938), 60 C.L.R. 150 (Australia H.C.), at p. 185, that "[n]o point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void." Similarly, Lord Kenyon wrote in *Mellish v. Motteux* (1792), Peake 156, 170 E.R. 113 (Eng. K.B.), "in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith": p. 157. In *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162 (Eng. K.B.), at p. 1910, Lord Mansfield stated that good faith is a principle applicable to all contracts: see also *Herbert v. Mercantile Fire Insurance Co.* (1878), 43 U.C.Q.B. 384 (Ont. Q.B.); R. Powell, "Good Faith in Contracts" (1956), 9 Curr. Legal Probs. 16.

36 However, these broad pronouncements have been, for the most part, restricted by subsequent jurisprudence to specific types of contracts and relationships, such as insurance contracts, leaving unclear the role of the broader principle of good faith in the modern Anglo-Canadian law of contracts: *Chitty on Contracts* (31st ed. 2012), at para. 1-039; W. P. Yee, "Protecting

Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195, at p. 195; E. P. Belobaba, "Good Faith in Canadian Contract Law", in *Special Lectures of the Law Society of Upper Canada 1985 — Commerical Law: Recent Developments and Emerging Trends* (1985), 73, at p. 75. One leading Canadian contracts scholar went so far as to say that the common law has taken a "kind of perverted pride" in the absence of any general notion of good faith, as if accepting that notion "would be admitting to the presence of some kind of embarrassing social disease": J. Swan, "Whither Contracts: A Retrospective and Prospective Overview", in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Contracts* (1984), 125, at p. 148.

37 This Court has not examined whether there is a general duty of good faith contractual performance. However, there has been an active debate in other courts and among scholars for decades over whether there is, or should be, a general or "stand-alone" duty of good faith in the performance of contracts. Canadian courts have reached different conclusions on this point.

38 Some suggest that there is a general duty of good faith: *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (N.S. T.D.), aff'd on narrower grounds (1992), 112 N.S.R. (2d) 180 (N.S. C.A.); *McDonald's Restaurants of Canada Ltd. v. British Columbia* (1997), 29 B.C.L.R. (3d) 303 (B.C. C.A.), at para. 99; *Crawford v. New Brunswick (Agricultural Development Board)* (1997), 192 N.B.R. (2d) 68 (N.B. C.A.), at paras. 7-8. They see a broad role for good faith as an implied term in all contracts that establishes minimum standards of acceptable commercial behaviour. As Kelly J. put it in *Gateway Realty*, at para. 38:

> The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. "Good faith" conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in "bad faith" — a conduct that is contrary to community standards of honesty, reasonableness or fairness.

39 Other courts are of the view that there exists no such general duty of good faith in all contracts: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.), at para. 54; *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (Alta. C.A.), at paras. 15-19, *per* Kerans J.A., *dubitante*; *Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp.*, 2013 ONCA 494, 365 D.L.R. (4th) 15 (Ont. C.A.), at para. 131; see G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 338-46. The detractors of such a general duty of good faith have accepted a limited role for good faith in certain contexts but have held that it would create commercial uncertainty and undermine freedom of contract to recognize a general duty of good faith that would permit courts to interfere with the express terms of a contract.

40 This Court ought to develop the common law to keep in step with the "dynamic and evolving fabric of our society" where it can do so in an incremental fashion and where the ramifications of the development are "not incapable of assessment": *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.), at p. 670; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.), at para. 93; see also *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.), at pp. 760-64; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), at para. 85; *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, 2002 SCC 8, [2002] 1 S.C.R. 156 (S.C.C.); *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.); *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 (S.C.C.), at para. 46. This is even more appropriate where, as here, what is contemplated is not the reversal of some settled rule, but a development directed to bringing greater certainty and coherence to a complex and troublesome area of the common law.

41 As I see it, the developments that I propose are desirable as a result of several considerations. First, the current Canadian common law is uncertain. Second, the current approach to good faith performance lacks coherence. Third, the current law is out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada — Quebec and the United States: see, e.g., Hall, at p. 347. While the developments which I propose will not completely address these problems, they will bring a measure of coherence and predictability to the law and will bring the law closer to what reasonable commercial parties would expect it to be.

(ii) Survey of the Current State of the Common Law

42 Anglo-Canadian common law has developed a number of rules and doctrines that call upon the notion of good faith in contractual dealings; it is a concept that underlies many elements of modern contract law: S. M. Waddams, *The Law of Contracts* (2010), at para. 550; J. D. McCamus *The Law of Contracts* (2nd ed. 2012), at pp. 835-38; OLRC, at p. 165; Belobaba, at pp. 75-76; J. F. O'Connor, *Good Faith in English Law* (1990), at pp. 17-49; J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997), 113 *Law Q. Rev.* 433. The approach, not unfairly, has been characterized as developing "piecemeal solutions in response to demonstrated problems": *Interfoto Library Ltd. v. Stiletto Visual Programmes Ltd.* (1987), [1989] 1 Q.B. 433 (Eng. C.A.), at p. 439, *per* Bingham L.J. (as he then was). Thus we see, for example, that good faith notions have been applied to particular types of contracts, particular types of contractual provisions and particular contractual relationships. It also underlies doctrines that explicitly deal with fairness in contracts, such as unconscionability, and plays a role in interpreting and implying contractual terms. The difficulty with this "piecemeal" approach, however, is that it often fails to take a consistent or principled approach to similar problems. A brief review of the current landscape of good faith will show the extent to which this is the case.

43 Considerations of good faith are apparent in doctrines that expressly consider the fairness of contractual bargains, such as unconscionability. This doctrine is based on considerations of fairness and preventing one contracting party from taking undue advantage of the other: G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at pp. 329-30; E. Peden, "When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability" (2005), 21 *J.C.L.* 226; Belobaba, at p. 86; S. M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995), 9 J.C.L. 55.

44 Good faith also plays a role in the law of implied terms, particularly with respect to terms implied by law. Terms implied by law redress power imbalances in certain classes of contracts such as employment, landlord-lessee, and insurance contracts: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), at p. 457, *per* McLachlin J.; see also *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), *per* McLachlin J., concurring. The implication of terms plays a functionally similar role in common law contract law to the doctrine of good faith in civil law jurisdictions by filling in gaps in the written agreement of the parties: *Chitty on Contracts*, at para. 1-051. In *Mesa Operating*, the Alberta Court of Appeal implied a term that a power of pooling properties for the purpose of determining royalty payments be exercised reasonably. The court implied this term in order to give effect to the intentions of the parties rather than as a requirement of good faith, but Kerans J.A. stated that "[t]he rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith": para. 22. Many other examples may be found in Waddams, *The Law of Contracts*, at paras. 499-506.

45 Considerations of good faith are also apparent in contract interpretation: *Chitty on Contracts*, at para. 1-050; Hall, at p. 347. The primary object of contractual interpretation is of course to give effect to the intentions of the parties at the time of contract formation. However, considerations of good faith inform this process. Parties may generally be assumed to intend certain minimum standards of conduct. Further, as Lord Reid observed in *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* (1973), [1974] A.C. 235 (U.K. H.L.), at p. 251, "[t]he more unreasonable the result the more unlikely it is that the parties can have intended it". As A. Swan and J. Adamski put it, the duty of good faith "is not an externally imposed requirement but inheres in the parties' relation": *Canadian Contract Law* (3rd ed. 2012), at §§ 8.134 to 8.146.

46 Good faith also appears in numerous contexts in a more explicit form. The concept of "good faith" is used in hundreds of statutes across Canada, including statutory duties of good faith and fair dealing in franchise legislation and good faith bargaining in labour law: S. K. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995), 74 *Can. Bar Rev.* 70, at p. 71.

47 There have been many attempts to bring a measure of coherence to this piecemeal accretion of appeals to good faith: see, among many others, McCamus, at pp. 835-68; S. K. O'Byrne, "The Implied Term of Good Faith and Fair Dealing: Recent Developments" (2007), 86 *Can. Bar. Rev.* 193, at pp. 196-204; Waddams, *The Law of Contracts*, at paras. 494-508; R. S.

Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968), 54 Va. L. Rev. 195; S. J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980), 94 *Harv. L. Rev.* 369. By way of example, Professor McCamus has identified three broad types of situations in which a duty of good faith performance of some kind has been found to exist: (1) where the parties must cooperate in order to achieve the objects of the contract; (2) where one party exercises a discretionary power under the contract; and (3) where one party seeks to evade contractual duties (pp. 840-56; *CivicLife.com Inc. v. Canada (Attorney General)* (2006), 215 O.A.C. 43 (Ont. C.A.), at paras. 49-50).

48 While these types of cases overlap to some extent, they provide a useful analytical tool to appreciate the current state of the law on the duty of good faith. They also reveal some of the lack of coherence in the current approach. It is often unclear whether a good faith obligation is being imposed as a matter of law, as a matter of implication or as a matter of interpretation. Professor McCamus notes:

> Although the line between the two types of implication is difficult to draw, it may be realistic to assume that implied duties of good faith are likely, on occasion at least, to slide into the category of legal incidents rather than mere presumed intentions. Certainly, it would be difficult to defend the implication of terms on each of the cases considered here on the basis of the traditional business efficiency or officious bystander test. In the control of contractual discretion cases, for example, it may be more realistic to suggest that the implied limitation on the exercise of the discretion is intended to give effect to the "reasonable expectations of the parties." [pp. 865-66]

49 The first type of situation (contracts requiring the cooperation of the parties to achieve the objects of the contract) is reflected in the jurisprudence of this Court. In *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072 (S.C.C.), the parties to a real estate transaction failed to specify in the purchase-sale agreement which party was to be responsible for obtaining planning permission for a subdivision of the property. By law, the vendor was the only party capable of obtaining such permission. The Court held that the vendor was under an obligation to use reasonable efforts to secure the permission, or as Dickson J. put it, "[t]he vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale": p. 1084. It is not completely clear whether this duty was imposed as a matter of law or was implied based on the parties' intentions: see p. 1083; see also *Gateway Realty* and *CivicLife.com*.

50 *Mitsui & Co. (Canada) Ltd. v. Royal Bank*, [1995] 2 S.C.R. 187 (S.C.C.), is an example of the second type of situation (exercise of contractual discretion). The lease of a helicopter included an option to buy at the "reasonable fair market value of the helicopter as established by Lessor": para. 2. This Court held, at para. 34, that, "[c]learly, the lessor is not in a position, by virtue of clause 32, to make any offer that it may feel is appropriate. It is contractually bound to act in good faith to determine the reasonable fair market value of the helicopters, which is the price that the parties had initially agreed would be the exercise price of the option." The Court did not discuss the basis for implying the term, but suggested that in the absence of a reasonableness requirement, the option would be a mere agreement to agree and thus would be unenforceable, which means that the implication of the term was necessary to give business efficacy to the agreement.

51 This Court's decision in *Freedman v. Mason*, [1958] S.C.R. 483 (S.C.C.), falls in the third type of situation in which a duty of good faith arises (where a contractual power is used to evade a contractual duty). In that case, the vendor in a real estate transaction regretted the bargain he had made. He then sought to repudiate the contract by failing to convey title in fee simple because he claimed his wife would not provide a bar of dower. The issue was whether he could take advantage of a clause permitting him to repudiate the transaction in the event that he was "unable or unwilling" to remove this defect in title even though he had made no efforts to do so by trying to obtain the bar of dower. Judson J. held that the clause did not "enable a person to repudiate a contract for a cause which he himself has brought about" or permit "a capricious or arbitrary repudiation": p. 486. On the contrary, "[a] vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner": p. 487.

52 The jurisprudence is not always very clear about the source of the good faith obligations found in these cases. The categories of terms implied as a matter of law, terms implied as a matter of intention and terms arising as a matter of interpretation sometimes are blurred or even ignored, resulting in uncertainty and a lack of coherence at the level of principle.

53 Apart from these types of situations in which a duty of good faith arises, common law Canadian courts have also recognized that there are classes of relationships that call for a duty of good faith to be implied by law.

54 For example, this court confirmed that there is a duty of good faith in the employment context in *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362 (S.C.C.). Mr. Keays was diagnosed with chronic fatigue syndrome and was frequently absent from work. Honda grew concerned with the frequency of the absences. It ordered Mr. Keays to undergo an examination by a doctor chosen by the employer, required him to provide a doctor's note for any absences, and discouraged him from retaining outside counsel. The majority held that in all employment contracts there was an implied term of good faith governing the manner of termination. In particular, the employer should not engage in conduct that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" when dismissing an employee: para. 57, citing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 98. Good faith in this context did not extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce: *Wallace*, at para. 76.

55 This Court has also affirmed the duty of good faith which requires an insurer to deal with its insured's claim fairly, both with respect to the manner in which it investigates and assesses the claim and to the decision whether or not to pay it: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 (S.C.C.), at para. 63, citing *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29. The breach of this duty may support an award of punitive damages: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.). This duty of good faith is also reciprocal: the insurer must not act in bad faith when dealing with a claim, which is typically made by someone in a vulnerable situation, and the insured must act in good faith by disclosing facts material to the insurance policy (para. 83, citing *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 (Alta. Q.B.), at paras. 84-85, *per* Murray J.).

56 This Court has also recognized that a duty of good faith, in the sense of fair dealing, will generally be implied in fact in the tendering context. When a company tenders a contract, it comes under a duty of fairness in considering the bids submitted under the tendering process, as a result of the expense incurred by parties submitting these bids: *Martel Building Ltd. v. R.*, 2000 SCC 60, [2000] 2 S.C.R. 860 (S.C.C.), at para. 88; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.); *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 58-59; A. C. McNeely, *Canadian Law of Competitive Bidding and Procurement* (2010), at pp. 245-54.

57 Developments in the United Kingdom and Australia point to enhanced attention to the notion of good faith, mitigated by reluctance to embrace it as a stand-alone doctrine. Good faith in contract performance has received increasing prominence in English law, despite its "traditional ... hostility" to the concept: *Yam Seng Pte Ltd. v. International Trade Corp Ltd.*, [2013] EWHC 111, [2013] 1 All E.R. (Comm) 1321 (Eng. Q.B.), at para. 123, citing E. McKendrick, *Contract Law* (9th ed. 2011), at pp. 221-22; see also *Chitty on Contracts*, at para. 1-039. In *Yam Seng*, Leggatt J. held that a number of specific duties embodying good faith can be implied according to the presumed intentions of the parties according to the traditional approach for implying terms: para. 131. Leggatt J. identified a number of these implied duties, including honesty, fidelity to the parties' bargain, cooperation, and fair dealing: paras. 135-50. Leggatt J. stated that "[a] paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust": para. 135; see D. Campbell, "Good Faith and the Ubiquity of the 'Relational' Contract'" (2014), 77 *Mod. L. Rev.* 475. The Court of Appeal considered the *Yam Seng* decision in *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.*, [2013] EWCA Civ 200 (Eng. C.A.) (BAILII), where it confirmed that good faith was not a general principle of English law, but that it could be an implied term in certain categories of cases: paras. 105 and 150.

58 Australian courts have also moved towards a greater role for good faith in contract performance: *Cheshire and Fifoot's Law of Contract*, (9th Australian ed. 2008), at 10.43 to 10.47. The duty of good faith in its modern form was recognized by Priestley J.A. in *Renard Constructions (ME) Pty. Ltd. v. Canada (Minister of Public Works)* (1992), 26 N.S.W.L.R. 234 (New South Wales C.A.). There is no generally applicable duty of good faith, but one will be implied into contracts in certain circumstances. The duty of good faith can be implied as a matter of law or as a matter of fact, although the cases are not always clear on the

basis on which the term is being implied. Australian courts have taken a broad view of what constitutes good faith: see, e.g., *Burger King Corp. v. Hungry Jacks 's Pty Ltd.*, [2001] NSWCA 187 (New South Wales C.A.) (AustLII). The law of good faith performance in Australia is still developing and remains unsettled: E. Peden, "Good faith in the performance of contract law" (2004), 42: 9 *L.S.J.* 64, at p. 64. However, it is clear that the duty of good faith requires adherence to standards of honest conduct: A. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000), 116 *Law Q. Rev.* 66, at p. 76; *Burger King*, at paras. 171 and 189.

(iii) The Way Forward

59 This selective survey supports the view that Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear: Belobaba; O'Byrne, "Good Faith in Contractual Performance", at p. 95; B. J. Reiter, "Good Faith in Contracts" (1983), 17 *Val. U.L. Rev.* 705, at pp. 711-12. It also shows that in Canada, as well as in the United Kingdom and Australia, there is increasing attention to the notion of good faith, particularly in the area of contractual performance. Opponents of any general obligation of good faith prefer the traditional, organic development of solutions to address particular problems as they arise: see, e.g., M. G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984), 9 *Can. Bus. L.J.* 385; D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993), 14 *Advocates' Q.* 435, at pp. 436 and 440. However, foreclosing some incremental development of the law at the level of principle would go beyond what prudent caution requires and evidence an almost "perverted pride" — to use Swan's term — in the law's failings.

60 Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties: see Swan and Adamski, at §1.24.

61 The fact that commercial parties expect honesty on the part of their contracting partners can also be seen from the fact that it was the American Bar Association's Section of Corporation, Banking and Business Law that urged the adoption of "honesty in fact" in the original drafting of the Uniform Commercial Code ("U.C.C."): E. A. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963), 30 *U. Chicago L. Rev.* 666, at p. 673. Moreover, empirical research suggests that commercial parties do in fact expect that their contracting parties will conduct themselves in good faith: see, e.g., S. Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963), 28 *Am. Soc. Rev.* 55, at p. 58; H. Beale and T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975), 2 *Brit. J. Law. & Soc.* 45, at pp. 47-48; S. Macaulay, "An Empirical View of Contract", [1985] *Wis. L. Rev.* 465; V. Goldwasser and T. Ciro, "Standards of Behaviour in Commercial Contracting" (2002), 30 *A.B.L.R.* 369, at pp. 372-77. It is, to say the least, counterintuitive to think that reasonable commercial parties would accept a contract which contained a provision to the effect that they were not obliged to act honestly in performing their contractual obligations.

62 I conclude from this review that enunciating a general organizing principle of good faith and recognizing a duty to perform contracts honestly will help bring certainty and coherence to this area of the law in a way that is consistent with reasonable commercial expectations.

(iv) Towards an Organizing Principle of Good Faith

63 The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

64 As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: see, e.g., *R. v. Jones*, [1994] 2 S.C.R. 229 (S.C.C.), at p. 249; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544 (S.C.C.), at para. 124; R.

M. Dworkin, "Is Law a System of Rules?", in R. M. Dworkin, ed., *The Philosophy of Law* (1977), 38, at p. 47. It is a standard that helps to understand and develop the law in a coherent and principled way.

65 The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

66 This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

67 This approach is consistent with that taken in the case of unjust enrichment. McLachlin J. (as she then was) outlined the approach in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at pp. 786 and 788:

> This case presents the Court with the difficult task of mediating between, if not resolving, the conflicting views of the proper scope of the doctrine of unjust enrichment. It is my conclusion that we must choose a middle path; one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the established categories of recovery ....
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> . . . . .
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> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

68 The flexible approach that was taken in *Peel* recognizes that "[a]t the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain": p. 788. In that case, this Court further developed the law through application of an organizing principle without displacing the existing specific doctrines. This is what I propose to do with regards to the organizing principle of good faith.

69 The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties. For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange: Swan and Adamski, at § 1.24; B. Dixon, "Common law obligations of good faith in Australian commercial contracts — a relational recipe" (2005), 33 *A.B.L.R.* 87.

70 The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.), at para. 31.

Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601 (S.C.C.), at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

71 Tying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility.

(v) Should There Be a New Duty?

72 In my view, the objection to Can-Am's conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. The relationship between Can-Am and Mr. Bhasin was not an employment or franchise relationship. Classifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation. After all, a party almost always has some amount of discretion in how to perform a contract. It would also be difficult to say that a duty of good faith should be implied in this case on the basis of the intentions of the parties given the clear terms of an entire agreement clause in the Agreement. The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.

73 In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (Ont. C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (Ont. C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

74 There is a longstanding debate about whether the duty of good faith arises as a term implied as a matter of fact or a term implied by law: see *Mesa Operating*, at paras. 15-19. I do not have to resolve this debate fully, which, as I reviewed earlier, casts a shadow of uncertainty over a good deal of the jurisprudence. I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.

75 Viewed in this way, the entire agreement clause in cl. 11.2 of the Agreement is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it: see *CivicLife.com*, at para. 52.

76 It is true that the Anglo-Canadian common law of contract has been reluctant to impose mandatory rules not based on the agreement of the parties, because they are thought to interfere with freedom of contract: see *Gateway Realty*, *per* Kelly J.; O'Byrne, "Good Faith in Contractual Performance", at p. 95; Farnsworth, at 677-78. As discussed above, however, the duty of honest performance interferes very little with freedom of contract, since parties will rarely expect that their contracts permit dishonest performance of their obligations.

77 That said, I would not rule out any role for the agreement of the parties in influencing the scope of honest performance in a particular context. The precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements. The approach I outline here is similar in principle to that in § 1-302(b) of the U.C.C. (2012):

> The obligations of good faith, diligence, reasonableness and care ... may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable.

78 Certainly, any modification of the duty of honest performance would need to be in express terms. A generically worded entire agreement clause such as cl. 11.2 of the Agreement does not indicate any intention of the parties to depart from the basic tenets of honest performance: see *GEC Marconi Systems Pty Ltd. v. BHP Information Technology Pty Ltd.*, [2003] FCA 50 (Australia C.A.) (AustLII), at para. 922, *per* Finn J.; see also O'Byrne, "Good Faith in Contractual Performance", at p. 96.

79 Two arguments are typically raised against an increased role for a duty of good faith in the law of contract: see Bridge, Clark, and Peden, "When Common Law Triumphs Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability". The first is that "good faith" is an inherently unclear concept that will permit *ad hoc* judicial moralism to undermine the certainty of commercial transactions. The second is that imposing a duty of good faith is inconsistent with the basic principle of freedom of contract. I do not have to decide here whether or not these points are valid in relation to a broad, generalized duty of good faith. However, they carry no weight in relation to adopting a rule of honest performance.

80 Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is also clear and easy to apply. Moreover, one commentator points out that given the uncertainty that has prevailed in this area, cautious solicitors have long advised clients to take account of the requirements of good faith: W. Grover, "A Solicitor Looks at Good Faith in Commercial Transactions", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 93, at pp. 106-7. A rule of honest performance in my view will promote, not detract from, certainty in commercial dealings.

81 Any interference by the duty of honest performance with freedom of contract is more theoretical than real. It will surely be rare that parties would wish to agree that they may be dishonest with each other in performing their contractual obligations.

82 Those who fear that this modest step would create uncertainty or impede freedom of contract may take comfort from experience of the civil law of Quebec and the common and statute law of many jurisdictions in the United States.

83 The *Civil Code of Québec* recognizes a broad duty of good faith which extends to the formation, performance and termination of a contract and includes the notion of the abuse of contractual rights: see arts. 6, 7 and 1375. While this is not the place to expound in detail on good faith in the Quebec civil law, it is worth noting that good faith is seen as having two main aspects. The first is the subjective aspect, which is concerned with the state of mind of the actor, and addresses conduct that is, for example, malicious or intentional. The second is the objective aspect which is concerned with whether conduct is unacceptable according to the standards of reasonable people. As J.-L. Baudouin and P.-G. Jobin explain, [TRANSLATION] "a person can be in good faith (in the subjective sense), that is, act without malicious intent or without knowledge of certain facts, yet his or her conduct may nevertheless be contrary to the requirements of good faith in that it violates objective standards of conduct that are generally accepted in society": *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at para. 132. The notion of good faith includes (but is not limited to) the requirement of honesty in performing the contract: *ibid.*, at para. 161; *Banque de Montréal c. Ng*, [1989] 2 S.C.R. 429 (S.C.C.), at p. 436.

84 In the United States, § 1-304 of the U.C.C. provides that "[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." The U.C.C. has been enacted by legislation in all 50 states. While the provisions of the U.C.C. apply only to commercial contracts, § 205 of the *Restatement (Second) of Contracts* (1981) provides for a general duty of good faith in all contracts. This provision of the *Restatement* has been followed by courts

in the vast majority of states. The notion of "good faith" in the *Restatement* substantially followed the definition proposed by Robert Summers in an influential article, where he proposed that "good faith" is best understood as an "excluder" of various categories of bad faith conduct: p. 206; see § 205, comment a. The general definition of "good faith" in the U.C.C. is also quite broad, encompassing honesty and adherence to "reasonable commercial standards": § 1-201(b)(20). This definition was originally limited to "honesty in fact", that is, a duty of honesty in performance, and was only later expanded: A. D. Miller and R. Perry, "Good Faith Performance" (2013), 98 *Iowa L. Rev.* 689, at pp. 719-20. Honesty in performance is also a key component of "good faith" under the *Restatement*: § 205, comments a and d.

85 Experience in Quebec and the United States shows that even very broad conceptions of the duty of good faith have not impeded contractual activity or contractual stability: see, e.g., J. Pineau, "La discrétion judiciaire a-t-elle fait des ravages en matière contractuelle?", in *La réforme du Code civil, cinq ans plus tard* (1998), 141. It is also worth noting that in both the United States and Quebec, judicial developments preceded legislative action in codifying good faith. In the United States, courts had recognized the existence of a general duty of good faith before the promulgation of the U.C.C.: see, e.g., *Kirke La Shelle Co. v. Armstrong Co.* (1933), 263 N.Y. 79 (U.S. N.Y. Ct. App. 1933). Similarly, though there was no express provision of "good faith" in the *Civil Code of Lower Canada*, the Court implied such a general duty from more specific provisions of the *Code*: see *Banque canadienne nationale c. Soucisse*, [1981] 2 S.C.R. 339 (S.C.C.); *Banque nationale du Canada c. Houle*, [1990] 3 S.C.R. 122 (S.C.C.); *Québec (Commission hydroélectrique) c. Banque de Montréal*, [1992] 2 S.C.R. 554 (S.C.C.). The duty of good faith was subsequently included in the revisions leading to the enactment of the *Civil Code of Québec*.

86 The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (*uberrimae fidei*) such as an insurance contract, which among other things obliges the parties to disclose material facts: *Whiten*. But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.

87 This distinction explains the result reached by the court in *United Roasters Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (U.S. C.A. 4th Cir. 1981). The terminating party had decided in advance of the required notice period that it was going to terminate the contract. The court held that no disclosure of this intention was required other than what was stipulated in the notice requirement. The court stated:

> ... there is very little to be said in favor of a rule of law that good faith requires one possessing a right of termination to inform the other party promptly of any decision to exercise the right. A tenant under a month-to-month lease may decide in January to vacate the premises at the end of September. It is hardly to be suggested that good faith requires the tenant to inform the landlord of his decision soon after January. Though the landlord may have found earlier notice convenient, formal exercise of the right of termination in August will do. [pp. 989-90]

United Roasters makes it clear that there is no unilateral duty to disclose information relevant to termination. But the situation is quite different, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract.

88 The duty of honest performance has similarities with the existing law in relation to civil fraud and estoppel, but it is not subsumed by them. Unlike promissory estoppel and estoppel by representation, the contractual duty of honest performance does not require that the defendant intend that his or her representation be relied on and it is not subject to the uncertainty around whether estoppel can be used to found an independent cause of action: *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.), at para. 5; *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.); Waddams, *The Law of Contracts*, at paras. 195-203; B. MacDougall, *Estoppel* (2012), at pp. 142-44. As for the tort of civil fraud, breach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on and breach of it supports a claim for damages according to the contractual rather than the tortious measure: see, e.g., *Parna v. G. & S. Properties*

Ltd. (1970), [1971] S.C.R. 306 (S.C.C.), cited with approval in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8, [2014] 1 S.C.R. 126 (S.C.C.), at para. 19.

89 Mr. Bhasin, supported b many judicial and academic authorities, has argued for wholesale adoption of a more expansive duty of good faith in contrast to the modest, incremental change that I propose: A.F., at para. 51; Summers, at p. 206; Belobaba; *Gateway Realty*. In many of its manifestations, good faith requires more than honesty on the part of a contracting party. For example, in *Dynamic Transport*, this Court held that good faith in the context of that contract required a party to take reasonable steps to obtain the planning permission that was a condition precedent to a sale of property. In other cases, the courts have required that discretionary powers not be exercised in a manner that is "capricious" or "arbitrary": *Mason, at p. 487*; *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (Ont. C.A.), at p. 7. In other contexts, this Court has been reluctant to extend the requirements of good faith beyond honesty for fear of causing undue judicial interference in contracts: *Wallace*, at para. 76.

90 It is not necessary in this case to define in general terms the limits of the implications of the organizing principle of good faith. This is because it is unclear to me how any broader duty would assist Mr. Bhasin here. After all, the contract was subject to non-renewal. It is a considerable stretch, as I see it, to turn even a broadly conceived duty of good faith exercise of the non-renewal provision into what is, in effect, a contract of indefinite duration. This in my view is the principal difficulty in the trial judge's reasoning because, in the result, her decision turned a three year contract that was subject to an express provision relating to non-renewal into a contract of roughly nine years' duration. As the Court of Appeal pointed out, in my view correctly, "[t]he parties did not intend or presume a perpetual contract, as they contracted that either party could unilaterally cause it to expire on any third anniversary": para. 32. Even if there were a breach of a broader duty of good faith by forcing the merger, Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract. Since no damages flow from this breach, it is unnecessary to decide whether reliance on a discretionary power to achieve a purpose extraneous to the contract and which undermined one of its key objectives might call for further development under the organizing principle of good faith contractual performance.

91 I note as well that, even in jurisdictions that embrace a broader role for the duty of good faith, plaintiffs have met with only mixed success in alleging bad faith failure to renew a contract. Some cases have treated non-renewal as equivalent to termination and thus subject to a duty of good faith: *Shell Oil Co. v. Marinello*, 294 A.2d 253 (U.S. N.J. Sup. Ct. 1972), aff'd, 07 A.2d 598 (U.S. N.J. Sup. Ct. 1973); *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (U.S. Pa. S.C. 1978), at pp. 741-42. Other courts have seen non-renewal as fundamentally different, especially where the express terms of the contract contemplate the expiry of contractual obligations and leave no room for any sort of duty to renew: *J.H. Westerbeke Corp. v. Onan Corp.*, 580 F. Supp. 1173 (U.S. Dist. Ct. D. Mass. 1984), at p. 1184; *Pitney-Bowes Inc. v. Mestre* (1981), 517 F. Supp. 52 (U.S. Dist. Ct. S.D. Fla. 1981), cert. denied, 464 U.S. 893 (U.S. Sup. Ct. 1983).

92 I conclude that at this point in the development of Canadian common law, adding a general duty of honest contractual performance is an appropriate incremental step, recognizing that the implications of the broader, organizing principle of good faith must be allowed to evolve according to the same incremental judicial approach.

93 A summary of the principles is in order:

(1) There is a general organizing principle of good faith that underlies many facets of contract law.

(2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.

(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

(3) Application

94 The trial judge made a clear finding of fact that Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause": para. 261; see also para. 271. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly.

95 The immediate dispute in this case centred on the non-renewal clause contained in cl. 3.3 of the 1998 Agreement which Mr. Bhasin entered into in November 1998. It provided that the Agreement was for a three-year term and would be automatically renewed unless one of the parties gave notice to the contrary at least six months before the end of the initial or any renewed term:

> 3.3 The term of this Agreement shall be for a period of three years from the date hereof (the "Initial Term") and thereafter shall be automatically renewed for successive three year periods (a "Renewal Term"), subject to earlier termination as provided for in section 8 hereof, unless either [Can-Am] or the Enrollment Director notifies the other in writing at least six months prior to expiry of the Initial Term or any Renewal Term that the notifying party desires expiry of the Agreement, in which event the Agreement shall expire at the end of such Initial Term or Renewal Term, as applicable.

96 The factual matrix in which the judge made her finding of dishonest performance is complicated and I will only outline it in very broad terms in order to put that finding in context. There were two main interrelated story lines.

97 The first concerns Mr. Hrynew's persistent attempts to take over Mr. Bhasin's market through a merger — in effect a takeover by him of Mr. Bhasin's agency. The second concerns the difficulties, beginning in early April 1999, that Can-Am was having with the Alberta Securities Commission, which regulated its business and its enrollment directors in Alberta. The Commission insisted that Can-Am appoint a full-time employee to be a PTO responsible for compliance with Alberta securities law. Can-Am ultimately appointed Mr. Hrynew, with the result that he would audit his competitor agencies, including Mr. Bhasin's, and therefore have access to their confidential business information. Mr. Bhasin's refusal to allow Mr. Hrynew access to this information led to the final confrontation with Can-Am and its giving notice of non-renewal in May 2001. Can-Am, for its part, wanted to force a merger of the Bhasin agency under the Hrynew agency, effectively giving Mr. Bhasin's business to Mr. Hrynew. It was in the context of this situation that the trial judge made her findings of dishonesty on the part of Can-Am.

98 The trial judge concluded that Can-Am acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause, both with respect to its own intentions and with respect to Mr. Hrynew's role as PTO. Her detailed findings amply support this overall conclusion.

99 By early 2000, Can-Am was considering a significant reorganization of its activities in Alberta; by June of that year, it sent an organizational chart to the Commission showing that Mr. Bhasin's agency was to be merged under Mr. Hrynew's. But it had said nothing of this to Mr. Bhasin: trial reasons, at paras. 167-68. The trial judge found that these representations made by Can-Am to the Commission were clearly false if, as she concluded, they intended to refer to Mr. Bhasin: para. 246. She also found that Can-Am, by June 2000, was fearful that the Commission was going to pull its licence in Alberta and that it was prepared to do whatever it could to forestall that possibility. "However, it was not dealing honestly with [Mr.] Bhasin about the realities of the situation as [it] saw them": para. 246.

100 In August 2000, Mr. Bhasin first heard of Can-Am's merger plans for him during a meeting with Can-Am's regional vice-president. But when questioned about Can-Am's intentions with respect to the merger, the official "equivocated" and did not tell him the truth that from Can-Am's perspective this was a "done deal". The trial judge concluded that the official was "not honest with [Mr.] Bhasin" at that meeting: para. 247.

101 When Mr. Bhasin complained about Mr. Hrynew's conflict of interest in being both auditor and competitor, Can-Am in effect blamed the Commission, claiming that the Commission had rejected its proposal to appoint a third party PTO. This was not truthful. Can-Am failed to mention that it had proposed to appoint a non-resident of Alberta who was clearly not qualified according to the Commission's criteria or that it had decided to appoint Mr. Hrynew even though he did not meet the Commission's criteria either: trial reasons, at paras. 195 and 221. It also misrepresented — repeatedly — to Mr. Bhasin that Mr. Hrynew was bound by duties of confidentiality and segregation of activities in the course of an audit, when in fact there was no such requirement. Can-Am did not even finalize its PTO contract with Mr. Hrynew until March 2001 and, notwithstanding

its assurances to Mr. Bhasin, it failed to include such a provision in the contract: paras. 190-221. As the trial judge found, Can-Am "could not possibly have missed this honestly in the PTO agreement, given that [Mr. Bhasin's] very protests about [Mr.] Hrynew's appointment as PTO were about confidentiality and segregation of activities": para. 221. The judge also found that Can-Am repeated these "lies" about Mr. Hrynew's supposed obligations of confidentiality even after the PTO agreement, without these protections, had been signed: para. 204.

102 Can-Am pushed on with the requirement that Mr. Hrynew audit Mr. Bhasin's agency as if it were required to do so by the Commission even though it had arranged to have one of its employees conduct the audit of Mr. Hrynew's agency: trial reasons, at para. 198.

103 As the trial judge found, this dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision. I conclude that Can-Am breached the 1998 Agreement when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause.

C. Liability for Civil Conspiracy and Inducing Breach of Contract

104 In light of this conclusion, I agree with the Court of Appeal's rejection of Mr. Bhasin's claims based on the torts of inducing breach of contract and unlawful means conspiracy.

105 The trial judge specifically found that Mr. Hrynew did not encourage Can-Am to act dishonestly in its dealings with Mr. Bhasin and that Can-Am's dishonest conduct was not fairly attributable to Mr. Hrynew: paras. 271 and 287. It follows that Mr. Hrynew did not induce Can-Am's breach of its contractual duty of honest performance.

106 The trial judge dismissed the claim for conspiracy to injure and there is no basis to interfere with that finding. However, the trial judge held the respondents liable for unlawful means conspiracy, with the unlawful means being the breach of contract and inducing breach of contract: para. 326. Because, in light of my conclusions, the only relevant breach of contract in this case is the breach of the duty of honest performance and there was no inducement of breach of contract, the only relevant unlawful means pertained to Can-Am alone and not Mr. Hrynew. Accordingly, there can be no liability for civil conspiracy: see *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427 (Ont. C.A.), at para. 43.

107 I therefore agree with the result reached by the Court of Appeal that there could be no liability for inducing breach of contract or unlawful means conspiracy: para. 36. It follows that the claims against Mr. Hrynew were rightly dismissed.

D. What Is the Appropriate Measure of Damages?

108 I have concluded that Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal. It is therefore liable for damages calculated on the basis of what Mr. Bhasin's economic position would have been had Can-Am fulfilled that duty. While the trial judge did not assess damages on that basis given her different findings in relation to liability, she made findings that permit this Court to do so.

109 The trial judge specifically held that but for Can-Am's dishonesty, Mr. Bhasin could have acted so as to "retain the value in his agency": paras. 258-59. In reaching this conclusion, the trial judge was well aware of the difficulties that Mr. Bhasin would have in selling his business given the "almost absolute controls" that Can-Am had on enrollment directors and that it owned the "book of business": para. 402. She also heard evidence and made findings about what the value of the business was, taking these limitations into account. These findings, in my view, permit us to assess damages on the basis that if Can-Am had performed the contract honestly, Mr. Bhasin would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to Mr. Hrynew.

110 It is clear from the findings of the trial judge and from the record that the value of the business around the time of non-renewal was $87,000. The defendant's expert at trial valued Mr. Bhasin's business as of 2001 (the time of non-renewal) as approximately $87,000. While there is some confusion in the record about the date of evaluation and the relevance of discount

rates, I am persuaded that the trial judge found that the business was worth $87,000 at the time that the Agreement expired and that she made this finding fully alive to the difficulties standing in the way of a sale of the business given the contractual arrangements between Can-Am and its enrollment directors: see, e.g., para. 451. In addition, we have had no suggestion in argument that this figure should be reassessed. In fact, the defendants, as appellants before the Court of Appeal, submitted to that court that if damages were payable, they should be assessed at the value of the business at the time of the expiry of the Agreement and noted that the trial judge had accepted the evidence of their expert witness, Mr. Bailey, that the value was $87,000.

111 I conclude therefore that Mr. Bhasin is entitled to damages in the amount of $87,000.

IV. Disposition

112 I would allow the appeal with respect to Can-Am and dismiss the appeal with respect to Mr. Hrynew. I would vary the trial judge's assessment of damages to $87,000 plus interest. Mr. Bhasin should have his costs throughout as against Can-Am. There should be no costs at any level in favour of or against Mr. Hrynew.

Appeal allowed in part.

Pourvoi accueilli en partie.

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TAB 5

2012 ONSC 4882
Ontario Superior Court of Justice

Fraser Papers Inc., Re

2012 CarswellOnt 11519, 2012 ONSC 4882, 100 C.C.P.B. 79, 221 A.C.W.S. (3d) 21, 95 C.B.R. (5th) 28

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

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Fraser Papers Inc./Papiers Fraser Inc. and FPS Canada Inc. (Applicants)

Morawetz J.

Heard: June 29, 2012
Judgment: September 18, 2012
Docket: CV-09-8241-00CL

Counsel: D.J. Miller, J.T. Porter, for Applicants in CCAA Proceedings and for Former Directors in Quebec Class Action
D. Wray, J. Kugler, K. Duranleau, for Quebec Class Action Plaintiffs
A. Merskey, V. Sinha, for AON Conseil Inc. c.o.b. as AON Hewitt

Subject: Insolvency; Corporate and Commercial; Employment; Civil Practice and Procedure

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Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc. (2008), 2008 CarswellOnt 1427, (sub nom. *Morneau Sobeco Ltd. Partnership v. AON Consulting Inc.)* 237 O.A.C. 267, 65 C.C.L.I. (4th) 159, 2008 ONCA 196, 40 C.B.R. (5th) 172, 65 C.C.P.B. 293, (sub nom. *Slater Steel Inc., Re)* 2008 C.E.B. & P.G.R. 8285, 291 D.L.R. (4th) 314, 2008 ONSC 196 (Ont. C.A.) — referred to

Nortel Networks Corp., Re (2009), 53 C.B.R. (5th) 196, 75 C.C.P.B. 206, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) — considered

Nortel Networks Corp., Re (2010), 406 N.R. 390 (note), 270 O.A.C. 400 (note), 2010 CarswellOnt 1760, 2010 CarswellOnt 1761 (S.C.C.) — referred to

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Nortel Networks Corp., Re (2010), 68 C.B.R. (5th) 232, 2010 ONCA 402, 2010 CarswellOnt 3752 (Ont. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 5.1 [en. 1997, c. 12, s. 122] — considered

s. 5.1(1) [en. 1997, c. 12, s. 122] — considered

s. 5.1(2) [en. 1997, c. 12, s. 122] — considered

s. 11 — referred to

s. 17 — referred to

Régimes complémentaires de retraite, Loi sur les, L.R.Q., c. R-15.1
art. 152 — referred to

MOTION by defendant directors for declaratory relief relating to class action.

***Morawetz J.*:**

Introduction

1 This motion was brought by Mr. Paul E. Gagné and Mr. Samuel J. B. Pollock (the "Defendant Directors"), former directors of Fraser Papers Inc. ("Fraser Papers"), for certain relief relating to a class action commenced in the Superior Court of Quebec — Class Action Division, Court File No. 500-06-000598274 (the "Class Action Claim") by Rene Emond, Jean-Guy Provost and Geinette Bonneau-Parent (collectively, the "Class Action Plaintiffs") against, *inter alia*, the Defendant Directors.

2 The Defendant Directors seek declarations that:

(i) the Class Action Plaintiffs in the Class Action Claim constitute Current and Former CEP Members as such term is defined in the order issued in these proceedings dated September 17, 2009 (the "CEP Representation Order") and, as such, and in that capacity, are subject to the jurisdiction of this court;

(ii) the Class Action Plaintiffs and all other Current and Former CEP Members who are or were at any time beneficiaries, participants, surviving spouses or dependants under the Quebec Hourly Plan (defined below) were represented by the Communications, Energy and Paperworkers Union of Canada ("CEP") with respect to any claims in any way related to Fraser Papers, including but not limited to, in connection with the Quebec Hourly Plan;

(iii) pursuant to the CEP Representation Order and the order in these proceedings dated April 6, 2010 (the "April Sale Order"), CEP was authorized to and did:

(a) negotiate and compromise any claims that existed or that arose at law or equity in connection with any issue or matter relating to any recovery, compromise of rights or entitlements of the Current and Former CEP Members, including but not limited to any claims in connection with the Quebec Hourly Plan;

(b) execute an agreement dated February 24, 2010 (the "Global Agreement") releasing the Defendant Directors from all claims relating to all facts and circumstances existing as at that date, whether known or unknown; and

(c) execute a further release in favour of the Defendant Directors dated April 7, 2010 (the "Contractual Release") releasing them from all claims relating to all facts and circumstances existing as at February 24, 2010, whether known or unknown;

(iv) section 5.1(2) of the *Companies' Creditors Arrangement Act* ("CCAA") does not affect the contractual releases of the Defendant Directors contained in the Global Agreement or the Contractual Release executed by the CEP on behalf of the Current and Former CEP Members;

(v) any claims that could have been asserted by the Current and Former CEP Members, whether in respect of the Quebec Hourly Plan or otherwise, have been fully and irrevocably released pursuant to the Global Agreement and the Contractual Release;

(vi) the contractual releases of the Defendant Directors contained in the Global Agreement and the Contractual Releases are unlimited, and do not exclude claims of any type, whether based on contract, allegations of misrepresentation, wrongful or oppressive conduct, or otherwise.

Facts and Issues

3 Fraser Papers and certain of its Canadian and U.S. affiliates filed for protection pursuant to the CCAA (the "CCAA Proceeding") on June 18, 2009.

4 Fraser Papers was the plan sponsor for four defined benefit pension plans registered in Canada; two of which were registered in Quebec and two of which were registered in New Brunswick.

5 One of the Quebec plans provides benefits to hourly (unionized) employees and former employees at the company's mill in Thurso, Quebec (the "Quebec Hourly Plan"), while the other Quebec plan was for salaried (non-unionized) employees and retirees.

6 On September 17, 2009, CEP brought a motion seeking to represent its current members and to represent former members of bargaining units represented by CEP including pensioners, retirees, deferred vested participants and surviving spouses and dependants employed or formerly employed by Fraser Papers (the "Current and Former CEP Members").

7 On September 17, 2009, the court issued an order confirming CEP's representation of all Current and Former CEP Members (the "CEP Representation Order"). CEP was expressly authorized under the CEP Representation Order to compromise any and all claims that existed or might arise at law or equity in connection with any issue or matter relating to any recovery, compromise of rights or entitlements of the Current and Former CEP Members.

8 With the exception of 24 retirees of the International Brotherhood of Electrical Workers' Union, who were represented by Davies Ward Phillips & Vineberg pursuant to a separate representation order also dated September 17, 2009, all beneficiaries of the Quebec Hourly Plan were Current and Former CEP Members represented by CEP pursuant to the CEP Representation Order.

9 No party made an election to opt out of representation by CEP under the CEP Representation Order.

10 The three representative plaintiffs in the Quebec Class Action were Current and Former CEP Members as defined by the CEP Representation Order and were represented by CEP in that capacity.

11 Pursuant to the CEP Representation Order, CEP:

(i) executed the Global Agreement containing a release in favour of Fraser Papers' directors and officers;

(ii) consented to court orders approving the Global Agreement and the releases contained therein by orders dated February 24, 2010 and March 22, 2010;

(iii) executed a further contractual release in favour of Fraser Papers' directors and officers dated April 7, 2010 (the "Contractual Release"); and

(iv) consented to other releases in favour of Fraser Papers' directors and officers contained in the April Sale Order. Such releases are referred to collectively as the "CEP Releases".

12 The release contained in the Global Agreement, which was annexed to the court orders of Pepall J. (as she then was) dated February 24, 2010 and March 22, 2010, provides as follows:

[20] Each of: (i) the applicant's directors and officers; and (ii) Brookfield Asset Management and its directors and officers shall be released from all claims relating to all facts and circumstances in respect of the applicant's existing as at this time (whether known or unknown) and the completion of the APA.

13 The language of the Contractual Release reads:

5. The union hereby irrevocably, fully and finally releases each of FP's directors and officers from all claims relating to all facts and circumstances in respect of FP existing as at February 24, 2010 (whether known or unknown) and the completion of the APA.

14 Mr. Glen McMillan, former Chief Financial Officer of Fraser Papers, deposed that, in reliance upon the releases granted by CEP, transactions were undertaken by the Applicants and other parties which provided significant value to all unsecured creditors, including all beneficiaries under the Quebec Hourly Plan, that would not have otherwise been possible. Further, Mr. McMillan states that the unqualified release in favour of Fraser Papers' directors was a fundamental term of an agreement that permitted the Applicants' largest business operations to be sold and value to be available for distribution to unsecured creditors including the Quebec Hourly Plan.

15 The Applicants take the position that the cause of action asserted in the Class Action Claim flows from the deficit under the Quebec Hourly Plan and the corresponding reduction of benefits to beneficiaries under the Quebec Hourly Plan.

16 The Applicants also take the position that the CCAA Proceeding included a claims process, pursuant to which all claims against the Applicants and their directors and officers were to be filed and that the process provided for the exclusive forum in which any and all claims that could be asserted by any person (defined in the Claims Order to include legal representatives) against the Applicants and their directors or officers must be filed. The Applicants further contend that this claims process allowed the Applicants, their directors and officers, the Monitor, the court and all other stakeholders to identify the universe of potential claims.

17 A claim was filed against Fraser Papers and accepted in the CCAA Proceeding for the entire amount of the deficit under the Quebec Hourly Plan, and distributions have been made to the Quebec Hourly Plan based on the claim for the entire deficit.

18 CEP did not file a proof of claim against the Defendant Directors at any time during the CCAA Proceeding.

19 The issue in the Class Action Claim with respect to the Defendant Directors is described as: Did the persons who are directly responsible for establishing, applying and monitoring the investment policy of the pension plan of the unionized workers of Fraser Papers Inc., Thurso Pulp Mill, commit an offence making them liable for the losses of benefits and reductions in the rights of the participants and beneficiaries.

20 From the standpoint of the Class Action Plaintiffs, this motion raises the following issues:

(i) whether this court has the jurisdiction to deal with an determine the present motion; and

(ii) if so, whether the claims pleaded in the Class Action have been released.

21 For the following reasons, I am of the opinion that this court has the jurisdiction to deal with and determine this motion. I am also of the opinion that the claims pleaded in the Class Action Claim have been released.

Jurisdiction

22 The Class Action Plaintiffs take the position that the Class Action Claim has been properly filed with the court in Quebec and that the position advanced by the Applicants on this motion ought to have been brought before the court in Quebec.

23 Counsel submits that, while the amended CCAA plan was sanctioned by this court, this does not grant "exclusive jurisdiction" upon this court to issue orders relating to litigation commenced in another jurisdiction. Further, even if the amended CCAA plan does grant "exclusive jurisdiction" to this court, the exclusivity of that jurisdiction is limited to the amended CCAA plan itself and does not extend to all of the issues raised by the Defendant Directors on this motion.

24 In my view, a complete answer to this argument is provided by the Applicants at paragraphs 24-26 of their factum.

25 Simply put, the amended CCAA plan, which has been sanctioned by this court, stipulates that any issue relating to the effect of the amended CCAA plan is subject to the exclusive jurisdiction of this court.

26 Further, sections 11 and 17 of the CCAA provide this court with the authorization to grant the relief requested by the Defendant Directors and to make any order that it considers appropriate in the circumstances.

27 Each of the orders made by this court, including the CEP Representation Order, the Claims Order, the orders approving the Global Agreement, the April Sales Order and the Sanction Order have legal force and effect in Quebec, by operation of law. It is the scope of these orders which has been called into question in the Class Action Claim. In my view, it is beyond question, that this motion directly involves issues relating to the effect of the amended CCAA plan.

28 The CCAA provides for and these orders requested the aid and assistance of the courts of other jurisdictions in recognizing and enforcing the terms of such orders. (See CCAA section 16.) I am satisfied that this court has the jurisdiction to deal with this motion.

Releases

29 With respect to the second issue, namely, whether the claims pleaded in the Class Action Claim have been released, the Class Action Plaintiffs take the position that section 2(f)(iii) of the Claims Procedure Orders called for claims to be filed against the Applicants and/or directors and, as such, the Claims Procedure did not call for creditors to file claims against directors acting in a capacity other than that of director or officer of the Applicants. Further, the Claims Procedure Order, they submit, cannot bar claims that cannot be compromised pursuant section 5.1(2) of the CCAA or claims that were unknown at the claims bar date.

30 The Class Action Plaintiffs point out that the Defendant Directors are former directors of the Applicants. They are, however, named as defendants in the Quebec Class Action both in their capacity as directors of the Applicants and in their capacity as members of the Applicants' management pension committee with delegated authority to oversee the funding, investment management and administration of the Quebec Hourly Plan pursuant to section 152 of the *Quebec Supplemental Pension Plan's Act* (the "SPPA") and the applicable instrument of delegation.

31 The Class Action Plaintiffs allege that, pursuant to their delegated authority, the Defendant Directors, as administrators of the Quebec Hourly Plan, were required to exercise the prudence, diligence and skill that a reasonable person would exercise in similar circumstances and, pursuant to their delegated authority, the Defendant Directors were required to report to the Quebec Hourly Plan Pension Committee in writing any situation in the normal course that might adversely affect the financial interests of the pension fund and that requires correction.

32 It is also contended that the claims in the Class Action Claim were not known or discovered until in or around the termination of the CCAA Proceeding.

33 The Class Action Claim seeks damages against the Defendant Directors personally in the amount of $11.7 million.

34 Counsel to the Class Action Plaintiffs submits that the Contractual Release contains a number of limitations. First, they contend that the Contractual Release does not extend to extinguish claims against the Defendant Directors acting in the capacity of delegates of the Quebec Hourly Plan Pension Committee. Counsel submits that directors may wear "two hats" — one in the role of employer and the other as administrator of a pension plan and there is a clear legal distinction between the conduct of the Defendant Directors' qua corporation, where they have an obligation to act in the best interests of the Applicants, and the Defendant Directors qua delegate of the Quebec Hourly Pension Plan Committee, where they have an obligation to act with prudence, care and in the best interests of the Quebec Hourly Plan.

35 Counsel submits that the releases, both contractual and statutory, should be interpreted in light of the dual roles carried out by the Defendant Directors and that releases in favour of directors qua corporation will not release the conduct of directors qua delegates of the Quebec Hourly Plan Pension Committee. The Class Action Claim consists of, *inter alia*, claims against the Defendant Directors qua delegates of the pension committee — claims, counsel submits, are not released pursuant to the Contractual Release. Counsel references *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.*, 2008 ONSC 196 (Ont. C.A.), paras. 31-37 and *Indalex Ltd., Re*, 2011 ONCA 265 (Ont. C.A.) at para. 129.

36 Counsel also submits that, with the exception of fraud or gross negligence, the Contractual Release expressly releases the releasees, which include, the Defendant Directors, from claims arising out of any decrease in the New Brunswick Hourly Plan ("NB Hourly Plan") but no similar release exists with respect to any decrease in the value of the Quebec Hourly Plan. Counsel submits that the absence of a release in respect of any decrease in the value of the Quebec Hourly Plan reflects the parties' intention not to release such conduct.

37 Counsel to the Class Action Plaintiffs also submits that the context in which the Contractual Release was negotiated confirms the limitations to the release described above. The Contractual Release was negotiated in the context of satisfying the conditions precedent to the specialty papers transaction and was not negotiated in the context of the sale of the Thurso facility. As such, the releases granted should therefore be considered and interpreted in this context.

38 Counsel to the Class Action Plaintiffs also submits that the CCAA court orders do not release the claims against the Defendant Directors in the Class Action Claim.

39 Counsel submits that the release contained in the April Sale Order has a number of limitations and that claims against the Applicants' directors and officers for fraud and gross negligence are expressly carved out of the release. The claims against the Defendant Directors set out in the Quebec Class Action include claims of a fraudulent misrepresentation and gross negligence and, thus, counsel contends these claims are not extinguished by the release contained in the April Sale Order.

40 Further, counsel submits that the release in respect of claims against the Defendant Directors relating to their actions as or on behalf of the administrator or sponsors of the pension plans does not include a release of claims in respect of the Quebec Hourly Plan. Counsel submits that the definition of "pension plans" contained in the April Sale Order is limited to the Applicants' pension plans registered in New Brunswick and therefore does not include a release in respect of conduct as or on behalf of the administrator or sponsors of the Quebec Hourly Plan.

41 Counsel also raises the issue of the sanction order granted on February 11, 2011 which approves and sanctions the amended CCAA plan dated January 27, 2011. The sanction order includes a broad release in favour of the Defendant Directors which release was opposed by the CEP during the sanction hearing.

42 Counsel to the Class Action Plaintiffs contends that the broad release in favour of the Defendant Directors was expressly limited by application of s. 5.1 (2) of the CCAA.

43 Section 5.1 of the CCAA provides as follows:

> 5.1 (1) Claims against directors — compromise — a compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.
>
> (2) Exception — a provision for the compromise of claims against directors may not include claims that
>
> (a) relate to contractual rights of one or more creditors; or
>
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

44 Counsel submits that the Class Action Claim includes claims that relate to contractual rights of creditors, including claims related to the Defendant Directors' breach of the delegation instrument that delegated to them authority and responsibility to administer and manage the Quebec Hourly Plan. The Class Action Claim also includes claims of misrepresentation and claims of wrongful conduct against the Defendant Directors in respect of their administration and management of the pension fund. It also alleges that the Defendant Directors acted with gross negligence, as well as made fraudulent and negligent misrepresentations to the pension committee. Oppressive conduct is also alleged and counsel submits that the claims fall within the statutory carve out in section 5.1(2) of the CCAA and therefore are not released by the sanction order.

45 In my view, the position put forth by the Class Action Plaintiffs has no merit.

46 The CCAA Proceeding included a comprehensive claims process, pursuant to which all claims against the Applicants and their directors and officers were to be filed.

47 The definition of "claim" is set out at paragraph 2(f)(iii) of the Claims Procedure Order. It reads as follows:

> "Claim" means:
>
> (i) a restructuring claim;
>
> (ii) a secured claim; and/or
>
> (iii) the rights of any person whatsoever, including any secured creditor, against one or more the applicants and/or directors, whether or not asserted and however acquired, in connection with any indebtedness, liability or obligation of any kind of one or more of the applicants and/or directors in existence on the claim date, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, direct or indirect, by guarantee, surety, insurance deductible or otherwise, and whether or not such claim or right arises out of a contract that is executor or anticipatory in nature or any other claims that would have the claims provable in bankruptcy had the applicable applicant become bankrupt on a claim date; provided however, that in all cases "claim" shall not include an excluded claim.

48 It seems to me that the definition of claim was drafted in very broad terms. The claims process in place in this proceeding was such that it would allow the Applicants, their directors and officers, the Monitor, the court and all other stakeholders to identify the universe of potential claims.

49 As pointed out by Mr. McMillan in his affidavit at paragraphs 33, 52 and 58, a claim was filed against Fraser Papers and accepted in the CCAA Proceeding for the entire amount of the deficit under the Quebec Hourly Plan, and distributions have been made to the Quebec Hourly Plan based on the claim for the entire deficit.

50 Further, as noted by Mr. McMillan, CEP chose not to file a proof of claim against the Defendant Directors at any time during the CCAA Proceeding on behalf of the Current and Former CEP Members.

51 I am in agreement with the submission put forth by counsel to the Applicants to the effect that nothing in the CCAA:

(i) limits the ability of the party to grant contractual releases to another party;

(ii) limits the ability of the court to authorize the execution of releases by a representative party on behalf of others;

(iii) limits the ability of the court to grant releases to any party on a motion brought within the CCAA proceedings (other than an order sanctioning a plan in the case of directors), particularly where such order is made on consent of the releasors; or

(iv) limits the ability of the court to approve releases granted by one party to another.

52 Simply put, a contractual settlement and a release that is binding on the signatories to the contract can be negotiated at any time in a CCAA proceeding.

53 Further, I accept the submission of counsel to the Applicants that unlike releases in favour of directors contained in a plan of arrangement that are subject to section 5.1 of the CCAA, no such restrictions exist with respect to contractual releases granted by a party at any stage of the proceeding.

54 The CCAA court has the jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA proceeding and prior to any plan of arrangement being presented. See *Nortel Networks Corp., Re* (2010), 63 C.B.R. (5th) 44 (Ont. S.C.J. [Commercial List]), *Nortel Networks Corp., Re* (2010), 66 C.B.R. (5th) 77 (Ont. S.C.J. [Commercial List]) (leave to appeal denied at 2010 CarswellOnt 3752 (Ont. C.A.), leave to appeal to the Supreme Court of Canada dismissed (33491) [2010 CarswellOnt 1760 (S.C.C.)] and *Grace Canada Inc., Re* (2008), 50 C.B.R. (5th) 25 (Ont. S.C.J. [Commercial List]).

55 I accept the submission of counsel to the Applicants that the Contractual Release extends to all claims relating to all facts and circumstances in respect of Fraser Papers existing at the date of the release, whether known or unknown. The deficit under the Quebec Hourly Plan existed at the time the CCAA Proceeding was commenced which was clearly prior to the execution of the Contractual Release. Further, it was the subject of a proof of claim that had been filed against Fraser Paper. Even if all of the facts giving rise to the deficit under the Quebec Hourly Plan were not known at the time the Contractual Release was executed, it seems to me that the terms of the Release specifically and clearly provide it would be effective to release such claims.

56 In my view, a plain reading of the Contractual Release leads to the inescapable conclusion that the Contractual Release covers all activities for which the Class Action Plaintiffs have asserted that the Defendant Directors are liable. Even assuming that the allegations in the Class Action Claim amount to claims for gross negligence or breach of fiduciary duty, it seems to me that the language of the Contractual Release is sufficiently broad to include such claims. The Contractual Release is in favour of Fraser Papers' directors and officers. It is not restricted in the manner suggested by the Class Action Plaintiffs.

57 The purpose of a full and final release is to provide finality to a party, once and for all, from any liability or obligation to another party arising out of particular circumstances.

58 In my view, it is clear that the Defendant Directors have been fully and irrevocably released in respect of the claims asserted in the Class Action Claim pursuant to the Contractual Release.

59 Furthermore, I am also of the view that the Class Action Claim is barred on the grounds that the subject matter of the Class Action Claim has been released and extinguished in the Applicants' CCAA Proceeding.

60 As counsel to the Applicants points out, since claims in respect of pension, termination, severance, retirement payments and other benefit claims can be central issues in a CCAA Proceeding, where the interests of former employees are at stake, the court may make an order appointing representative counsel that is empowered to negotiate on behalf of its constituents. See *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]). As noted in *Nortel, supra*, representation orders provide a social benefit by assisting former employees and providing them with a reliable resource for information about the process. The appointment of representative counsel also benefits the streamlining and introducing efficiency to the process for all parties involved in a CCAA proceeding.

61 The CEP Representation Order made in these proceedings is binding on the Class Action Plaintiffs. CEP was clearly authorized to negotiate a compromise of beneficiaries claims or rights on behalf of the Current and Former CEP members. At no time did any individual opt out of the CEP Representation Order.

62 The time to assert any claim against the Defendant Directors was during the Claims Process established by court order. As noted above, no claims were filed against the Defendant Directors at any time during the CCAA proceedings in respect of the Quebec Hourly Plan.

63 The amended CCAA Plan that received creditor approval was sanctioned by the court. The Class Action Plaintiffs are bound by the terms of the amended CCAA Plan in the sanction order, in addition to the CEP releases.

64 As noted by counsel to the Applicants, in the reasons supporting the granting of the sanction order over CEP's objections, Pepall J. (as she then was) referred to the prior releases that had been granted by or consented to by CEP, which were broader than the releases under the amended CCAA Plan. It seems to me, that the issues giving rise to the Class Action Claim were identified early in the proceedings and were the subject of considerable negotiation. These negotiations led to agreements pursuant to which consideration was paid to certain creditor groups. In exchange, comprehensive releases were executed. It culminated in a court-sanctioned plan, which again, contains release language which, in my view, was clearly intended to finalize the matters at issue on this motion.

65 The Quebec Hourly Plan and, therefore, its beneficiaries including all Current and Former CEP members, have received their *pro rata* share of the distributions under the amended CCAA Plan. In my view, any and all claims of any nature and kind that could be asserted against the Defendant Directors have been released pursuant to the CEP releases.

66 Clearly in the negotiation process that culminated in the execution of the Global Agreement and the Contractual Release, it was open to CEP to limit or restrict the scope of the release provisions, so as to preserve the claim that they now wish to prosecute. CEP did not do so. In fact, language that would limit or restrict the release in the manner suggested by the Class Action Plaintiffs at [35] above is conspicuously absent. Likewise, there is no court order that would lead to a conclusion that the court-approved releases were limited in the manner suggested by the Class Action Plaintiffs.

67 I am of the view that any claim that could be asserted be asserted by the Current and Former CEP Members, whether in respect of the Quebec Hourly Plan or otherwise, has been released.

Disposition

68 The motion of the Defendant Directors is granted and an order shall issue to this effect. In addition, costs are awarded in favour of the Defendant Directors. If the parties are unable to agree on quantum, written submissions, to a maximum of four pages, may be submitted within 21 days.

69 It is noted that AON Conseil Inc. c.o.b. as AON Hewitt ("AON") filed a factum and was present at the hearing. Issues relating to AON have not been determined on this motion and the parties have reserved their rights as to whether AON is entitled to similar relief.

Motion granted.

End of Document

TAB 6

2000 ABCA 238
Alberta Court of Appeal [In Chambers]

Canadian Airlines Corp., Re

2000 CarswellAlta 919, 2000 ABCA 238, [2000] 10 W.W.R. 314, [2000] A.W.L.D. 655, [2000] A.J. No. 1028, 20 C.B.R. (4th) 46, 228 W.A.C. 131, 266 A.R. 131, 84 Alta. L.R. (3d) 52, 99 A.C.W.S. (3d) 533, 9 B.L.R. (3d) 86

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

And In the Matter of the Business Corporations Act (Alberta) S.A. 1981, c. B-15, as amended, Section 185;

And In the Matter of Canadian Airlines Corporation and Canadian Airlines International Ltd.; Resurgence Asset Management LLC (Applicant) and Canadian Airlines Corporation and Canadian Airlines International Ltd. (Respondents)

Wittmann J.A.

Heard: August 3, 2000
Judgment: August 29, 2000
Docket: Calgary Appeal 00-08901

Proceedings: refused leave to appeal *Canadian Airlines Corp., Re* (2000), 2000 CarswellAlta 662, 2000 ABQB 442, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.); affirmed (2000), 2000 CarswellAlta 1556, 2001 ABCA 9, [2001] 3 W.W.R. 1 (Alta. C.A.)

Counsel: *D.R. Haigh, Q.C., D.S. Nishimura,* and *A.Z.A. Campbell,* for Applicant.
H.M. Kay, Q.C., A.L. Friend, Q.C., and *L.A. Goldbach,* for Respondents.
S.F. Dunphy, for Air Canada.
F.R. Foran, Q.C., for Monitor, Pricewaterhouse Coopers.

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

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Canadian Airlines Corp., Re, 2000 ABCA 149, 2000 CarswellAlta 503, 80 Alta. L.R. (3d) 213, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — applied

Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd. (1993), 81 B.C.L.R. (2d) 142, 31 B.C.A.C. 161, 50 W.A.C. 161 (B.C. C.A.) — considered

Gibbex Mines Ltd. v. International Video Cassettes Ltd., [1975] 2 W.W.R. 10, 49 D.L.R. (3d) 731 (B.C. S.C.) — considered

Harris v. Universal Explorations Ltd. (1982), 16 B.L.R. 186, (sub nom. *Universal Explorations Ltd., Re)* 18 Alta. L.R. (2d) 119, 35 A.R. 71 (Alta. T.D.) — considered

Norcan Oils Ltd. v. Fogler (1964), [1965] S.C.R. 36, 49 W.W.R. 321, 46 D.L.R. (2d) 630 (S.C.C.) — considered

Schmidt v. Air Products of Canada Ltd., 3 C.C.P.B. 1, 20 Alta. L.R. (3d) 225, (sub nom. *Stearns Catalytic Pension Plans, Re)* 168 N.R. 81, [1994] 8 W.W.R. 305, 3 E.T.R. (2d) 1, 4 C.C.E.L. (2d) 1, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631, (sub nom. *Stearns Catalytic Pension Plans, Re)* 155 A.R. 81, (sub nom. *Stearns Catalytic Pension Plans, Re)* 73 W.A.C. 81, C.E.B. & P.G.R. 8173 (S.C.C.) — referred to

Sparling v. Northwest Digital Ltd. (1991), 47 C.P.C. (2d) 124 (B.C. C.A.) — applied

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s. 185 — considered

s. 234 — considered

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s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 13 — considered

APPLICATION by investment corporation for leave to appeal from judgment reported at 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, [2000] 10 W.W.R. 269, 2000 ABQB 442, 20 C.B.R. (4th) 1 (Alta. Q.B.), approving airline's plan of arrangement under *Companies' Creditors Arrangement Act.*

***Wittmann J.A.* [In Chambers]:**

INTRODUCTION

1 This is an application by Resurgence Asset Management LLC ("Resurgence") for leave to appeal the order of Paperny, J., dated June 27, 2000, [reported 84 Alta. L.R. (3d) 9, [2000] 10 W.W.R. 269 (Alta. Q.B.)] pursuant to proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, ("*CCAA*"). The order sanctioned a plan of compromise and arrangement ("the Plan") proposed by Canadian Airlines Corporation ("CAC") and Canadian Airlines International Ltd. ("CAIL") (together, "Canadian") and dismissed an application by Resurgence for a declaration that Resurgence was an unaffected creditor under the Plan.

BACKGROUND

2 Resurgence was the holder of 58.2 per cent of $100,000,000.00 (U.S.) of the unsecured notes issued by CAC.

3 CAC was a publicly traded Alberta corporation which, prior to the June 27 order of Paperny, J., owned 100 per cent of the common shares of CAIL, the operating company of Canadian Airlines.

4 Air Canada is a publicly traded Canadian corporation. Air Canada owned 10 per cent of the shares of 853350 Alberta Ltd. ("853350"), which prior to the June 27 order of Paperny, J., owned all the preferred shares of CAIL.

5 As described in detail by the learned chambers judge in her reasons, Canadian had been searching for a decade for a solution to its ongoing, significant financial difficulties. By December 1999, it was on the brink of bankruptcy. In a series of transactions including 853350's acquisition of the preferred shares of CAIL, Air Canada infused capital into Canadian and assisted in debt restructuring.

6 Canadian came to the conclusion that it must conclude its debt restructuring to permit the completion of a full merger between Canadian and Air Canada. On February 1, 2000, to secure liquidity to continue operating until debt restructuring was achieved, Canadian announced a moratorium on payments to lessors and lenders. CAIL, Air Canada and lessors of 59 aircraft reached an agreement in principle on a restructuring plan. They also reached agreement with other secured creditors and several major unsecured creditors with respect to restructuring.

7 Canadian still faced threats of proceedings by secured creditors. It commenced proceedings under the *CCAA* on March 24, 2000. Pricewaterhouse Coopers Inc. was appointed as Monitor by court order.

8 Arrangements with various aircraft lessors, lenders and conditional vendors which would benefit Canadian by reducing rates and other terms were approved by court orders dated April 14, 2000 and May 10, 2000.

9 On April 25, 2000, in accordance with the March 24 court order, Canadian filed the Plan which was described as having three principal objectives:

(a) To provide near term liquidity so that Canadian can sustain operations;

(b) To allow for the return of aircraft not required by Canadian; and

(c) To permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset value and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

10 The Plan generally provided for stakeholders by category as follows:

(a) Affected unsecured creditors, which included unsecured noteholders, aircraft claimants, executory contract claimants, tax claimants and various litigation claimants, would receive 12 cents per dollar (later changed to 14 cents per dollar) of approved claims;

(b) Affected secured creditors, the senior secured noteholders, would receive 97 per cent of the principal amount of their claim plus interest and costs in respect of their secured claim, and a deficiency claim as unsecured creditors for the remainder;

(c) Unaffected unsecured creditors, which included Canadian's employees, customers and suppliers of goods and services, would be unaffected by the Plan;

(d) Unaffected secured creditor, the Royal Bank, CAIL's operating lender, would not be affected by the Plan.

11 The Plan also proposed share capital reorganization by having all CAIL common shares held by CAC converted into a single retractable share, which would then be retracted by CAIL for $1.00, and all CAIL preferred shares held by 853350 converted into CAIL common shares. The Plan provided for amendments to CAIL's articles of incorporation to effect the proposed reorganization.

12 On May 26, 2000, in accordance with the orders and directions of the court, two classes of creditors, the senior secured noteholders and the affected unsecured creditors voted on the Plan as amended. Both classes approved the Plan by the majorities required by ss. 4 and 5 of the *CCAA*.

13 On May 29, 2000, by notice of motion, Canadian sought court sanction of the Plan under s. 6 of the *CCAA* and an order for reorganization pursuant to s. 185 of the *Business Corporations Act* (Alberta), S.A. 1981, c. B-15 as amended ("*ABCA*"). Resurgence was among those who opposed the Plan. Its application, along with that of four shareholders of CAC, was ordered to be tried during a hearing to consider the fairness and reasonableness of the Plan ("the fairness hearing").

14 Resurgence sought declarations that the actions of Canadian, Air Canada and 853350 constitute an amalgamation, consolidation or merger with or into Air Canada or a conveyance or transfer of all or substantially all of Canadian's assets to Air Canada; that any plan of arrangement involving Canadian will not affect Resurgence and directing the repurchase of their notes pursuant to provisions of their trust indenture and that the actions of Canadian, Air Canada and 853350 were oppressive and unfairly prejudicial to it pursuant to s. 234 of the *ABCA*.

15 The fairness hearing lasted two weeks during which *viva voce* evidence of six witnesses was heard, including testimony of the chief financial officers of Canadian and Air Canada. Submissions by counsel were made on behalf of the federal government, the Calgary and Edmonton airport authorities, unions representing employees of Canadian and various creditors of Canadian. The court also received two special reports from the Monitor.

16 As part of assessing the fairness of the Plan, the learned chambers judge received a liquidation analysis of CAIL, prepared by the Monitor, in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event that CAIL's assets were disposed of by a receiver or trustee. The Monitor concluded that liquidation would result in a shortfall to certain secured creditors, that recovery by unsecured creditors would be between one and three cents on the dollar, and that there would be no recovery by shareholders.

17 The learned chambers judge stated that she agreed with the parties opposing the Plan that it was not perfect, but it was neither illegal, nor oppressive, and therefore, dismissed the requested declarations and relief sought by Resurgence. Further, she held that the Plan was the only alternative to bankruptcy as ten years of struggle and failed creative attempts at restructuring clearly demonstrated. She ruled that the Plan was fair and reasonable and deserving of the sanction of the court. She granted the order sanctioning the Plan, and the application pursuant to s. 185 of the *ABCA* to reorganize the corporation.

LEAVE TO APPEAL UNDER THE *CCAA*

18 The *CCAA* provides for appeals to this Court as follows:

> 13. Except in the Yukon Territory, any person dissatisfied with an order or a decision made under this Act may appeal therefrom on obtaining leave of the judge appealed from or of the court or a judge or the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

19 As set out in *Re Canadian Airlines Corp.*, 2000 ABCA 149 (Alta. C.A. [In Chambers]) ("*Resurgence No. 1*"), a decision on a leave application sought earlier in this action, and as conceded by all the parties to this application, the criterion to be applied in an application for leave to appeal is that there must be serious and arguable grounds that are of real and significant interest to the parties. This criterion subsumes four factors to be considered by the court:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point raised is of significance to the action itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

20 The respondents argue that apart from the test for leave, mootness is an additional overriding factor in the present case which is dispositive against the granting of leave to appeal.

MOOTNESS

21 In *Galcor Hotel Managers Ltd. v. Imperial Financial Services Ltd.* (1993), 81 B.C.L.R. (2d) 142 (B.C. C.A.), an order authorizing the distribution of substantially all the assets of a limited partnership had been fully performed. The appellants appealed, seeking to have the order vacated. The appellants had unsuccessfully applied for a stay of the order. In deciding whether to allow the appeal to be presented, Gibbs, J.A., for the court, said there was no merit, substance or prospective benefit that could accrue to the appellants, and that the appeal was therefore moot.

22 In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (S.C.C.), Sopinka, J. for the court, held that where there is no longer a live controversy or concrete dispute, an appeal is moot.

23 No stay of the June 27 order was obtained or even sought. In reliance on that order, most of the transactions contemplated by the Plan have been completed. According to the Affidavit of Paul Brotto, sworn July 6, 2000, filed July 7, 2000, the following occurred:

> 5. The transactions contemplated by the Plan have been completed in reliance upon the Sanction Order. The completion of the transactions has involved, among other things, the following steps:
>
> (a) Effective July 4, 2000, all of the depreciable property of CAIL was transferred to a wholly-owned subsidiary of CAIL and leased back from such subsidiary by CAIL;
>
> (b) Articles of Reorganization of CAIL, being Schedule "D" to the Plan (which is Exhibit "A" to the Sanction Order), were filed and a Certificate of Amendment and Registration of Restated Articles was issued by the Registrar of Corporations pursuant to the Sanction Order, and in accordance with sections 185 and 255 of the Business Corporations Act (Alberta) (the "Certificate") on July 5, 2000. Pursuant to the Articles of Reorganization, the common shares of CAIL formerly held by CAC were converted to retractable preferred shares and the same were retracted. All preferred shares of CAIL held by 853350 Alberta Ltd. ("853350") were converted into CAIL common shares;
>
> (c) The "Section 80.04 Agreement" referred to in the Plan between CAIL and CAC, pursuant to which certain forgiveness of debt obligations under s.80 of the Income Tax Act were transferred from CAIL to CAC, has been entered into as of July 5, 2000;
>
> (d) Payment of $185,973,411 (US funds) has been made to the Trustee on behalf of all holders of Senior Secured Notes as provided for in the Plan and 853350 has acquired the Amended Secured Intercompany Note; and
>
> (e) Payments have been made to Affected Unsecured Creditors holding Unsecured Proven Claims and further payments will be made upon the resolution of disputed claims by the Claims officer; and
>
> (f) It is expected that payment will be made within several days of the date of this Affidavit to the Trustee, on behalf of the Unsecured Notes, in the amount 14 percent of approximately $160,000,000.

24 In *Norcan Oils Ltd. v. Fogler* (1964), [1965] S.C.R. 36 (S.C.C.), it was held that the Alberta Supreme Court Appellate Division could not set aside or revoke a certificate of amalgamation after the registrar of companies had issued the certificate in accordance with a valid court order and the corporations legislation. A notice appealing the order had been served but no stay had been obtained. Absent express legislative authority to reverse the process once the certificate had been issued, the majority of the Supreme Court of Canada held the amalgamation could not be unwound and therefore, an appellate court ought not to make an order which could have no effect.

25 Courts following *Norcan Oils Ltd.* have recognized that any right to appeal will be lost if a party does not obtain a stay of the filing of an amalgamation approval order: *Harris v. Universal Explorations Ltd.* (1982), 35 A.R. 71 (Alta. T.D.) and *Gibbex Mines Ltd. v. International Video Cassettes Ltd.*, [1975] 2 W.W.R. 10 (B.C. S.C.).

26 *Norcan* applies to bind this Court in the present action where CAIL's articles of reorganization were filed with the Registrar of Corporations on July 5, 2000 and pursuant to the provisions of the *ABCA*, a certificate amending the articles was issued. The certificate cannot now be rescinded. There is no provision in the ***ABCA*** for reversing a reorganization.

27 The respondents point out that there are other irreversible changes which have occurred since the date of the June 27, 2000 order. They include changes in share structure, changes in management personnel, implementation of a restructuring plan that included a repayment agreement with its principal lender and other creditors and payments to third parties. [Affidavit of Paul Brotto, paras. 6, 7, 8, 9, 10, 11, 12.]

28 The applicant relies on *Re Blue Range Resource Corp.* (1999), 244 A.R. 103 (Alta. C.A.), to argue that leave to appeal can be granted after a *CCAA* plan has been implemented. In that case, as noted by Fruman, J.A. at 106, a plan was in place and an appeal of the issues which were before her would not unduly hinder the progress of restructuring.

29 In this case, however, the proposed appeal by Resurgence would interfere with the restructuring since the remedies it seeks requires that the Plan be set aside. One proposed ground of appeal attacks the fairness and reasonableness of the Plan itself when the Plan has been almost fully implemented. It cannot be said that the proposed appeal would not unduly hinder the progress of restructuring.

30 If the proposed appeal were allowed, this Court cannot rewrite the Plan; nor could it remit the matter back to the *CCAA* supervising judge for such purpose. It must either uphold or set aside the approval of the Plan granted by the court below. In effect, if Resurgence succeeded on appeal, the Plan would be vacated. However, that remedy is no longer possible, at minimum, because the certificate issued by the Registrar cannot be revoked. As stated in *Norcan Oils Ltd.*, an appellate court cannot order a remedy which could have no effect. This Court cannot order that the Plan be undone in its entirety.

31 Similarly, the other ground of Resurgence's proposed appeal, oppression under s. 234 of the *ABCA*, cannot be allowed since that remedy must be granted within the context of the *CCAA* proceedings. As recognized by the learned chambers judge, allegations of oppression were considered in the test for fairness when seeking judicial sanction of the Plan. As she discussed at paragraphs 140-145 of her reasons, the starting point in any determination of oppression under the *ABCA* requires an understanding of the rights, interests and reasonable expectations which must be objectively assessed. In this action, the rights, interests and reasonable expectations of both shareholders and creditors must be considered through the lens of *CCAA* insolvency legislation. The complaints of Resurgence, that its rights under its trust indenture have been ignored or eliminated, are to be seen as the function of the insolvency, and not of oppressive conduct. As a consequence, even if Resurgence were to successfully appeal on the ground of oppression, the remedy would not be to give effect to the terms of the trust indenture. This Court could only hold that the fairness test for the court's sanction was not met and therefore, the approval of the Plan should be set aside. Again, as explained above, reversing the Plan is no longer possible.

32 The applicant was unable to point to any issue where this Court could grant a remedy and yet leave the Plan unaffected. It proposed on appeal to seek a declaration that it be declared an unaffected unsecured creditor. That is not a ground of appeal but is rather a remedy. As the respondents argued, the designation of Resurgence as an affected unsecured creditor was part of the Plan. To declare it an unaffected unsecured creditor requires vacating the Plan. On every ground proposed by the applicant, it appears that the response of this Court can only be to either uphold or set aside the approval of the court below. Setting aside the approval is no longer possible since essential elements of the Plan have been implemented and are now irreversible. Thus, the applicant cannot be granted the remedy it seeks. No prospective benefit can accrue to the applicant even if it succeeded on appeal. The appeal, therefore, is moot.

DISCRETION TO HEAR MOOT APPEALS

33 Even if an appeal could provide no benefit to the applicants, should leave be granted?

34 In *Borowski, supra*, Sopinka, J. described the doctrine of mootness at 353. He said that, as an aspect of a general policy or practice, a court may decline to decide a case which raises merely a hypothetical or abstract questions and will apply the doctrine when the decision of the court will have no practical effect of resolving some controversy affecting the rights of parties.

35 After discussing the principles involved in deciding whether an issue was moot, Sopinka, J. continued at 358 to describe the second stage of the analysis by examining the basis upon which a court should exercise its discretion either to hear or decline to hear a moot appeal. He examined three underlying factors in the rationale for the exercise of discretion in departing from the usual practice. The first is the requirement of an adversarial context which helps guarantee that issues are well and fully argued when resolving legal disputes. He suggested the presence of collateral consequences may provide the necessary adversarial context. Second is the concern for judicial economy which requires that special circumstances exist in a case to make it worthwhile to apply scare judicial resources to resolve it. Third is the need for the court to demonstrate a measure of awareness of its proper law-making function as the adjudicative branch in the political framework. Judgments in the absence of a dispute may be viewed as intruding into the role of the legislative branch. He concluded at 363:

> In exercising its discretion in an appeal which is moot, the court should consider the extent to which each of the three basic rationalia for enforcement of the mootness doctrine is present. This is not to suggest that it is a mechanical process. The principles identified above may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third and vice versa.

36 The third factor underlying the rationale does not apply in this case. As for the first criterion, the circumstances of this case do not reveal any collateral consequences, although, it may be assumed that the necessary adversarial context could be present. However, there are no special circumstances making it worthwhile for this Court to ration scarce judicial resources to the resolution of this dispute. This outweighs the other two factors in concluding that the mootness doctrine should be enforced.

37 On the ground of mootness, leave to appeal should not be granted.

38 I am supported in this conclusion by similar cases before the British Columbia Court of Appeal, *Sparling v. Northwest Digital Ltd.* (1991), 47 C.P.C. (2d) 124 (B.C. C.A.) and *Galcor, supra.*

39 In *Sparling*, a company sought to restructure its financial basis and called a special meeting of shareholders. A court order permitted the voting of certain shares at the shareholders' meeting. A director sought to appeal that order. On the basis of the initial order, the meeting was held, the shares were voted and some significant changes to the company occurred as a result. Hollinrake, J.A. for the court described these as substantial changes which are irreversible. He found that the appeal was moot because there was no longer a live controversy. After considering *Borowski*, he also concluded that the court should not exercise its discretion to depart from the usual practice of declining to hear moot appeals.

40 In *Galcor*, as stated earlier, an order authorizing the distribution of certain monies to limited partners was appealed. A stay was sought but the application was dismissed. An injunction to restrain the distribution of monies was also sought and refused. The monies were distributed. The B.C. Court of Appeal held there was no merit, no substance and no prospective benefit to the appellants nor could they find any merit in the argument that there would be a collateral advantage if the appeal were heard and allowed. None of the criteria in *Borowski* were of assistance as there was no issue of public importance and no precedent value to other cases. Gibbs, J.A. was of the opinion it would not be prudent to use judicial time to hear a moot case as the rationing of scarce judicial resources was of importance and concern to the court.

APPLICATION OF THE CRITERIA FOR LEAVE

41 In any event, consideration of the usual factors in granting leave to appeal does not result in the granting of leave.

42 In particular, the applicant has not established *prima facie* meritorious grounds. The issue in the proposed appeal must be whether the learned chambers judge erred in determining that the Plan was fair and reasonable. As discussed in *Resurgence No. 1*, regard must be given to the standard of review this Court would apply on appeal when considering a leave application.

The applicant has been unable to point to an error on a question of law, or an overriding and palpable error in the findings of fact, or an error in the learned chambers judge's exercise of discretion.

43 Resurgence submits that serious and arguable grounds surround the following issues: (a) Should Resurgence be treated as an unaffected creditor under the Plan? and (b) Should the Plan have been sanctioned under s. 6 of the *CCAA*? The applicant cannot show that either issue is based on an appealable error.

44 On the second issue, the main argument of the applicant is that the learned chambers judge failed to appreciate that the vote in favour of the Plan was not fair. At bottom, most of the submissions Resurgence made on this issue are directed at the learned chambers judge's conclusion that shareholders and creditors of Canadian would not be better off in bankruptcy than under the Plan. To appeal this conclusion, based on the findings of fact and exercise of discretion, Resurgence must establish that it has a *prima facie* meritorious argument that the learned chambers judge's error was overriding and palpable, or created an unreasonable result. This, it has not done.

45 Resurgence also argues that the acceptance of the valuations given by the Monitor to certain assets, in particular, Canadian Regional Airlines Limited ("CRAL"), the pension surplus and the international routes was in error. The Monitor did not attribute value to these assets when it prepared the liquidation analysis. Resurgence argued that the learned chambers judge erred when she held that the Monitor was justified in making these omissions.

46 Resurgence argued that CRAL was worth as much as $260 million to Air Canada. The Monitor valued CRAL on a distressed sale basis. It assumed that without CAIL's national and international network to feed traffic and considering the negative publicity which the failure of CAIL would cause, CRAL would immediately stop operations.

47 The learned chambers judge found that there was no evidence of a potential purchaser for CRAL. She held that CRAL had a value to CAIL and could provide value of Air Canada, but this was attributable to CRAL's ability to feed traffic to and take traffic from the national and international service of CAIL. She held that the Monitor properly considered these factors. The $260 million dollar value was based on CRAL as a going concern which was a completely different scenario than a liquidation analysis. She accepted the liquidation analysis on the basis that if CAIL were to cease operations, CRAL would be obliged to do so as well and that would leave no going concern for Air Canada to acquire.

48 CRAL may have some value, but even assuming that, Resurgence has not shown that it has a *prima facie* meritorious argument that the learned chambers judge committed an overriding and palpable error in finding that the Monitor was justified in concluding CRAL would not have any value assuming a windup of CAIL. She found that there was no evidence of a market for CRAL as a going concern. Her preference for the liquidation analysis was a proper exercise of her discretion and cannot be said to have been unreasonable.

49 Resurgence also argued that the pension plan surplus must be given value and included in the liquidation analysis because the surplus may revert to the company depending upon the terms of the plan. There was some evidence that in the two pension plans, with assets over $2 billion, there may be a surplus of $40 million. The Monitor attributed no value because of concerns about contingent liabilities which made the true amount of any available surplus indefinite and also because of the uncertainty of the entitlement of Canadian to any such amount.

50 The learned chambers judge found that no basis had been established for any surplus being available to be withdrawn from an ongoing pension plan. She also found that the evidence showed the potential for significant contingencies. Upon termination of the plan, further reductions for contingent benefits payable in accordance with the plans, any wind up costs, contribution holidays and litigation costs would affect a determination of whether there was a true surplus. The evidence before the learned chambers judge included that of the unionized employees who expected to dispute all the calculations of the pension plan surplus and the entitlement to the surplus. The learned chambers judge observed also that the surplus could quickly disappear with relatively minor changes in the market value of the securities held or in the calculation of liabilities. She concluded that given all variables, the existence of any surplus was doubtful at best and held that ascribing a zero value was reasonable in the circumstances.

51 In addition to the evidence upon which the learned chambers judge based her conclusion, she is also supported by the case law which demonstrates that even if a pension surplus existed and was accessible, entitlement is a complex question: *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611 (S.C.C.).

52 Resurgence argued that the international routes of Canadian should have been treated as valuable assets. The Monitor took the position that the international routes were unassignable licences in control of the Government of Canada and not property rights to be treated as assets by the airlines. Resurgence argues that the Monitor's conclusion was wrong because there was evidence that the international routes had value. In December 1999, CAIL sold its Toronto - Tokyo route to Air Canada for $25 million. Resurgence also pointed to statements made by Canadian's former president and CEO in mid-1999 that the value of its international routes was $2 billion. It further noted that in the United States, where the government similarly grants licences to airlines for international routes, many are bought and sold.

53 The learned chambers judge found the evidence indicated that the $25 million paid for the Toronto-Tokyo route was not an amount derived from a valuation but was the amount CAIL needed for its cash flow requirements at the time of the transaction in order to survive. She found that the statements that CAIL's international routes were worth $2 billion reflected the amount CAIL needed to sustain liquidity without its international routes and was not the market value of what could realistically be obtained from an arm's length purchaser. She found there was no evidence of the existence of an arm's length purchaser. As the respondents pointed out, the Canadian market cannot be compared to the United States. Here in Canada, there is no other airline which would purchase international routes, except Air Canada. Air Canada argued that it is pure speculation to suggest it would have paid for the routes when it could have obtained the routes in any event if Canadian went into liquidation.

54 Even accepting Resurgence's argument that those assets should have been given some value, the applicant has not established a *prima facie* meritorious argument that the learned chambers judge was unreasonable to have accepted the valuations based on a liquidation analysis rather than a market value or going concern analysis nor that she lacked any evidence upon which to base her conclusions. She found that the evidence was overwhelming that all other options had been exhausted and have resulted in failure. As described above, she had evidence upon which to accept the Monitor's valuations of the disputed assets. It is not the role of this Court to review the evidence and substitute its opinion for that of the learned chambers judge. She properly exercised her discretion and she had evidence upon which to support her conclusions. The applicant, therefore, has not established that its appeal is *prima facie* meritorious.

55 On the first issue, Resurgence argues that it should be an unaffected creditor to pursue its oppression remedy. As discussed above, the oppression remedy cannot be considered outside the context of the *CCAA* proceedings. The learned chambers judge concluded that the complaints of Resurgence were the result of the insolvency of Canadian and not from any oppressive conduct. The applicant has not established any *prima facie* error committed by the learned chambers judge in reaching that conclusion.

56 Thus, were this appeal not moot, leave would not be granted as the applicant has not met the threshold for leave to appeal.

CONCLUSION

57 The application for leave to appeal is dismissed because it is moot, and in any event, no serious and arguable grounds have been established upon which to found the basis for granting leave.

Application dismissed.

TAB 7

1982 CarswellOnt 3364
Ontario Supreme Court, High Court of Justice

Hodgson v. Traders Realty Co.

1982 CarswellOnt 3364, 16 A.C.W.S. (2d) 422

BETWEEN WILLIAM ROBERT HODGSON, Plaintiff, and TRADERS REALTY LIMITED, CANADA PERMANENT MORTGAGE CORPORATION, CO-OPERATIVE LIFE INSURANCE COMPNAY, CO-OPERATORS LIFE INSURANCE ASSOCIATION, CO-OPERATORS INSURANCE ASSOCIATION, EATON/BAY LIFE ASSURANCE COMPANY and EATON/BAY TRUST COMPANY, Defendants.

Callon J

Judgment: October 8, 1982
Docket: None given.

Counsel: G. Mackenzie, for the Plaintiff.
R. L. Falby, Q.C.. for the Defendants.

Subject: Contracts

***THE HONOURABLE MR. JUSTICE CALLON*:**

1 In this action, the plaintiff claims damages for breach of contract and, in the alternative, restitutionary relief based on the principle of unjust enrichment or on the basis that a payment was made by the plaintiff to the defendant as a result of economic compulsion or duress.

2 The basic facts are not in dispute. The Plaintiff was at all material times the president and chairman of the board of directors of the corporation known as Skyline Hotels Limited. He was also the majority shareholder of Skyline which operated a number of hotels. In late 1977 and early 16,78, Skyline negotiated a second mortgage of nine million dollars with all of the defendants. in addition to the second mortgage, skyline provided the defendants with other security. included in this other security was an escrow agreement under which the plaintiff deposited his Skyline shares with the trustee.

3 The plaintiff advances his claim for damages for breach of contract under the escrow agreement, a.copy of which appears under Tab 10 of Exhibit No. 1. The provisions of paragraphs 3 and 4 of the escrow agreement are central to this issue and they are as follows:

> "3. Hodgson covenants and agrees to and with each of the Lenders not to sell, assign, transfer, mortgage, hypothecate or otherwise in any manner deal with any of the Shares or any interest therein or in the Certificates or any interest therein or in the Shares within escrow, during the term hereof, except as contemplated by paragraph 4 hereof.
>
> 4. Trustee covenants and agrees to and with each of the Lenders to hold the Certificates and not to release any thereof from escrow nor transfer the Certificates or any interest therein or in the Shares within escrow, during the term hereof, except as follows:
>
> (i) with the written consent of each of the Lenders; or
>
> (ii) as Hodgson shall require in connection with any amalgamation, merger. arrangement or other statutory procedure to which Skyline shall be a party, whereunder any of the Shares are to be exchanged for, converted into, or redeemed or otherwise purchased upon payment of, other securties and/or money, and pursuant to which Hodgson shall continue

> (subject to any further action on his part in accordance herewith) to have control in fact of any company or companies successor or successors to and/or in possession of substantially all of the assets of Skyline, in which case Trustee shall forthwith deliver the Certificates to Hodgson and Hodgson hereby undertakes to forthwith deliver such securities and/ or moneys to Trustee to be held upon and subject to the terms hereof, mutatis mutandis;

but Trustee shall not exercise any rights of ownership with respect to the Shares or Certificates. "

4 All of the parties to this action are experienced and knowledgeable in financial and business matters and were throughout, represented and advised by competent legal counsel who were also experienced and knowledgeable in financial and business matters.

5 In march of 1980, the plaintiff was approached by York-Hanover Limited with a view to it purchasing all of the shares of Skyline. The plaintiff then approached the defendants for their consent to the release of his shares, so that the sale of all of the shares of Skyline could be sold to York-Hanover Limited. The price to he paid-for the shares was considered by the plaintiff to be most advantageous financially to the plaintiff and to the minority shareholders of Skyline. negotiations followed between the plaintiff and the defendants with respect to the terms under which the plaintiff's shares would he released to him, so that the sale of all of the shares to York-Hanover Limited could be completed. As one of the terms, the plaintiff proposed and agreed that he would provide the defendants with a letter of credit in the amount of Two Million Dollars. A further term was that York-Hanover Limited would guarantee payment of the second mortgage,and it was prepared to do so. The term to which the plaintiff vigorously objected was the payment to the defendants of the amount of $175,000. The evidence is that the plaintiff agreed to pay $75,000 but that the defendant insisted on a payment of $175,000. The latter payment was made by the plaintiff and his Skyline shares were released to him by the defendants and the sale to York-Hanover was completed in or about April 1980. It is the recovery of this payment of $175,000 which the plaintiff claims by way of restitutionary relief.

6 With respect to his claim for damages for breach of contract, the plaintiff submitts that there is an implied term in the escrow agreement,that the consent of the defendants to the sale of the plaintiff's shares would not be unreasonably witheld. in order to support such a claim, the plaintiff would have to rely on parol or extrinsic evidence. The defendants objected to the admissibility of such evidence but I ruled that I would hear it subject to the objection of the defendants and would ultimately decide its admissibility or otherwise.

7 The use of extrinsic evidence is succinctly stated by Phipson on Evidence, 12th edition, (1926) at page 793 in these words:

> When a transaction has been reduced to, or recorded in, writing, either by requirement of law or agreement of the parties, extrinsic evidence is in general, inadmissible to contradict vary, add to or subtract from the terms of the document."

The first consideration is whether or not there is any ambiguity or doubt as to the meaning of and proper interpretation of the terms of the escrow agreement. In *Leitch Gold Mines Ltd. v. Texas Gulf Sulpher Co.* (1969) I O.R. 469, 3 D.L.R. (3d) 161 at 216,Gale, C.J.O. expressed his opinion as to the meaning of "ambiguity"-; which would make the rule applicable, in this way:

> "Where the language of the document and the incorporated manifestations of initial intention are clear on a consideration of the document alone and can be applied without difficulty to the facts of the case, it can be said that no patent ambiguity exists. In such a case, extrinsic evidence is not admissible to affect its interpretation. On the other hand, where the language is equivocal, or if.unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present. The term "latent ambiguity" seems now to be applied generally to all uses of doubtful meaning or application."

8 In *Re Gabriel and Hamilton Tiger-Cat Football Club Ltd.*, (1975) 8 O.R.(2d) 285 at 294, O'Leary, J. dealt with the implied terms in a contract as follows:

> The right of the Court to imply terms into a contract, except where such are to be implied by statute or custom, is extremely limited and has been outlined afresh by the House of Lords in *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board*, (1973) 2 All E.R. 260. At pp. 265-8, Lord Pearson said as follows:

In the High Court before Donaldson, J. the appellants relied on the plain meaning of the contract literally interpreted, and the respondents' argument was, mainly at any rate, directed to the implication of a term. Donaldson J decided in favour of the appellants that no term could he implied. He cited a passage from the judgment of Scrutton LJ in *Reigate v. Union Manufacturing Co.(Ramsbottom) Ltd.*,((1918) 1 K.B. 592 at 605 (1918-19) All ER Rep 143 at 149):

> A term can only be implied if it is necessary in the business sense to give efficacy to the contract: that is, if it is such a term that it can confidently he said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case," they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear." Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."

The learned judge then said:

> When I come to imagine the answers of the parties if asked as they signed the contract "What happens about the time for completion of phase III, if.completion of phase I is delayed?" I am quite unable to discern any certain answer."

He went on to show there were several possible answers.

In the Court of Appeal and in the present appeal, the respondents" argument was based on both a "point of construction" and on implication of a term. It has been convenient in this case to make the contrast between the two branches of the respondents' argument in this way, but I am doing so without prejudice to the question whether as a matter of correct theory the implication of a term may properly be considered as an aspect of the construction of the contract. Cairns, in a dissenting judgment rejected both branches of the respondents' arguments. As to the first, he said:

> "Here we are being invited to construe the contract not by a restrictive interpretation nor by choosing between two possible meanings of a clause, but by adding words for which I can find no sort of warrant."

As to the second, he cited a passage from the opinion of Lord Wright in *Luxor (Eastbourne) Ltd. v. Cooper* ((1941) 1 All ER 33 at 52, 53, (1941) AC 108 at 137):

> "It is well recognised, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that lit goes without saying," some term not expressed but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have comtemplated. The implication must arise inevitable to give effect to the intention of the parties.

Then Cairns LJ said:

"I do not consider that it is necessary in this case to imply any term to give business efficacy to the contract. The contractors were taking the risk of circumstances arising which might make it difficult for then to complete phase III by the contract date of completion. There is nothing exceptional about that."

. . . . .

Faced with the conflict of judicial opinion in this case, I prefer the views of Donaldson J and Cairns was being more orthodox and in conformity with the basic principle that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. if the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings; the clear terms must be applied even if the court thinks some other terms would have been more suitable.

> An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract; it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them; it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves."

9 In considering the terms of paragraphs 3 and 4 of the excrow agreement, I find that they are free of ambiguity or doubt. Paragraph 4(i) provides that the plaintiff's Skyline shares may not be released "except with the written consent of each of the lenders", that is,the defendants. Paragraph 4(ii) then goes on to provide the circumstances under which the plaintiff may require the release of the shares without the consent, written or otherwise, of the defendants. To imply a term that the written consent could not be unreasonably withheld, would be varying the agreement reached by the parties by adding a term to the written document, which was not in contemplation of the parties. Extrinsic evidence is therefore inadmissible and I find that there no implied term in the contract or agreement whereby the consent of the defendants to the release of the plaintiff's shares could not be unreasonably withheld.

10 I perhaps should add that even if I were to admit the extrinsic evidence which was called and which consisted of the evidence of the plaintiff and of James Andrews and of Solicitor George Tiviluk, I would not have been satisfied that any such term should he implied. Their evidence was more of an indication of their impression of what the position of the defendants was with respect to a release of the plaintiff's shares, than clear evidence upon which I could find such an implied term. In addition Solicitor Nicodemo Scarfo, employed by the defendant Traders, testified that when he met with the Solicitor for the plaintiff, they suggested a clause in the escrow agreement that the consent could not he unreasonably withheld, but that he rejected it. The escrow agreement was then prepared by the plaintiff's solicitor in the form in which it appears under Tab 1, Exhibit No. 1.

11 With respect to the plaintiff's claim for restitutionary relief on the basis of economic complusion or duress, the legal principles which must be considered are set forth in the judgment of The Ontario Court of Appeal in *Ronald Elwyn Lister v. Dunlop Canada Ltd.*, (1979) 27 O.R. (2d) 168 at 178 as follows:

> " Similar in outward appearance to this jurisdiction is that exercised by the common law Courts to set aside an agreement obtained by economic duress, or to order restitution where a benefit has been obtained through economic duress. "That type of duress is perhaps more common now than formerly, or more visible. In the recent case of *Pao On et al. V. V. Lau Yui et al.*, (1979) 3 All E.R. 65 (P.C.), Lord Scarman expressed the view of the Board on the question whether English law recognizes a category of duress known as "economic duress". He said at pp. 789:
>
> > "Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observation of Kerr J in *The Siboen and The Sibotre*,(1976) Lloyd's Rep 293 at 336, that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent". This conception is in line with what was said in this Board's decision in *Barton v. Armstrong*,(1975) 2 All ER 465 at 476-477, (1976) AC 104 at 121, by Lord Wilberforce and Lord Simon of Glaisdale, observations with which the majority judgment appears to be in agreement. In determining whether there was a coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v. Horner*,(1915) 3 KB 106, (1914) All ER Rep 595, relevant in determining whether he acted voluntarily or not."

12 I am satisfied that the plaintiff consented to the payment of $175,000, even though reluctantly, as part of the bargain that he reached with the defendants in order to obtain the release of his shares and so that he could complete a trans action that was most beneficial to him financially. There is nothing in the evidence to satisfy me that there was such a coercion of his will to vitiate his consent. The plaintiff therefore fails in his claim for restitutionary relief on the basis of economic compulsion or duress.

13 Further, since the payment of $175,000 was made to the defendants as a result of a bargain reached between parties with a full understanding of what was involved and each with most competent legal counsel and advice, it cannot be said that to allow the defendants to retain the $175,000 is to allow them to retain a benefit which results in them being unjustly enriched at the expense of the plaintiff.

14 In the result, the action is dismissed.

— -Submissions on costs.

15 HIS LORDSHIP: I will consider the matter of costs, and endorse the Record accordingly.

End of Document

TAB 8

1992 CarswellOnt 163
Ontario Court of Appeal

Algoma Steel Corp. v. Royal Bank

1992 CarswellOnt 163, [1992] O.J. No. 889, 11 C.B.R. (3d) 11, 34 A.C.W.S. (3d) 1109, 3 W.D.C.P. (2d) 397, 55 O.A.C. 303, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98

ALGOMA STEEL CORPORATION, LIMITED v. ROYAL BANK OF CANADA, MONTREAL TRUST COMPANY (Trustee of certain debentures issued by Algoma Steel Corporation, Limited under a certain trust indenture) and ROYAL BANK OF CANADA, CANADIAN IMPERIAL BANK OF COMMERCE, HONGKONG BANK OF CANADA, and TORONTO DOMINION BANK (in their capacity as holders of certain of the debentures issued pursuant to said trust indenture)

Krever, McKinlay and Labrosse JJ.A.

Heard: April 21-23, 1992
Judgment: April 30, 1992
Docket: Doc. CA C11707

Counsel: *D.J.T. Mungovan* and *Debbie A. Campbell*, for Kelsey-Hayes Canada Limited and Kelsey-Hayes Company.
M.E. Royce and *M.E. Barrack*, for Algoma Steel Corporation, Limited.
W.L.N. Somerville, Q.C., and *B.H. Bresner*, for Royal Insurance Company of Canada.
R.N. Robertson, Q.C., and *W.A. Apps*, for Dofasco Inc.

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 —

s. 11(c)

s. 12(2)(a)(iii)

Insurance Act, R.S.O. 1990, c. I.8 —

s. 132

s. 132(1)

Motion for leave to appeal and an appeal under the *Companies' Creditors Arrangement Act*.

Per curiam:

1 This is a motion for leave to appeal and, if leave is granted, an appeal, under the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "C.C.A.A."), from the order of Farley J. dismissing a motion for the valuation of the claim of Kelsey-Hayes Canada Limited ("Kelsey-Hayes") and for leave to bring proceedings against The Algoma Steel Corporation Limited ("Algoma"), the subject of a plan of arrangement under the C.C.A.A.

2 Kelsey-Hayes is involved in product-liability litigation in Missouri as a result of serious personal injuries suffered by a child when a wheel broke away from a Dodge truck and struck him. The wheel was manufactured by Kelsey-Hayes, against whom a Missouri jury awarded a verdict in excess of $4 million U.S. That verdict was set aside by the trial judge on the basis that Chrysler Corporation, the truck's manufacturer, had been improperly dismissed from the action at an earlier stage. The setting aside of the verdict was appealed to the Missouri Court of Appeals, but judgment on the appeal has been reserved. Kelsey-Hayes, the defendant in the Missouri litigation, alleges that the steel used for the manufacture of the errant wheel was a defective product of Algoma and seeks to claim contribution or indemnity from Algoma in order to be able to pursue, under s. 132 of the *Insurance Act*, R.S.O. 1990, c. I.8, the proceeds of a product-liability insurance policy by which Algoma is insured by the Royal Insurance Company of Canada ("Royal"). It also seeks relief under the plan of arrangement in respect of the amount of any liability Algoma may have to it in excess of the policy limits.

3 In the C.C.A.A. proceedings, an order was made by Montgomery J. in the terms of s. 11(*c*) of the C.C.A.A. that no action or other proceeding may be proceeded with or commenced against Algoma except with the leave of the court. It is common ground that Kelsey-Hayes, by reason of its claim against Algoma, is a known designated unsecured creditor of Algoma, as defined in the plan of arrangement. The plan of arrangement, which has been voted on by all classes of affected creditors, and sanctioned, subject to the outcome of this appeal, by an order of Farley J. dated April 26, 1992, provides that upon payment by Algoma to a trustee of a certain sum in payment of the claims of the specified unsecured creditors, "all Claims of Specified Unsecured Creditors will be released, discharged and cancelled."

4 After Kelsey-Hayes notified Algoma of the litigation in Missouri, of its allegation of defective steel against Algoma, and of its claim in the amount of the Missouri verdict, Algoma responded by valuing the claim at the sum of $1. Kelsey-Hayes thereupon applied to the court, under the provisions of s. 12(2)(*a*)(iii) of the C.C.A.A., for the determination of the amount of its claim. Before the application was heard, Kelsey-Hayes enlarged the relief sought to include that described above and Royal was brought into the proceedings. Mr. Justice Farley held that he had no authority to permit Kelsey-Hayes to proceed against Algoma and went on to confirm the valuation of the claim at $1. The essential issue in this appeal is whether, under the C.C.A.A., the fact that the plan of arrangement now exists prevents the court from permitting Algoma from being proceeded against by Kelsey-Hayes even to the limited extent of the insurance proceeds.

5 We are of the view that, however weak the evidence available on the application may have been with respect to the origin of the steel used in the manufacture of the wheel, and thus the case against Algoma, it cannot be said that the case is without any foundation or is frivolous. The fact that s. 12(2)(iii) provides that the amount of a creditor's claim, if not admitted by the company, "shall be determined by the court on summary application by the company or by the creditor," does not compel the court to determine the valuation summarily. The provision simply authorizes the proceedings to be brought summarily, that is, by way of originating notice of motion or application rather than by the lengthier, and more complicated, procedure of an action. In an appropriate case, therefore, there is no reason why the determination cannot be made after a trial either of an issue or an action, in the course of which production and discovery would be available. In the absence of such a trial, it cannot be said, in our view, that the valuation of the claim of Kelsey-Hayes against Algoma in the sum of $1 is correct.

6 The more difficult question is whether the court has jurisdiction to authorize proceedings now that the plan of arrangement is in place. It is submitted that it does not, because of the need for commercial certainty and because to do so would be to amend the plan of arrangement (which extinguishes the claims of all designated unsecured creditors, of which Kelsey-Hayes is certainly one). The plan of arrangement is a matter of contract, it is argued, and the court's jurisdiction is limited to sanctioning or refusing to sanction the arrangement arrived at contractually. There is much merit in this argument, but, in our view, it is not a complete answer.

7 Kelsey-Hayes does not deny that if the language of the plan of arrangement quoted above, extinguishing the claims of designated unsecured creditors, is unambiguous, as we believe it is, to grant the relief which it seeks would require an amendment by the court of the plan of arrangement. We accept the submission that, generally speaking, the plan of arrangement is consensual and the result of agreement and that if it is fair and reasonable (an issue for the court to decide) it is not to be interfered with by the court unless (a) the Act authorizes the court to affect the plan and (b) there are compelling reasons

justifying the court's action. Generally speaking again, the court ought not to interfere where to do so would prejudice the interests of the company or the creditors. But where no prejudice would result and the needs of justice are to be met, the court may act if the C.C.A.A., properly interpreted, authorizes intervention. In this connection, it may be relevant that, although it is hardly conclusive, Algoma's management information circular to creditors, shareholders and employees, which accompanied the proposed plan of arrangement, advised those persons, under the heading "Court Approval of the Plan" as follows:

> The authority of the Court is very broad under both the CCAA and the OBCA — Algoma has been advised by counsel that the Court will consider, among other things, the fairness and reasonableness of the Plan. The Court may approve the Plan as proposed *or as amended in any manner that the Court may direct* and subject to compliance with such terms and conditions, if any, as the Court thinks fit.

[Emphasis added.] We agree that the circular's statement that the court may direct an amendment of the plan does not, as a matter of law, make it so. The C.C.A.A. must be the authority for the jurisdiction and the critical issue is whether there is any provision in the Act that fairly gives rise to a power in the court to amend. In our view, there is such a provision and that provision, s. 11(*c*), depending on the language of the plan itself, may by necessary inference, in an appropriate case, enable the court to make an order, the technical effect of which is that the plan is amended. The relevant portion of the section reads as follows:

> whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> . . . . .
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company *except with the leave of the court* and subject to such terms as the court imposes.

[Emphasis added.]

8 As we have already pointed out, an order in the terms of this provision was made early in the proceedings by Montgomery J. The effect of the enactment and the order is to empower the court to grant leave to take proceedings against Algoma in appropriate circumstances. It was submitted that this power, having regard to the commercial realities reflected by the C.C.A.A., is one that may be exercised only before the creditors have voted to accept the plan of arrangement. No authority could be cited to support such a circumscription of the court's jurisdiction, unqualifiedly conferred by the statute. Nor, as a matter of principle, is there any reason to suggest that the scheme created by the C.C.A.A. contemplates a role for the court as a mere rubber stamp or one that is simply administrative rather than judicial. On the other hand, we have no doubt that, given the primacy accorded by the Act to agreement among the affected actors, the jurisdiction of the court is to be exercised sparingly and in exceptional circumstances only, if the result of the exercise is to amend the plan, even in merely a technical way. In this case, for example, it would be an unacceptable exercise of jurisdiction if the effect of granting leave to Kelsey-Hayes to proceed against Algoma would be to render vulnerable to possible execution any assets other than insurance proceeds, if any, that may be available under the policy by which Royal insured Algoma against product liability. If the leave granted could be so limited, and that is the difficulty that must be addressed, the plan of arrangement which, in its terms, extinguishes the claims of designated unsecured creditors, would undergo amendment in an insignificant and technical way only, as far as the other creditors are concerned.

9 The concern of prejudice must now be considered and the question asked whether any interests would be affected detrimentally if Kelsey-Hayes were permitted to claim against Algoma to the extent only of recourse to the insurance proceeds. If to give leave had the effect of giving potential access to assets over and above the policy limits, there would indeed be prejudice to several interests and, moreover, the plan of arrangement would be significantly amended. On the premise that only the insurance proceeds were to be made potentially available to satisfy any judgment that Kelsey-Hayes may be awarded in its claim over against Algoma, it cannot be said that any interest is affected adversely except possibly that of Royal and that of Dofasco Inc. ("Dofasco"). It is to that issue that we now turn.

10 The potential liability of Royal to Kelsey-Hayes as insurer of Algoma arises out of the provisions of s.132(1) of the *Insurance Act*, which read as follows:

> Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

Royal is potentially answerable to Kelsey-Hayes, a third party with respect to Algoma's policy of insurance only by virtue of this statutory provision but, in any third party claim against it, its liability is "subject to the same equities as the insurer would have if the judgment had been satisfied." Prejudice, in a legal sense, as far as Royal is concerned is non-existent.

11 The question of prejudice to Dofasco is more difficult. Its interest arises in this way. As part of the comprehensive restructuring scheme, of which the plan of arrangement is the central part, Algoma's assets are to be transferred to a new corporate entity, referred to in argument as New Algoma, in which Algoma's shareholders and creditors (whose claims are being compromised and otherwise discharged) are to receive shares. The funds to make this possible are to be supplied by Dofasco in the sum of $30 million. In return, Dofasco is to obtain Algoma's tax loss in the sum of $150 million. The result of these transactions as contemplated by the comprehensive scheme is that Algoma is to become devoid of assets and creditors, in short, that Algoma is to be made a "clean corporation," or a mere shell with a tax loss carryforward. Dofasco filed no material, and on the appeal filed no factum, showing any prejudice which it might suffer if leave to proceed is granted. Instead, in oral argument, it submitted that any such order would impair the integrity of the plan of arrangement and reduce the certainty that was necessary for the plan's success. In our view, no impairment will occur if an order is made subject to sufficient safeguards to limit any possible recovery to the insurance proceeds. We think a safeguard can be provided. The difficulty is in the language of s. 132 of the *Insurance Act*, which requires, as a condition precedent to a direct action against the insurer, that an execution against the insured be returned unsatisfied.

12 This very requirement makes the purpose of the section clear. It is to provide direct access to an insurer, by a person incurring the liability referred to in the section, in a situation where the insured is judgment proof, thus circumventing the normal operation of insurance contracts, which is solely to indemnify the insured against loss. To interpret the section in such a way as to apply only in the narrow situation where the insured is judgment proof (and therefore almost certainly insolvent), but not in situations where either the insured or its creditors have taken proceedings pursuant to federal insolvency statutes, would be to frustrate its objectives in a large percentage of situations where it would otherwise apply.

13 If the plaintiff in this case were successful in the Missouri action against Kelsey-Hayes and Kelsey-Hayes were successful in a permitted claim over for indemnity or contribution from Algoma, there could be no question that, notionally, the condition precedent of an unsatisfied judgment would be met because, prior to the plan, Algoma was insolvent and the commencement of proceedings under the C.C.A.A. rendered it judgment proof. To secure the certainty of the integrity of the plan, which Dofasco argues it needs in order to discharge its role in the scheme, we make clear our intention that only any insurance proceeds that may become available to Algoma are to be the subject of any recovery against Algoma that Kelsey-Hayes may prove that it is entitled to. That is to be accomplished by providing in our order that neither the assets of Algoma (other than the insurance proceeds) nor the assets of any other corporation which may become responsible in any way for any liabilities of Algoma by virtue of the operation of the plan of arrangement or the more comprehensive scheme of restructuring, or any condition precedent thereto, shall be available to satisfy any judgment obtained as a result of any proceedings by Kelsey-Hayes against Algoma.

14 The justice of permitting an amendment to the plan as inconsequential as the one we permit in these exceptional circumstances is illustrated by the hypothetical case put in argument. Suppose a visitor had become quadriplegic as a result of an injury on the premises of Algoma under circumstances in which Algoma as occupier might be liable and suppose Algoma's potential liability was insured against by an appropriate insurance policy. To restrict the injured person, a known designated unsecured creditor under the terms of the plan of arrangement, to his or her compromised claim valued, without a trial, in a summary proceeding, would, in our view, be unacceptable. The actual situation before the court is analogous.

15 For these reasons, we grant leave to appeal, allow the appeal, set aside the order of Farley J. dated April 9, 1992, and grant leave to Kelsey-Hayes to proceed as it may be advised in the terms set out above.

Leave to appeal granted; appeal allowed; leave to proceed granted.

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TAB 9

1982 CarswellOnt 190
Ontario Supreme Court, In Bankruptcy

Johnston, Re

1982 CarswellOnt 190, 2 P.P.S.A.C. 150, 43 C.B.R. (N.S.) 39

Re JOHNSTON

Saunders J.

Judgment: September 3, 1982
Docket: Ontario

Counsel: *G.S. Gringorten*, for trustee in bankruptcy.
A. Gerstl, for 376531 Ontario Limited.

Subject: Corporate and Commercial; Insolvency; Property

Table of Authorities

Statutes considered:

Personal Property Security Act, R.S.O. 1980, c. 375, ss. 4, 10, 13(2)(*a*), 22(1)(*a*)(iii), (2), 47, 63.

Trial of issue regarding perfection of security interest under Personal Property Security Act.

***Saunders J.* (orally):**

1 This is a trial of an issue directed by Hollingworth J. on 18th November 1980. The issues are:

2 1. Whether a certain chattel mortgage is an unperfected security interest within the meaning of the Personal Property Security Act (the P.P.S.A.), R.S.O. 1980, c. 375; and

3 2. Whether, if such interest is unperfected, it is subordinate to the interest of the trustee in bankruptcy.

4 At the trial the trustee was the plaintiff and the chattel mortgagee, 376531 Ontario Limited, was the defendant.

5 The only basis upon which perfection may be founded in this case is by registration of a financing statement under s. 47 of the P.P.S.A. Section 47(3) provides as follows:

> (3) The financing statement referred to in subsection 1 shall not be registered before the execution of the security agreement or after thirty days from the date of the execution of the security agreement.

It will be seen that there is a 30-day period within which a financing statement may be registered and that the section prohibits registration either before or after such period. There is, however, a provision in the statute in s. 63 permitting an extension of time for registration upon application to a judge.

6 The primary issue is, therefore, a narrow one. The question is whether the chattel mortgage was registered within 30 days after its execution. The determination of that issue depends on the meaning to be given to the word execution. The word in some situations means "signed" and in other situations means "signed, sealed and delivered". The distinction is important and crucial in this case because if the word means "signed", then the evidence clearly establishes that the registration of the

financing statement was made after the end of the statutory period and the security interest, evidenced by the chattel mortgage, would thus be unperfected. If, on the other hand, the word means "signed, sealed and delivered", then there is an issue based on the facts as to when delivery took place. There is no issue in this case with respect to the sealing of the document.

7 No authority was cited as to the meaning of the word "execution" within the context of s. 47 of the P.P.S.A. The statute uses both the word "sign" and the word "execution" in relation to documents and both words are used in s. 47 in relation to a security agreement. This might lead some to say that the legislature intended the words to have different meanings but others might say that the use of different words was merely tautological. For example, two eminent text writers on this statute, Fred. M. Catzman, Q.C., and Professor McLaren, both express the opinion that the word "execution" probably means signed. Mr. Catzman refers to the use of the word "signed" in s. 47(2) and says that that leads to the implication that the word "execution" in s. 47(3) means signed. On the other hand, Professor McLaren says that the word "execution" appears to mean signed in spite of the fact that in s. 47(2) the word "signed" is used. Both learned authors refer to s. 13(2)(*a*) and s. 4 as clearly indicating that the word "execution" means "signed" in those provisions. I must confess I have difficulty in appreciating the clarity. The substitution for the word "execution" of either the word "signed" or the phrase "signed, sealed and delivered" in s. 13(2)(*a*) and either the word "signing" or the phrase "signing, sealing and delivering" in s. 4 would not, in my opinion, render either section meaningless. The use of the word "execution" in those sections may not be of great significance. It is the use of the word in the context of s. 47 that must be determined.

8 As I have said, a secured party who wishes to perfect his interest by registration under s. 47 must do so within 30 days after execution. In order to comply he must know when execution occurred. In many cases he will know and often be present when the document is signed, but in other cases he will not have that information at first hand.

9 This particular case involves the sale of a business and is an example of the latter situation. It is usual in transactions of this kind, after the parties have entered into the agreement, for them and their respective solicitors to prepare the necessary documents to give effect to the understanding that has been reached in the purchase agreement. When the form and terms of the documents have been settled, the parties usually meet at a pre-arranged time to complete the transaction by exchanging the documents and the purchase moneys. If, pursuant to the purchase agreement, one of the parties is to accept a security agreement which requires perfection by registration, he may not necessarily know or have available to him the information as to when the document was in fact signed.

10 It is not unusual for the parties who signed the documents not to be present at the closing, and while it would be prudent for a solicitor acting on behalf of a secured party to obtain an affidavit as to when the document was in fact signed, the statute imposes no obligation on any party to provide it, and it may be that a party could not insist on the production of such an affidavit. In such a situation, however, a secured party will know and be able to establish, if it becomes necessary, the precise date on which the security agreement was delivered to him. It further occurs to me that if a question arises as to the precise date of signing it is possible that in certain circumstances the evidence would not be available and could not be obtained.

11 If the word "execution" were to mean merely sign, there is also a possibility of abuse. A party might sign a document more than 30 days in advance of its delivery in order to utilize this circumstance at a later time to deny a secured party his rights to priority over the interests of others.

12 It seems to me that simplicity and certainty of compliance are desirable objects when considering legislation of the nature of the P.P.S.A. While there may be, as there is in this case, difficulty in determining when delivery takes place, it is an element in the process which can be controlled by the secured party on whom the burden of compliance lies. It is my conclusion that the legislature meant more than merely "signed" when it used the word "execution" in s. 47(3) and that "execution" within the meaning of that subsection is not accomplished until the document has been signed and delivered.

13 The issue then becomes factual as to when the specific security agreement, a chattel mortgage, was delivered in this case. The determination is complicated by two factors:

14 1. the basic transaction, while not unusual, was somewhat different from a straightforward sale of the assets of a business as a going concern; and

15 2. the manner in which the parties conducted themselves in carrying out the agreement that was made.

16 The defendant was a franchisee of Heublein (Canada) Inc. under which it operated on the Kingston Road in Toronto a restaurant in the H. Salt, Esq., chain. The franchise was acquired by the defendant about March 1978 along with six other similar outlets. The defendant was owned and controlled by Pat Viccari and Dominic Viccari. The franchise was held under a licence agreement (Ex. 35) from Heublein. The premises were occupied under a sublease from Heublein as Heublein had previously operated the outlet on its own account under a lease from Highcam Investments Limited, which lease remained in existence. The outlet had possession and use of certain chattels, some of which had been purchased under a conditional sales agreement from Heublein and some of which had been leased. The outlet also had an inventory of food products and other consumables which it used in the course of its business.

17 The licence agreement provided, in effect, that a franchisee could not assign his rights under it other than by a process set out in s. 10 of the agreement. An essential element of any assignment was that the purchaser had to be acceptable to Heublein and I was referred to no provision in the agreement that placed any restraints on the unfettered discretion of Heublein to accept or refuse a proposed transferee. If a proposed transferee was acceptable, it is not disputed that the process was for the existing franchisee to terminate his arrangements with Heublein and for the new franchisee to enter into a new licence agreement and sublease arrangement with Heublein.

18 In the fall of 1978 the bankrupt, Robert Johnston, was an employee of Heublein and part of his duty was to visit the various outlets for the purpose of overseeing their operation. In this capacity he became acquainted with the Viccari brothers and made known to them that he was interested in acquiring a franchise outlet to operate on his own behalf.

19 The Viccaris were disposed to transfer the Kingston Road outlet and discussed with Johnston the possibility that he might acquire it. Johnston says that he approached the president of Heublein, Robert Blyth, who told him that there would be no problem if he wished to take over the operation. Dominic Viccari testified that he made the same enquiry of Mr. Blyth and received substantially the same answer.

20 At some point Dominic Viccari wrote out a one-page agreement dated 10th November 1978 (Ex. 12) which was signed by Johnston and was witnessed by an employee of the restaurant establishment. The agreement is in the form of an offer by Johnston to purchase the store at Kingston Road for a purchase price of $40,000 payable by $30,000 in cash, or a certified cheque, and by a mortgage for the balance of $10,000 at 10 per cent repayable on a 20-year amortization with a term of five years and open without bonus or penalty. There was a further agreement that the purchase price did not include the stock, and the stock was to be determined and paid for by way of a 30-day promissory note which would be given to the vendor company. The vendor company acknowledged that a lien might exist on the business and certified that such lien would be discharged.

21 Both Johnston and Viccari were anxious to close the transaction as soon as possible but both realized that the transaction could not be completed until Heublein formally gave its consent. In addition to consenting to the transfer to Johnston, the defendant had to settle with Heublein the payment of the balance of the purchase price of certain chattels which were subject to a conditional sales contract with Heublein. It is the evidence of Viccari that contemporaneously with the signing of the purchase agreement, he agreed with Blyth that the balance of the purchase price payable by the defendant for the chattels would be $5,000.

22 While it is not reflected in the purchase agreement, it is not disputed that Johnston and Viccari agreed that Johnston would go into possession of the premises and start running the business as soon as possible. An inventory was taken on Sunday, 3rd December, and Johnston commenced operation on the following Monday, 4th December. He acquired a licence, changed the locks and in general he started to operate the business. It was his feeling at that time, and from then on, that he had a completed unconditional arrangement with the defendant. However, from the time the agreement was made until the meeting of 9th March which I will refer to later, both Johnston and Viccari recognized that formal approval of Heublein was required to complete the transaction and that notwithstanding the informal indication from Blyth that there would be no problem in the approval of

Johnston and the transfer of the assets for $5,000, there was still a possibility that approval would not be forthcoming with the result that the transaction could not be completed.

23 I think it is fair to say that the concern of Johnston and Viccari was more with the delay that might occur in completion rather than with the possibility that it would not occur, as they both had had considerable experience with Heublein. They were both concerned about the delay which they had experienced in past dealings, and while they were confident that in the end everything would be all right, they nevertheless were always conscious of the possibility that the matter would not in fact be completed.

24 Viccari, some time after the agreement was signed, received a certified cheque from Johnston for $30,000 which Johnston referred to in his evidence as a down-payment. I must observe that it was a substantial down-payment in that it represented 75 per cent of the total purchase price. Viccari spoke to a solicitor who had represented him on other matters and instructed her to do what was necessary to complete the transaction on his behalf. He also told her that Johnston would be asking her to look after his interests. Johnston and Viccari had discussed legal representation previously and Viccari had suggested the services of the solicitor be engaged by both in order to minimize the legal costs in completing the transaction.

25 Johnston says that he phoned the solicitor and arranged with her to look after his interests, and her evidence is that she explained to him that she would be prepared to act for both of them but, if any conflicts should arise in the future, she would be unable to act for either of them.

26 Pursuant to those instructions the chattel mortgage, which is the subject matter of this trial, was prepared. It is dated 13th December 1978 and is between Robert Johnston, as mortgagor, and the defendant, as mortgagee. It secures the sum of $10,000 repayable at 10 per cent interest from 4th December 1978 and calls for repayment in monthly instalments of $95.17 each on the fourth of each month, commencing on 4th January 1979 to and including the 4th November 1983, with the balance becoming due and payable on 4th December 1983. The privilege of prepayment without notice or bonus is included.

27 The mortgaged assets are those set out in Sched. A to the mortgage and are identical to the assets described in the conditional sales agreement between Heublein and the defendant. The mortgage does not appear to secure any other assets.

28 Johnston attended at the offices of the solicitor some time in December 1978. At that time, in the presence of her clerk, he signed the chattel mortgage and also signed a promissory note (Ex. 40) for the payment of the inventory of food products and consumable supplies which had been catalogued and valued on the day before he took possession of the business. The amount paid for the inventory was $1,422.34 and the note, which was dated December 1978, was payable on 3rd January 1979.

29 As previously indicated, in order to complete the transaction it was necessary for a number of agreements to be entered into. These included the termination of the licence agreement and related matters between Heublein and the defendant, the entering into between Heublein and Johnston of a new licence agreement, a sublease and a registered user agreement with respect to the Heublein trade mark. All these matters were not completed until a meeting which was held in the offices of the solicitor for Heublein on 9th March 1979. In the interim, both Johnston and Viccari were pressing for an early closing and were concerned about delay.

30 A letter was written by Heublein giving conditional approval to the transaction (Ex. 25), but such approval was limited in time to 31st January 1979 and the transaction did not close before that date.

31 In the interim a certain part of the $30,000, which was held in the trust account of the solicitor, was paid to the defendant or to others on its behalf. The aggregate amount so paid was substantially in excess of $15,000. With respect to such payment, Viccari executed an undertaking (Ex. 33) in which he personally undertook to return the amounts advanced should "this transaction not close on or before the 31st day of January, 1979". Such undertaking indicates a recognition on Viccari's part at least that there was a possibility of the transaction not being completed before that date and that in such an event the moneys which he had received from Johnston were to be returned. This would also indicate that it was contemplated that the reason for non-completion might be other than the default of Johnston.

32 Notwithstanding the terms of the chattel mortgage, no payments were made under it prior to 9th March 1979. Johnston said it was his understanding that no payments were to be made until the "paper work" had been completed. There is no evidence Viccari made any demand for payment or was concerned about non-payment. He did say in his evidence that he recognized that Johnston was having some difficulty getting started and he was not pressing for payment at that time. Notwithstanding Johnston's understanding, no change was made in the terms of the document as previously recited and there remained an obligation for payment of interest from 4th December 1978 and monthly payments commencing on 3rd January 1979.

33 At the meeting on 9th March 1979 the solicitor for Heublein said he had no recollection of anything being done about the chattel mortgage and this is perhaps not surprising as it was a document that did not directly concern Heublein.

34 The clerk in the office of the solicitor for the parties said that the document did not contain a schedule of mortgaged assets at the time of execution and there was no other evidence at the trial about that matter. The document, as presented in evidence, does contain such a schedule which, as I previously indicated, is identical to that which was attached to the termination agreement between Heublein and the defendant.

35 The solicitor for the parties and her clerk both testified that they were present at the meeting on 9th March and that Mr. Johnston was asked to re-affirm his signature on the chattel mortgage. Neither could recall the words that were addressed to Johnston. He has no recollection of this occurring and I am prepared to accept his evidence on that point and find that no request for re-affirmation was made to him at that time.

36 Delivery to an extent depends on the intention of the deliverer. Johnston, when he signed the document in December, thought he had a deal but knew it was not completed. He knew that there was paper work that was required. He also knew in particular that the formal approval of Heublein was required. He did not consider that he had to make payments under the mortgage until the paper work was completed and he was never, so far as the evidence discloses, ever asked to make any such payments, nor was it ever suggested to him that he was in default in failing to do so.

37 Viccari knew that further action had to occur before the transaction was completed and he was worried about it when he arranged to withdraw funds in January from his solicitor's trust account. He checked again at that time with Blyth and asked him to please not change his mind about the approval of Johnston.

38 About that time the letter from Heublein, conditionally approving the transaction, provided there was a closing before 31st January, was received. The letter is dated 8th January 1979 and the first advance of trust funds occurred on 9th January 1979. It is not clear from the evidence whether the funds were advanced prior to the receipt of the letter, but I do not think very much turns on that.

39 The evidence by both the solicitor and her clerk was regrettably unsatisfactory in many respects. While it is recognized that they have been engaged in many transactions and that it is difficult to remember details of a particular transaction which occurred many years ago, I cannot help feeling that their testimony to a great extent was coloured by the view that they would wish to take of what occurred. Their evidence was further complicated by the circumstance that they were acting for both the defendant and Johnston which, while then not per se improper, raises problems when issues of this kind come to the fore. The parties had decided that Johnston should go into possession notwithstanding that all formalities had not been completed. When this happens, it is customary, if solicitors are acting, for the terms and conditions under which possession is granted to be reduced to writing. If this had been done in this case, some of the difficulties might have been avoided.

40 There are, however, two aspects of the evidence of the clerk that I accept. First, he knew that the chattel mortgage which he asked Johnston to sign in December was going to be registered at some future time. The clerk did not sign as a witness, in the mistaken belief that the document would not be registrable until he did so. He was wrong about that but his action indicates that he was conscious of the future intention to register the document and the intention not to register it at the time of signing by Johnston.

41 The second part of the clerk's testimony that I accept is his understanding in December that Heublein would be ready to complete the transaction early in January, and that the purpose of having Johnston come into the office in December was to have him sign the documents so that they would be available, at the proposed closing. He was concerned that when the actual formal closing took place Johnston, for one reason or another, might not be available to attend. The evidence indicates that franchise transfers close when Heublein decides that it is ready to close and that on reasonably short notice the parties attend at the offices of the Heublein solicitors to complete the transaction. It is normal and usual to prepare and sign documents in advance of a closing date in order for them to be available for delivery on such date.

42 It was submitted that the chattel mortgage was signed in December to provide protection to the defendant. It is questionable what kind of protection the mortgage could have afforded until it was fed by closing the transaction. The mortgaged assets were in the possession of the defendant under a conditional sales agreement. Until the defendant obtained title to the property described in the mortgage, it seems to me that there would be nothing in the mortgage to enforce, other than the covenant to pay, which was already contained in the purchase agreement. The extent of the protection, if any, afforded by the signed mortgage is perhaps an issue that need not be determined. It may have afforded limited protection in that Johnston could not have subsequently attempted to renege on the transaction by refusing to sign the mortgage.

43 While, as I have indicated, there was a considerable amount of the solicitor's evidence that could be described as self-serving, I do accept that she believed that the mortgage was not effective until the Heublein documents had been completed and delivered. She may have been wrong in that belief but that was the belief that she held,

44 As already indicated, the usual reason for signing in advance a document that is pursuant to a transaction is that it be available for delivery on closing. The usual understanding is that no documents are considered to be delivered until all have been delivered. If in this case possession had not been transferred, the inventory paid for and a substantial payment made, there would be absolutely no doubt as to the reason for advance signing. It was, in my view, always the intention of both parties that if the transaction did not close because Heublein did not consent, the arrangement between the defendant and Johnston would have to be cancelled. In fact, as the whole transaction depended on Heublein's consent, the parties would have had no other choice. In the context of all the arrangements, it is difficult for me to see what function the chattel mortgage could perform until the transaction was fully completed.

45 The mortgage called for interest to run from 4th December 1978, which was the date that Johnston commenced carrying on business. It seems logical that interest should run from that date as he then had possession of the mortgaged assets. The mortgage provided that the first monthly instalment was to be paid on 4th January 1979 which was about the time the clerk said that he expected the transaction to close. While it was Johnston's understanding that no payments were to be made until closing and no payments were demanded, there is no explanation as to why if such were the case the repayment terms of the mortgage were not amended. It was a matter that should have been attended to at closing by the solicitor for the parties. Either the repayment terms should have been amended or the unpaid instalments adjusted. Neither was done. I find on the balance of probabilities that it was the intention that interest should run on the mortgage debt from 3rd December 1978 but that no payments were to be made until the transaction closed.

46 Therefore, in all the circumstances, I conclude that the document was signed in December by Johnston for the purpose of being available at the closing whenever it could be arranged, and that it was not delivered until 9th March 1979 when the closing actually occurred. It follows, then, that the financing statement was registered within the statutory time limit and that the security was perfected.

47 In case I should be wrong in that conclusion I should deal with the second issue, which is whether the interest, if unperfected, is subordinate to the interest of the trustee. If it is subordinate, it would be so because of the provisions of s. 22(1)(*a*)(iii) of the P.P.S.A.

48 I am satisfied on the evidence that there was at least one creditor on the relevant date in the meaning of s. 22(2) who was without knowledge of the security interest represented by the chattel mortgage and that, therefore, if the interest is unperfected, the trustee would have priority over the chattel mortgage.

49 I have endorsed the record "For reasons given, security interest represented by chattel mortgage is perfected".

Record endorsed accordingly.

TAB 10

Case Name:
Collingwood Family Restaurant

Collingwood Family Restaurant (1326054 Ontario Inc.), Applicant v. Jaime Jaramillo and Director of Employment Standards, Responding Parties

[2004] O.E.S.A.D. No. 1199

File No. 2295-04-ES, Employment Practices Branch File

No. 42005393

Ontario Labour Relations Board

BEFORE: Mary Ellen Cummings, Alternate Chair

October 27, 2004.

(7 paras.)

DECISION

1 By correspondence dated October 18, 2004, the applicant responded to the Registrar's letter dated October 6, 2004 requesting a copy of the receipt or proof of payment of the Order to Pay. The applicant details therein arrangements made "as a guarantee of payment of the amount owing under the Order to Pay in the amount of $11,000.00."

2 In a decision dated October 18, 2004, the Board asked the Director, Employment Standards to advise whether this arrangement was "acceptable to the Director". Section 116 of the EMPLOYMENT STANDARDS ACT 2000, S.O. 2000, c. 41 as amended ("the Act") requires that an employer pay into trust the lesser of $10,000.00 or amount of the Order to Pay Wages, with the administrative fee, or "provide the Director with an irrevocable letter of credit acceptable to the Director in that amount".

3 Counsel for the Director, Employment Standards has advised the parties that the employer's arrangement is not acceptable to it, and does not comply with the Act. The Director, Employment Standards asks that the application be dismissed.

4 Counsel for the employer asks the Board to interpret section 116 liberally in order to grant access to justice. The employer does not have $11,000.00 to pay into trust and asserts that unless this arrangement is acceptable, the employer will not be able to have its case heard.

5 In my view, it is not up to the Board to determine if the arrangement is acceptable. Section 116(d) gives to the Director, Employment Standards the discretion over whether an irrevocable letter of credit is "acceptable to the Director". In this case, the Director, Employment Standards has exercised that discretion. Even though it is not for the Board to comment about the reasonableness of that exercise, I note that the arrangement the employer proposes is not contemplated by the Act.

6 The Act has a longstanding history of requiring employers to pay into trust the monies in the Order to Pay, or provide an irrevocable letter of credit. No doubt that has been a barrier to some employers. But it has also been an effective enforcement mechanism, consistent with the overall purposes of the Act.

7 This application is dismissed because the employer has failed to pay into trust the amounts required by section 116.

cp/e/qlesm

TAB 11

1988 CarswellNat 218
Federal Court of Canada, Appeal Division

Monsanto Can. Inc. v. Canada (Minister of Agriculture)

1988 CarswellNat 218, [1988] F.C.J. No. 303, 10 A.C.W.S. (3d) 57, 20 C.P.R. (3d) 193, 83 N.R. 279

In the Matter of the Pest Control Products Act, R.S.C. 1970, c. P-10, and the Pest Control Products Regulations, C.R.C., c. 1253

In the Matter of a decision by the Minister of Agriculture dated January 27, 1988

Monsanto Canada Inc., Applicant v. The Minister of Agriculture, Respondent

Marceau, Hugessen, Stone JJ.

Judgment: April 8, 1988
Docket: Doc. A-149-88

Counsel: *Roger L. Hughes, Q.C.* and *John N. Allport, Esq.*, for the Applicant.
Robert P. Hynes, for the Respondent.

Subject: Intellectual Property; Property; Public

***Hugessen J.* reasons for judgment:**

1 This is a motion to quash a section 28 application.

2 The applicant, Monsanto Canada Inc., produces an agricultural herbicide known as alachlor. Alachlor is a "control product" within the meaning of the *Pest Control Products Act* [1] and as such required and had obtained registration under that Act prior to being marketed in Canada. For reasons which need not concern us here, the Minister of Agriculture became concerned about the safety of alachlor and those concerns resulted, in February 1985, in the cancellation of the registration. At Monsanto's request and pursuant to the *Pest Control Products Regulations*, [2] a Review Board was appointed. The Board held lengthy hearings and ultimately, in October 1987, it issued a detailed report recommending that the registration of alachlor should be restored subject to certain conditions. The Minister did not accept the recommendation. On January 27, 1988, he issued the decision which is the subject matter of the present Section 28 proceedings. The operative part of the decision reads:

> Recognizing the paramount importance of human health and safety, it is my opinion that the use of alachlor represents an unacceptable risk of harm to public health, within the meaning of Sections 18 of the Pest Control Products Regulations. Pursuant, therefore, to Section 25 of these Regulations, I am declining to restore the registration of alachlor.

3 In his motion to quash, the respondent Minister asserts that his decision is not one which is subject to section 28 review. There is no question that it is a "decision", in the sense of being final, and it is common ground that it is an administrative decision. The issue raised by the motion to quash is whether the decision falls within the excepting words of section 28, as being one

> not required by law to be made on a judicial or quasi-judicial basis.

4 In answering that question we must look first to the legislative scheme in the context of which the decision was made:

> Whether an administrative decision or order is one required by law to be made on a judicial or non-judicial basis will depend in large measure upon the legislative intention. If Parliament has made it clear that the person or body is required

> to act judicially, in the sense of being required to afford an opportunity to be heard, the courts must give effect to that intention. But silence in this respect is not conclusive. At common law the courts have supplied the legislative omission--see Byles J. in *Cooper v. Wandsworth Board of Works*, at p. 194--in order to give such procedural protection as will achieve justice and equity without frustrating parliamentary will as reflected in the legislation. (footnote omitted).

(Per Dickson J., as he then was, in *The Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, at 503.)

5 The *Pest Control Products Act* is almost entirely silent as to when, why and how a product may obtain registration. The only specific guide to parliamentary intent is in section 3, which prohibits the use, *etc.* of any control product "under unsafe conditions". Rather, it is in the Regulations, purportedly [3] made by the Governor in Council pursuant to the enabling provisions of the Act, that we must look for the details of the legislative scheme of registration. The relevant provisions, for our purposes, are sections 18 to 25 of the *Pest Control Products Regulations*:

> *18.* The Minister may refuse to register a control product if, in his opinion,
>
> (*a*) the application for registration or the label for the control product does not comply with the Act and these Regulations;
>
> (*b*) the information provided to the Minister on the application is insufficient to enable the control product to be assessed or evaluated;
>
> (*c*) the applicant fails to establish that the control product has merit or value for the purposes claimed when the control product is used in accordance with its label directions;
>
> (*d*) the use of the control product would lead to an unacceptable risk of harm to
>
> (i) things on or in relation to which the control product is intended to be used, or
>
> (ii) public health, plants, animals or the environment; or
>
> (*e*) the control product is not required to be registered.
>
> *19.* During the period of registration of a control product, the registrant shall, when requested to do so by the Minister, satisfy the Minister that the availability of the control product will not lead to an unacceptable risk or harm to
>
> (*a*) things on or in relation to which the control product is intended to be used; or
>
> (*b*) public health, plants, animals or the environment.
>
> *20.* The Minister may, on such terms and conditions, if any, as he may specify, cancel or suspend the registration of a control product when, based on current information available to him, the safety of the control product or its merit or value for its intended purposes is no longer acceptable to him.
>
> *21.* Where the Minister
>
> (*a*) refuses to register a control product, or
>
> (*b*) cancels or suspends the registration of a control product,
>
> he shall send to the applicant or the registrant, as the case may be, a notice by registered mail stating that registration has been refused or that the registration has been cancelled or suspended and the reasons therefor.
>
> *22.* Where the registration of a control product has been suspended, the control product shall not be deemed to be registered, but subsection 4(1) of the Act shall not apply to a person, other than the registrant, who sells the control product, if the

person had the control product for sale on the day immediately preceding the day on which the notice of suspension was mailed to the registrant under section 21.

23. An applicant or registrant who has received a notice under section 21 may, within 30 days from the day on which the notice was received by him, apply in writing to the Minister for a hearing setting out in the application the matters that he intends to raise at the hearing.

24. Where the Minister receives an application for a hearing, he shall appoint a Review Board (hereinafter referred to as "the Board"), consisting of not less than three persons and shall refer the subject matter of the application to the Board.

25. (1) The Board shall inquire into the subject matter of the application and give the person who applied for the hearing and all other persons who may be affected by the subject matter of the hearing an opportunity to make representations to the Board at the hearing.

(2) As soon as possible after the hearing, the Board shall

(*a*) make a report containing its recommendations respecting the subject matter of the hearing and its reasons therefor and shall send a copy of the report to the Minister and to the person who applied for the hearing; and

(*b*) send to the Minister all documents and other material that the Board used at the hearing.

(3) After considering the report of the Board, the Minister may take such action with respect to the subject matter of the hearing as he deems advisable and shall notify the person who applied for the hearing of any action so taken.

6 The impugned decision was made by the Minister pursuant to subsection 25(3). By its very terms, it expresses the opinion that the use of alachlor would lead to an unacceptable risk of harm to public health within the meaning of section 18.

7 Any discussion of whether an administrative decision is required by law to be made on a judicial or quasi-judicial basis must start from the classic statement of Dickson J., as he then was, in *Minister of National Revenue v. Coopers and Lybrand, supra*, at pages 504 and 505:

It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.

(1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that hearing is contemplated before a decision is reached?

(2) Does the decision or order directly or indirectly affect the rights and obligations of persons?

(3) Is the adversary process involved?

(4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

These are all factors to be weighed and evaluated, no one of which is necessarily determinative. Thus, as to (1), the absence of express language mandating a hearing does not necessarily preclude a duty to afford a hearing at common law. As to (2), the nature and severity of the manner, if any, in which individual rights are affected, and whether or not the decision or order is final, will be important, but the fact that rights are affected does not necessarily carry with it an obligation to act judicially. In *Howarth v. National Parole Board*, a majority of this Court rejected the notion of a right to natural justice in a parole suspension and revocation situation. See also *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board.*

In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby: see *Durayappah v. Fernando.* The

> more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process.
>
> The existence of something in the nature of a *lis inter partes* and the presence of procedures, functions and happenings approximating those of a court add weight to (3). But, again, the absence of procedural rules analogous to those of courts will not be fatal to the presence of a duty to act judicially.
>
> Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum. As paradigms, at one end of the spectrum are rent tribunals, labour boards and the like, the decisions of which are eligible for judicial review. At the other end are such matters as the appointment of the head of a Crown corporation, or the decision to purchase a battleship, determinations inappropriate to judicial intervention. The examples at either end of the spectrum are easy to resolve, but as one approaches the middle the task becomes less so. One must weigh the factors for and against the conclusion that the decision must be made on a judicial basis. Reasonable men balancing the same factors may differ, but this does not connote uncertainty or *ad hoc* adjudication; it merely reflects the myriad administrative decision-making situations which may be encountered to which the reasonably well-defined principles must be applied. (footnotes omitted).

8 Applying these criteria as best I can, it seems to me that the balance clearly favours the view that the Minister's decision must be made on a quasi-judicial basis.

9 In the first place, it is apparent from subsection 25(1) that there must be a hearing at which all persons affected by the subject matter must be given the opportunity to make representations and be heard. It is true, of course, that the hearing is held not before the Minister, the ultimate decision-maker, but rather before the Review Board. If the Review Board's hearing is to be anything but a charade, however, the Minister must be obliged to take it into account. It is not without significance that section 23 requires the application for a hearing to be made to the Minister while subsection 25(2) specifies that the Minister is to receive not only the report but also "all documents and other material" used by the Board. These provisions seem to me to point unmistakably to the conclusion that the Board is simply an extension or *alter ego* of the Minister, created solely for the purpose of conducting a hearing which the Minister, as a purely practical matter, could not undertake on his own. Furthermore, given the nature of the interests involved, it seems to me that, if the Minister is entitled to have regard to representations or material other than what was produced before the Review Board, he cannot do so without meeting the same minimum requirements of natural justice as the Board and giving to the persons concerned the opportunity to respond and comment on such representations or material. In short he must hold at least a "paper" hearing. I would add that it is not by any means clear to me that subsection 25(3) allows the Minister, in deciding what action he deems advisable, to draw on sources of information other than what he has received from the Board.

10 Second, it is equally clear that the Minister's decision directly affects rights. So long as alachlor was registered, the applicant had the right to produce and market it and did so. The decision to cancel and not to restore that registration removes that right.

11 Third, while neither the Review Board nor the Minister decided a *lis* in the classic sense, the record shows that they in fact received representations made by persons whose interests were directly adverse to those of the applicant, notably, a commercial rival who produces a competitive herbicide and public interest groups concerned with environmental protection. It may be added that both the Review Board and the Minister also received representations from agricultural producers favourable to the applicant's position. If this was not an adversary process, it certainly bore a close resemblance to one.

12 Finally, the Minister's decision was based, as required by the Regulations, on his assessment of the risk of harm to public health created by alachlor. Such decision appears to me to be a classic example of the application by the decision maker of a substantive rule to an individual case. Public safety and public health do not seem to me to be broad, general policy issues of social or economic policy; on the contrary, they are very specific criteria against which each application for registration of a control product must be tested. No doubt, there will always be room for differences of opinion as to whether or not any particular product represents a significant risk but that does not elevate the decision as to whether or not such risk exists into one of policy. Looking at the two ends of the spectrum described by Dickson J. in the passage quoted earlier from the *Coopers and Lybrand* case, the choice as to whether, and in what conditions, a specific substance is safe enough to be licensed for commercial use

appears to me to be very close to the example which he gives of "labour boards" which are unquestionably quasi-judicial in nature. The decision sought to be reviewed here is not very different in nature from an enquiry into safety in the work place carried out by the Canada Labour Relations Board under section 87 of the *Canada Labour Code*. By contrast, it bears hardly any resemblance at all to the appointment and procurement functions which are given as paradigms of decisions at the other end of the spectrum. I am, accordingly, in respectful disagreement with the second of the two grounds given by this Court for quashing the application to review in *Pfizer Canada Inc. v. Minister of National Health & Welfare*, 12 C.P.R.(3d) 438; since that decision can, in any event, be fully supported on the first ground, namely, the applicant's lack of standing, I would treat the last paragraph on page 440 of the report as being an *obiter dictum*.

13 The result of this analysis is that, of the four criteria suggested by Dickson J., the return to the first, second and fourth is clearly affirmative and to the third partially so. That is more than enough, in my view, to tilt the balance decisively in favour of requiring the decision to be made on a quasi-judicial basis. I would therefore dismiss the motion to quash.

***Stone J.* reasons for judgment:**

14 I have had the advantage of reading in draft the Reasons for Judgment prepared by each of my colleagues, Mr. Justice Marceau and Mr. Justice Hugessen, and wish to add some views of my own to those therein expressed. The product alachlor is a herbicide that has been used by farmers in Canada for the control of grassy weeds among corn and soybean plants. The fear is that its continued use could cause cancer, particularly in those exposed to it during its application. Concern about the safety of alachlor was communicated to Canadian farmers by Agriculture Canada early in 1984 as a group with a "direct interest" in the product. [4]

15 The question whether the section 28 application should be quashed depends, of course, upon the application of the several criteria formulated by Mr. Justice Dickson (as he then was) in *The Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495 in the circumstances of this case. As both my colleagues have recited those criteria, I will not repeat them here. That they have come to opposite conclusions on the question of reviewability, is perhaps not surprising. Their views serve to illustrate the wisdom of these observations of Mr. Justice Dickson, found at page 505 of the report:

> Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum. As paradigms, at one end of the spectrum are rent tribunals, labour boards and the like, the decisions of which are eligible for judicial review. At the other end are such matters as the appointment of the head of a Crown corporation, or the decision to purchase a battleship, determinations inappropriate to judicial intervention. The examples at either end of the spectrum are easy to resolve, but as one approaches the middle the task becomes less so. *One must weigh the factors for and against the conclusion that the decision must be made on a judicial basis. Reasonable men balancing the same factors may differ, but this does not connote uncertainty or ad hoc adjudication; it merely reflects the myriad administrative decision-making situations which may be encountered to which the reasonably well-defined principles must be applied.*
>
> (emphasis added)

16 These same observations may also go to explain why Mr. Justice Dickson made it clear that the list of factors by which the reviewability of a decision is to be judged, was "not intended to be exhaustive", and why he was also at pains to caution against their mechanical application. Immediately after enumerating those factors, he added (at pages 504-505) these words, by which he appears once more to underscore the need for a degree of flexibility of approach:

> These are all factors to be weighed and evaluated, no one of which is necessarily determinative. Thus, as to (1), *the absence of express language mandating a hearing does not necessarily preclude a duty to afford a hearing at common law.* As to (2), the nature and severity of the manner, if any, in which individual rights are affected, and whether or not the decision or order is final, will be important, but *the fact that rights are affected does not necessarily carry with it an obligation to act judicially.* In *Howarth v. National Parole Board* ([1976] 1 S.C.R. 453), a majority of this Court rejected the notion of a right to natural justice in a parole suspension and revocation situation. See also *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board* ([1978] 1 S.C.R. 118).

> In more general terms, *one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby*: see *Durayappah v. Fernando* ([1967] 2 A.C. 337 (P.C.)). *The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process.*
>
> The existence of something in the nature of a *lis inter partes* and the presence of procedures, functions and happenings approximating those of a court add weight to (3). But, again, the *absence of procedural rules analogous to those of courts will not be fatal to the presence of a duty to act judicially.*
>
> (emphasis added)

17 I am relieved by my colleagues of having to set out the statutory framework against which the Respondent made the decision which is sought to be reviewed. While, technically, it is a decision not to restore registration of the product, I cannot ignore the fact that it came after the Applicant had enjoyed the benefits of a lengthy period of registration, during which period the product had been widely used by farmers in Canada [5]. As I see it, in essence, the purpose of having registration restored was to allow the Applicant to continue selling its product in Canada in competition with other such products as it had done for more than fifteen years prior to cancellation of the registration.

18 I am satisfied, for the reasons given by Mr. Justice Hugessen, that the first three criteria of the *Coopers and Lybrand* test are met in the present case. To the views he expresses, I wish to add the following. First, and as an overall observation, the determination is obviously important both to the Applicant and to the farmers affected by it. It effectively precludes the Applicant from continuing to distribute the product in Canada, and it precludes farmers from continuing to use it. In practical terms, it obliges them to rely on a substitute. The decision is, of course, also important to the wider Canadian public from the standpoint of protecting human health. Secondly, to adopt the words of Mr. Justice Le Dain in *Latif v. Canadian Human Rights Commission et al.*, [1980] 1 F.C. 687 (F.C.A.), at page 698, I think the issue is "suitable for judicial determination" even though no express statutory hearing process is established under subsection 25(3) of the Regulations. The question here is whether a duty existed to accord a hearing, particularly in light of the Review Board's favourable recommendation. Mr. Justice Le Dain focused on a similar question in the *Latif* case, where he said at page 697:

> Whether such a duty is to be implied, in the absence of an express provision for hearing, depends on a number of factors, chief of which in my opinion are the effect of the decision and the nature of the issues involved in making it. See *Durayappah v. Fernando*, [1967] 2 A.C. 337, per Lord Upjohn at page 349; *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495 per Dickson J. at pages 504-505.

Thirdly, that the decision directly affects rights of the Applicant, appears to have been accepted on both sides. It does so in a severe and final way, in my view. Fourthly, there is here I think "a certain adversarial aspect" (per Mr. Justice Le Dain, in *Mavour v. Minister of Employment and Immigration*, [1984] 2 F.C. 122 (F.C.A.), at page 128). While I cannot view the Respondent as an "adversary", he was evidently called upon to exercise a discretionary power for or against restoring registration in the face of much opposition by third parties who participated both in the review process and in the "paper" hearing that preceded the Respondent's decision.

19 To my mind, the pivotal issue involves the application of the fourth factor of the *Coopers and Lybrand* test. Accordingly, the question to be answered is:

> Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

In addressing this question, I wish to add the following to the views expressed by Mr. Justice Hugessen. Two lines of decisions in this Court appear to have touched upon this subject. It seems to me that in *AGIP S.p.A. v. Atomic Energy Control Board et al.*, [1979] 1 F.C. 223 (F.C.A.), we find an illustration of an obligation to implement social and economic policy in a broad sense. There, this Court quashed an application under section 28 to review a decision of the Atomic Energy Control Board refusing

to grant an export licence for a substance used in creating "atomic energy", the Board being obliged by regulation to "comply with any general or specific direction given by the Minister with reference to the carrying out of its purposes". In arriving at his decision, Chief Justice Jackett had this to say, at page 229:

> While the statute is a legislative interference with the exercise of rights that would otherwise be freely exercisable by the owners of the property involved, the statute was enacted to make provision for the control and supervision of the development, application and use of "atomic energy" and to enable Canada "to participate effectively in measures of international control of atomic energy which may hereafter be agreed upon"; and the scheme adopted, so far as the aspect that concerns this matter is concerned, is a scheme of licensing control by an agency - the Atomic Energy Control Board - acting under the control of a minister of the Crown. In these circumstances, in my view, it cannot be inferred that it was intended that a decision concerning the granting of an export permit for a substance that is used in creating "atomic energy" was to be made otherwise than as a purely administrative matter where the responsible minister is accountable exclusively to Parliament. When the nature of the subject matter-atomic energy - is considered, it would seem obvious that some of the factors entering into such a decision would have their source in government policy or in Canada's international obligations, which, in the nature of things, might well be such that their existence or nature could not be put into play, as between the applicant for a licence and the statutory authorities, so as to enable the operation of even the most rudimentary scheme of a judicial or quasi-judicial character for ensuring that an individual application for an export permit is decided in a just or fair way (*Re Clark and Attorney-General of Canada* (1978) 17 O.R. (2d) 593 by Evans C.J.H.C. at pp. 603 *et seq.*).

Mr. Justice Le Dain concurred, adding at pages 230-231:

> The decisions of the Atomic Energy Control Board in the exercise of its licensing function are made subject to direct ministerial control by means of directions expressive of governmental policy. This shows the very special position of the Board in this field: it is not exercising a truly independent adjudicative function on issues that viewed as a whole lend themselves to a judicial or quasi-judicial process. The reservation of the ministerial power to make directions upon the basis of the recommendations of a Review Panel composed of representatives of the departments concerned, as well as the Board, indicates that the issues in the final analysis are seen to be complex ones of national policy, involving in some cases questions of security, over which the government acting in its executive capacity must retain ultimate control.

The same point is also illustrated in *Baril et al. v. Minister of Regional Industrial Expansion*, [1986] 1 F.C. 328 (F.C.A.), where the Minister in question operated under a broad statutory mandate to determine, according to his own satisfaction, whether any particular investment in Canada "is likely to be of net benefit to Canada" This Court decided, at page 331 (per Mr. Justice Hugessen), that in carrying out his mandate the Minister "implements social and economic policy" in a broad sense.

20 I am not persuaded that the decision here in issue falls within the principle of these cases. That decision was not made at large, pursuant to a social or economic policy in the broad sense. Instead, it appears to have involved a determination by the Respondent, in light of given circumstances, of whether a product of a particular manufacturer posed an "unacceptable risk...to public health", within the meaning of the Regulations. Other products in other cases to which the Regulations apply would, no doubt, be subject to the same decision-making process. The findings of the Review Board and the language of the decision itself suggests that, in declining to restore the registration of alachlor, the Respondent took account of both a concern for human health, and the availability to farmers of what he considered to be a satisfactory substitute for that product. Those determinations, it seems to me, involved consideration of specific statutory criteria (a mixture of fact, law and opinion), much as did the determinations that were made in the *Latif* case, *supra*, a case which is illustrative of the second line of decisions alluded to above. In holding that the decision there in question was reviewable under section 28, Mr. Justice Le Dain stated at pages 698-699:

> The foregoing issues are suitable for judicial determination. Indeed, they are issues of a kind which are decided in practice by the courts. They are issues on which it is fair and appropriate, and indeed useful, to hear the person affected. I cannot think of any good reason, other than that of the practical convenience of the Commission, why the complainant should not be heard. I do not find anything in the terms of section 33 or the other provisions of the Act which exclude an implied duty to act judicially in making a decision not to deal with a complaint on one of the grounds in section 33. The subjective terms

> in which the power of decision has been conferred -"unless in respect of that complaint it appears to the Commission" - do not by themselves exclude such a duty: *Durayappah v. Fernando*, [1967] 2 A.C. 337 at page 348. Nor does the fact that express provision for a hearing by a Human Rights Tribunal has been made in section 40 necessarily exclude an implied duty under section 33: *L'Alliance des Professeurs catholiques de Montréal v. The Labour Relations Board of Quebec*, [1953] 2 S.C.R. 140 at pages 153-154. Finally, the requirement in section 34 that the Commission give written notice of the reason for its decision is not inconsistent with a duty to offer the complainant an opportunity to be heard. If anything, it serves to emphasize the judicial or quasi-judicial nature of the decision. It reinforces the impression that *the decision is to be based on specific statutory criteria to which the party affected should have an opportunity to address himself.* For these reasons I am of the opinion that the decision not to deal with a complaint on one of the grounds specified in section 33 of the Act is one which is required by law to be made on a judicial or quasi-judicial basis, and that this Court accordingly has jurisdiction to entertain the section 28 application.
>
> (emphasis added)

I refer also to the *Mavour* case, *supra*, at page 128, where Mr. Justice Le Dain applied this same test in deciding that a decision based upon the opinion of an adjudicator whether a person "poses a danger to the public or would not otherwise appear for the examination or inquiry or for removal from Canada" within the meaning of the *Immigration Act, 1976*, was amenable to review under section 28. In deciding that it was, he said this at page 128:

> Although the decision has a discretionary element, as in the granting of bail in a criminal case (which has always been held to be a judicial discretion), *it involves the consideration of statutory criteria of a factual nature - whether the person concerned poses a danger to the public or if not detained would not otherwise appear for the inquiry or for the continuation thereof or for removal from Canada - rather than a broad question of policy.*
>
> (emphasis added)

21 I agree that the views on the point under discussion as expressed by this Court in *Pfizer Canada Inc. v. Minister of National Health and Welfare et al.* (1986), 12 C.P.R. (3d) 438 are not decisive of this issue, in that they were not necessary to the decision in that case.

22 I must, as I should, say nothing about the merits of the decision under attack, a matter which, in my view, is entirely for the Respondent acting properly within his powers. Nor do I think my conclusion will hamper the Respondent in exercising powers conferred by section 20 of the Regulations as a result of any concern he may have for the safety of any particular product. He may, as authorized, either cancel or suspend a registration, a step he has followed in this case. The issue we have before us is limited to the reviewability of a decision made pursuant to subsection 25(3) of the Regulations, after receipt of a review board's report. As I have concluded that the decision in question is reviewable under section 28, I would dismiss the motion to quash.

***Marceau J.* reasons for judgment:**

23 The Respondent, the Minister of Agriculture, moves to quash the proceedings herein directed against a decision made by him recently. He contends that this decision was an administrative one not required by law to be made on a judicial or quasi-judicial basis and therefore not amenable to a section 28 application. There is nothing exceptional, of course, in such a motion which in effec calls for a determination as to the nature and extent of the procedural requirements the law has attached to the making of the decision. It will be seen however that, in this case more perhaps than in most cases, the disposition of the motion may have more consequence than merely approving or disapproving the manner in which the attack against the impugned decision was launched. The disposition of the motion, based as it will be on a choice between the requirements of "procedural fairness" and the higher standard of a quasi-judicial process, will, in fact, establish the standard against which the reviewing court must evaluate the actual procedure adopted by the Minister in making his decision, and thus may have a decisive influence on the outcome of the judicial review itself.

24 The decision involved was issued on January 27, 1988 under the authority of the *Pest Control Products Act*, R.S.C. 1970, c. P-10 and the regulations promulgated thereunder. The Minister was thereby indicating his refusal to "register" a particular

herbicide, chemically known as "Alachlor" and marketed by the Applicant, Monsanto Canada Inc., a refusal which had the effect of prohibiting in the future the importation or sale in Canada of the product. After a review of the statutory scheme - which, because of the nature of the issue, must be made in some detail - it will be easier to understand the facts that led to the decision.

The Statutory Scheme

25 The *Pest Control Products Act* (the "*Act*"), the long title of which is "An act to regulate products used for the control of pests and the organic functions of plants and animals", is a short and simple statute comprising only 14 sections. Its central provision is to be found in section 4 which reads as follows:

> *4.* (1) No person shall import into or sell in Canada any control product unless such control product
>
> (*a*) has been registered as prescribed;
>
> (*b*) conforms to prescribed standards; and
>
> (*c*) is packaged and labelled as prescribed.

The definition of a "control product" is given in section 2(1). It undoubtedly includes a chemical such as Alachor, so there is no need to reproduce it. The only other relevant section of the *Act* is section 5 which gives the Governor in Council power to make regulations, paragraph (*d*) of which reads thus:

> (*d*) respecting the registration of control products and of establishments in which any prescribed control products are manufactured and prescribing the fees therefor, and respecting the procedures to be followed for the review of cases involving the refusal, suspension or cancellation of the registration of any such product or establishment;

26 The *Pest Control Products Regulations* set out first the requirements for registration of a control product and in particular the necessity to satisfy the Minister as to any information he may require to determine the "safety, merit and value" of the product (sections 7 and 9). Section 13 then provides thus:

> *13.* (1) Where the Minister receives an application for a certificate of registration he shall, subject to section 18, register the control product and record in a register of control products the information that accompanied the application.
>
> (2) In addition to the information mentioned in subsection (1), the register of control products shall contain
>
> (*a*) the specifications of each control products;
>
> (*b*) the label for each control product;
>
> (*c*) the registration number assigned to each control product; and
>
> (*d*) such other information as the Minister deems necessary.
>
> (3) When a control product has been registered, the Director shall issue a certificate of registration bearing the registration number of the control product.

27 After having established that registrations expire on December 31 of the year designated by the Minister, five years being the maximum term that can be granted, the *Regulations* then describe the power of the Minister to refuse to register a product, and to cancel or suspend a registration already granted. Sections 18, 19 and 20 should be reproduced:

> *18.* The Minister may refuse to register a control product if, in his opinion,
>
> (*a*) the application for registration or the label for the control product does not comply with the Act and these Regulations;

(*b*) the information provided to the Minister on the application is insufficient to enable the control product to be assessed or evaluated;

(*c*) the applicant fails to establish that the control product has merit or value for the purposes claimed when the control product is used in accordance with its label directions;

(*d*) the use of the control product would lead to an unacceptable risk of harm to

(i) things on or in relation to which the control product is intended to be used, or

(ii) public health, plants, animals or the environment; or

(*e*) the control product is not required to be registered.

19. During the period of registration of a control product, the registrant shall, when requested to do so by the Minister, satisfy the Minister that the availability of the control product will not lead to an unacceptable risk of harm to

(*a*) things on or in relation to which the control product is intended to be used; or

(*b*) public health, plants, animals or the environment.

20. The Minister may, on such terms and conditions, if any, as he may specify, cancel or suspend the registration of a control product when, based on current information available to him, the safety of the control product or its merit or value for its intended purposes is no longer acceptable to him.

28 When the Minister refuses, cancels or suspends a registration, he must, in a notice to the applicant or registrant, indicate his reasons for doing so. The latter may then apply for a hearing which will be held by an *ad hoc* board to which the matter will be referred. The Board will inquire and report to the Minister with its recommendations and reasons therefor. Section 24 and section 25(1) and (2) read thus:

24. Where the Minister receives an application for a hearing, he shall appoint a Review Board (hereinafter referred to as "the Board"), consisting of not less than three persons and shall refer the subject matter of the application to the Board.

25. (1) The Board shall inquire into the subject matter of the application and give the person who applied for the hearing and all other persons who may be affected by the subject matter of the hearing an opportunity to make representations to the Board at the hearing.

(2) As soon as possible after the hearing, the Board shall

(*a*) make a report containing its recommendations respecting the subject matter of the hearing and its reasons therefor and shall send a copy of the report to the Minister and to the person who applied for the hearing; and

(*b*) send to the Minister all documents and other material that the Board used at the hearing.

29 Finally, upon receipt of the Board's report, the Minister acts as follows:

25. (3) After considering the report of the Board, the Minister may take such action with respect to the subject matter of the hearing as he deems advisable and shall notify the person who applied for the hearing of any action so taken.

30 This last provision is the one under which the impugned decision was made. So, let us now come to the undisputed facts as they were explained to us.

The Factual Circumstances

31 The herbicide Alachlor was first registered under the *Act* in 1969. In 1983 the department of Health and Welfare began to express concern regarding the carcinogenic potential of the product and in 1984 it made a recommendation that it be cancelled. A series of consultations and discussions then took place among the Minister, the Applicant's officials and representatives of the federal departments of agriculture and health and welfare.

32 On February 5, 1985, the Applicant was advised by letter from the Minister that the registration of Alachlor was cancelled. On March 4, 1985, the Applicant requested that a board be appointed for a hearing pursuant to section 23 of the *Regulations* and at the same time made application for a temporary registration pending review. On February 26, 1986, the Board, set up pursuant to section 24 to consider the cancellation, issued a preliminary recommendation for a temporary registration. The Minister refused by letter dated May 5, 1986. The Board completed its review and delivered its final report on November 13, 1987, recommending that the registration be restored.

33 The Minister considered the Board's final report along with submissions he received from other sources and upon which the Applicant was invited to comment. Finally, on January 27, 1988, he issued his decision in a letter the terms of which have to be known:

> I have carefully considered the report of the Alachlor Review Board and have also noted subsequent comments received from various parties to the hearing, and subsequently forwarded to all concerned.
>
> Recognizing the paramount importance of human health and safety, it is my opinion that the use of alachlor represents an unacceptable risk of harm to public health, within the meaning of Sections 18 of the Pest Control Products Regulations. Pursuant, therefore, to Section 25 of these Regulations, I am declining to restore the registration of alachlor.
>
> My reasons are as follows:
>
> Health and Welfare Canada and the Board agree that alachlor is an animal carcinogen and should be considered to be a potential human carcinogen for regulatory purposes.
>
> I am accepting Health and Welfare's prudent approach to uncertainties and assumptions inherent in developing estimates for the purposes of decision making.
>
> Based on a full review of the entire metolachlor data package, as opposed to the incomplete data base available to the Review Board, Health and Welfare Canada has concluded that metolachlor does not cause cancer.
>
> The appreciable cancer risk to applicators seen by Health and Welfare Canada with respect to alachlor, and the availability of metolachlor were the principle factors in my decision to keep alachlor off the market.
>
> Metolachlor, the primary substitute for alachlor is currently available to farmers, maintaining their access to vital chloroacetalanide herbicides. The aggregate loss to Canadian society from the continued cancellation of alachlor would be relatively small.
>
> It is my responsibility to judge the acceptability of the risks associated with alachlor use, based on the advice I have received regarding both the risks and the benefits. I must exercise my judgement as to whether the balance is acceptable or unacceptable in the interests of Canadian society. I appreciate that the Board has recognized that this is a difficult evaluation.
>
> Having carefully weighed all the factors, I believe my decision is in the overall interests of Canadian society.

The Issue

34 As indicated at the outset, the Minister's contention in support of his motion to quash is well defined. He does not dispute that his refusal to register on January 27, 1988 was an administrative decision he made as a "federal board, commission or other

tribunal" within the meaning of section 28(1) of the *Federal Court Act*; he readily agrees, of course, that it was such a decision which had to be made according to "rules of procedural fairness". What he says is that the decision was not one subject to the further requirements of a judicial or quasi-judicial process.

35 It is well known that the basic criteria of a decision or order required by law to be made on a judicial or quasi-judicial basis have been set out by Dickson J. (as he then was) in the Supreme Court decision in *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495 in the form of questions to be examined which he formulated as follows:

> (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?
>
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

So let us find where each of the questions will lead us here.

36 (1) Is a hearing contemplated in the legislation? Not in the statute to be sure but not any more in the *Regulations*, as I understand the scheme established thereby. The Board set up under section 24 is required to hold a hearing so as to give all parties an opportunity to make representations. But the Board has a very clear mandate, namely make a recommendation, and the hearing before it is strictly aimed at the fulfillment of that mandate. The decision of the Minister comes only afterwards. For convenience, I repeat the provision of the *Regulations* which is directly concerned with it:

> *25.* (3) After considering the report of the Board, the Minister may take such action with respect to the subject matter of the hearing as he deems advisable and shall notify the person who applied for the hearing of any action so taken.

It is true that the Minister is to receive with the report "all documents and other material" used by the Board, but that does not in any way, it seems to me, make the decision of the Minister an end product of the hearing before the Board. Quite the contrary, in my view, the suggestion is that the recommendation is only part of the material on the basis of which the Minister is to arrive at a conclusion. It may also be true that the Minister, in using material not put before the Board, is under a duty to give the Applicant an opportunity to comment on it, but this would be because of the obligation to act fairly within the meaning of the *Nicholson*[6] judgment (as was found by the Trial division in a prior decision made under section 18[7]), not because the common law requirements of natural justice applicable to a quasi-judicial process would be involved.

37 (2) Does the decision affect rights? The producing and marketing of chemical products being a totally regulated field, one cannot speak of a primary right to deal at will with a particular controlled product. Alachlor it is true was for years properly registered during which time it could be marketed; it must be noted, however, that the object of the impugned decision was not the cancellation of the registration (that was done in 1985), it was the refusal to register. According to the scheme of the legislation, the initial refusal to register a product and the cancellation of a registration of that product are treated in the same manner (section 21 of the *Regulations*) which would suggest that, before the legislation as it stands, a registrant has no more right than an applicant. The decision, of course, was directly adverse to the interest of the Applicant, but it is not so clear that a specific right of its was in question, within the meaning of the criterium as I understand it. Obviously, there was involved a right not to be denied registration for no valid reason and not to be treated unfairly but this is not the right Mr. Justice Dickson had in mind since it is present with respect to any administrative decision.

38 (3) Is the adversary process involved? It is clear to me that it is not. It is not involved for the simple reason that there are no adversaries, no opponents, no antagonists, no two parties vying with each other for the same thing or advantage. We know that there have been conflicting opinions expressed as to the safety of the product and that some people or groups have

seen fit to make known their particular interest in the ultimate decision, but that is not sufficient to bring about an adversarial process, as I understand the meaning of the expression.

39 (4) Finally, what is the Minister called upon to do: apply substantive rules to a particular case or make a judgment of prudence in the course of implementing some social and economic policy in a broad sense? I simply fail to see any substantive rules in the legislation involved here. A policy is adopted and spelt out which is that of protecting public health and safety by not permitting the free circulation of chemical products representing too great a risk, and a duty is conferred upon the Minister to implement that policy through the system of registration. Nothing else, however, is defined: no standard to follow, no rule which could be applied to determine when the risk is too great. The Minister is left to his judgment and to his conception of the protection required to be assure public health; he is the one to strike the balance between the danger that a chemical product may involve for the safety of the public and the advantage that users may derive from it. This is clearly in keeping with the thrust of the language of the legislation which constantly reiterates the principle of the discretion of the Minister in phrases like "in his opinion" (s. 18), "satisfy the Minister" (s. 19), "acceptable to him" (s. 20), and most particularly in keeping with the wording of the provision immediately involved which I repeat for convenience:

> *25.* (3) After considering the report of the Board, the Minister may take such action with respect to the subject matter of the hearing *as he deems advisable* and shall notify the person who applied for the hearing of any action so taken.

In my view, the Court was right, in *Pfizer Canada Inc. v. Minister of National Health and Welfare*, 12 C.P.R. (3d) 438, when it said that a decision of the Minister made in sole contemplation of public health was, in its judgment, one amounting to an implementation of "social and economic policy in a broad sense", rather than application of "substantive rules" to an individual case.

40 My conclusion, therefore, at the end of this analysis conducted according to the directions of the *Coopers and Lybrand* judgment, is that the decision under attack does not have the basic characteristics of a decision requiring a judicial or quasi-judicial process, a conclusion which, in my view, is appropriate. It seems to me that the Minister, in the exercise of this delicate duty conferred upon him by Parliament to control the circulation of chemical products having in mind the national interest in the areas of public health and safety, does not need the type of assistance that a high standard of procedural requirement is meant to assure and may even at times be unduly restrained by the demands of a judicial or quasi-judicial process.

41 I would grant the motion and quash the section 28 application.

Footnotes

1 R.S.C. 1970, c. P-10.

2 C.R.C., c. 1253.

3 Applicant's counsel indicated that one of his grounds of attack upon the decision would be the *ultra vires* of the Regulations. That, of course, is not something which can be put in question on the motion to quash so that, for the present purposes, I take the Regulations as being law.

4 See *The Report of the Alachlor Review Board* of October, 1987, at page 42, and letter of Minister of Agriculture (Canada) to Minister of Environment (Ontario), Exhibit "E" to affidavit of Sherwin M. Lyman, sworn February 25, 1988.

5 At page 118 of Annex 1, (Exhibit "K" to the affidavit of Sherwin M. Lyman) we find the *Alachlor Review Board Report (Temporary Registration)* of February 26, 1986, wherein it is stated at page 127 that: "Alachlor is a product which has maintained the major share of the overall grass herbicide market for corn and soybeans in Canada since its initial time of registration". Its share of market is therein stated to have been "roughly equivalent" to that of its major competitor, metolachlor.

6 *Nicholson v. Haldimand-Norfolk Regional Bd. of Comms. of Police*, [1977] 1 S.C.R. 311.

7 *Monsanto Canada Inc. v. Minister of Agriculture*, [1986] 3 F.T.R. 69.

TAB 12

1995 CarswellMan 187
Manitoba Court of Queen's Bench

P. & G. Cleaners Ltd. v. Johnson

1995 CarswellMan 187, [1995] 9 W.W.R. 487, [1995] M.J. No. 340, 105 Man. R. (2d) 175, 22 B.L.R. (2d) 60, 57 A.C.W.S. (3d) 587

P. & G. CLEANERS LTD. and STEWART LEIBL v. JAMES JOHNSON

Jewers J.

Judgment: September 1, 1995
Docket: Doc. CI 95-01-90075

Counsel: *P.C. Suche, Q.C.*, for applicants.
D. Jackson, for respondent.

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

Table of Authorities

Cases considered:

Canada Egg Products Ltd. v. Canadian Doughnut Co., [1955] S.C.R. 398, [1955] 3 D.L.R. 1 — *considered*

Empress Towers Ltd. v. Bank of Nova Scotia (1990), [1991] 1 W.W.R. 537, 50 B.C.L.R. (2d) 126, 14 R.P.R. (2d) 115, 73 D.L.R. (4th) 400, 48 B.L.R. 212 (C.A.) [leave to appeal to S.C.C. refused [1991] 3 W.W.R. xxvii, 54 B.C.L.R. (2d) xxxiv, 16 R.P.R. (2d) 66, 50 B.L.R. 136, 79 D.L.R. (4th) vii, 133 N.R. 238] — *distinguished*

Fletton Ltd. v. Peat Marwick Ltd. (1986), 32 B.L.R. 162 (B.C.S.C.) [affirmed [1988] 6 W.W.R. 109, 27 B.C.L.R. (2d) 209, 50 D.L.R. (4th) 79, leave to appeal to S.C.C. refused (1988), 50 D.L.R. (4th) vii, 91 N.R. 254] — *considered*

Greenberg v. Meffert (1985), 50 O.R. (2d) 755, 7 C.C.E.L. 152, 37 R.P.R. 74, (sub nom. *Greenberg v. Montreal Trust Co.)* 9 O.A.C. 69, 18 D.L.R. (4th) 548 (C.A.) [leave to appeal to S.C.C. refused (1985), 56 O.R. (2d) 320, 30 D.L.R. (4th) 768, 64 N.R. 156, 14 O.A.C. 240] — *distinguished*

Rafferty v. Power (1993), 15 C.P.C. (3d) 48 (B.C. Master) — *considered*

Tredegar v. Harwood, [1929] A.C. 72 (H.L.) — *applied*

Application for order requiring respondent to consent to proposed share purchase.

***Jewers J.*:**

1 Mr. Leibl and Ms Portnoy — effectively the principal shareholders of Perth's Cleaners — were at loggerheads in the management of the company, and Mr. Leibl has now agreed to buy out Ms Portnoy. There is one problem: Mr. Leibl entered into an agreement with Mr. Johnson from whom he purchased shares in a related company that he would not acquire any further shares without Mr. Johnson's consent and Mr. Johnson has refused to give that consent except on conditions unacceptable to

Mr. Leibl. This application is to determine whether Mr. Johnson is unreasonably withholding his consent and whether he can be compelled to give it.

2 The shareholdings of Perth Services Ltd. are as follows: Nova Services Ltd. is the majority and controlling shareholder with 64.5% (5,119.5 shares); 8% (637) of the shares are owned by Don Desjardins (525) and Eileen Johnson (112); 27.5% (2,169.5) are held by Stewart Leibl. The shareholdings of Nova are Phyllis Portnoy (50%) and P. & G. Cleaners Ltd. (50%). Stewart Leibl owns 100% of the shares of P. & G. In effect, then, Nova controls Perth Services and, in turn, Phyllis Portnoy and P. & G. Cleaners (Stewart Leibl) jointly control Nova, which means that they jointly control Perth Services. P. and G. is the registered owner of one common share in the capital of Nova; Phyllis Portnoy is the registered owner of one common share; and Ms Portnoy and P. and G. jointly own one common share, each has too an undivided one-half interest.

3 Nova's only undertaking is to hold shares in Perth Services.

4 Because Mr. Leibl and Ms Portnoy could not agree on how to run Perth's and the operation of the company was thereby stalemated, P. & G. brought an application in this court to have Nova dissolved (Suit #CI 92-01-67476). This application was ultimately settled when P. & G. agreed to purchase the shares of Ms Portnoy in Nova and a consent court order was obtained giving effect to that transaction. The purchase was conditional on a number of things including that consents be obtained from Perth's lenders, Mutual Life of Canada and Royal Bank of Canada, and that the respondent James Johnson consent to the purchase. Mutual Life and the Royal Bank have consented but Mr. Johnson has not.

5 Formerly, the Nova shares now held by P. & G. were owned by the respondent James Johnson who was then the husband of Ms Portnoy. They have since divorced.

6 P. and G. acquired its interest in Nova on July 17, 1992 by purchasing the one share owned by Mr. Johnson and Mr. Johnson's undivided one-half interest in the share which he owned jointly with Ms Portnoy.

7 The purchase price for Johnson's Nova shares — $650,000 — was to be paid over a six-year period ending July 1998. The payment of the purchase price is secured by:

8 (a) a security agreement executed by P. and G. in favour of Johnson creating a security interest in the Nova shares; and

9 (b) a limited recourse guaranty executed by Mr. Leibl with respect to P. and G.'s liabilities to Johnson under a promissory note executed by P. and G. The limited recourse guaranty is supported by a security agreement executed by Mr. Leibl in favour of Johnson, creating a security interest in all of the shares of Perth's or any corporation that owns shares of Perth's owned by Mr. Leibl.

10 Mr. Leibl gave an undertaking not to purchase any further shares in Perth's (directly or indirectly), or provide financial assistance to any other person for that purpose (directly or indirectly) without the prior written consent of Mr. Johnson until the amount owing to Johnson had been paid in full. The full text of that undertaking is as follows:

> For valuable consideration, the receipt and sufficiency of which is hereby acknowledged, I, Stewart Leibl, hereby undertake that until the amount outstanding under a promissory note for $450,000 executed by P. & G. Cleaners Ltd. in favour of James Johnson on July 17, 1992, a copy of which is attached hereto, is paid in full, I shall not, nor shall I, permit any of P. & G. Cleaners Ltd., Nova Services Ltd. or Perth Services Ltd. to acquire or provide assistance, financial or otherwise, to enable any other person to acquire, any right, title or interest of any nature or kind, either directly or indirectly, beneficially or otherwise in any shares of Perth Services Ltd. or any corporation related to Perth Services Ltd., without the prior written consent of James Johnson.

11 P. & G. has regularly paid the installments on the purchase price of the shares to Mr. Johnson and the original debt of $650,000 has now been reduced to $250,000. It is common ground that the financial position of Perth's has very much improved since the date of the share purchase agreement between Mr. Leibl and Mr. Johnson.

12 The court order embodying the terms of the settlement between Mr. Leibl and Ms Portnoy provides in part as follows:

(a) P. & G. Cleaners Ltd. will purchase the interest of Phyllis Portnoy in one and one-half shares of Nova Services Ltd. for $393,866.59 payable in cash on closing;

(b) On closing, P. & G. Cleaners Ltd. will advance to Nova Services Ltd. a loan in the aggregate amount of $106,133.41 to enable Nova Services Ltd. to repay and satisfy in full the following:

(i) its indebtedness to the Estate of Iser Portnoy in the amount of $50,000.00;

(ii) its indebtedness to Zebra Enterprises Ltd. in the amount of $16,000.00;

(iii) the shareholders loan from Phyllis Portnoy in the amount of $40,133.41.

(c) On closing, Nova Services Ltd. will pay the indebtedness referred to in paragraph 1(b)(i), (ii) and (iii) herein;

(d) On closing, P. & G. Cleaners Ltd. will pay Phyllis Portnoy interest on $500,000.00 calculated at the Royal Bank's primate rate of interest from and after June 30, 1995 to the date of closing ...

13 P. & G.'s purchase of the shares from Ms Portnoy is being financed as follows:

(a) loan from Perth's (Brandon) Ltd. $250,000;

(b) loan from Perth Services $100,000;

(c) shareholders loan ..... $150,000.

14 (Perth's (Brandon) Ltd. is a related company and provides a source of some cash to Perth Services; and the shareholders loan represents the sum of $150,000 which Mr. Leibl is personally investing.)

15 The loan from Perth's (Brandon) is secured by a guaranty of Perth Services. In the event of a default by P. & G., the loan is not accelerated and under the Perth's guarantee, Perth's (Brandon) may offset the past due installment against any amount payable by Perth's (Brandon) to Perth's. The shareholders loan is postponed to the indebtedness of P. & G. to James Johnson pursuant to a guarantee and postponement of claim executed by Mr. Leibl in favour of Mr. Johnson dated July 17, 1992.

16 P. & G. has offered to hypothecate to Mr. Johnson, the Nova shares acquired from Ms Portnoy so that all of the outstanding shares of Nova would be hypothecated to Mr. Johnson as security for P. & G.'s debt to him. (Mr. Leibl had already hypothecated all shares owned by him personally in Perth's and all shares owned by him in P. & G.) Accordingly, Mr. Johnson would hold, either directly or indirectly, as security 92% of the outstanding shares of Perth's, subject to the prior rights of the other lenders.

17 Mr. Johnson has refused to consent to the sale of Ms Portnoy's shares to Mr. Leibl unless a number of conditions are met, including an agreement to pay him a higher rate of interest than what he is now receiving under his original share purchase from Mr. Leibl and a guarantee that all of his legal fees will be paid up to the sum of $20,000. Mr. Leibl feels that Mr. Johnson is being unreasonable because he is now being offered security over *all* of the shares in Nova whereas previously he only had security over those owned by Mr. Leibl; Mr. Johnson does not agree that he is being unreasonable and feels that the very basis of his security; namely, the assets and financial viability of Perth Services is being compromised by the way in which the transaction with Ms Portnoy is being financed.

18 Counsel for the applicants submits that the consent to be given by Mr. Johnson is not absolute but is subject to an implied condition that it must be granted so long as his financial interests are protected; alternatively, she submits that it is subject to the implied condition that he must act in good faith. She submits that his interests are being protected and that he is in acting in bad faith.

19 Counsel for Mr. Johnson submits that the consent is absolute and that Mr. Johnson may withhold it even if he is not acting reasonably; he submits, however, that Mr. Johnson is acting reasonably.

20 I am in agreement with the argument of the respondent.

21 The right to give or withhold consent is in absolute terms: There are no conditions or provisions attached. It is not like the familiar case of the provision in a lease whereby a landlord's consent to the assignment of the lease is required, but is not to be unreasonably withheld.

22 The case of *Tredegar v. Harwood*, [1929] A.C. 72 (H.L.), illustrates the point. That case concerned a clause in a lease whereby the landlord's approval of fire insurance coverage to be arranged by the lessee was required. It was to be in the joint names of the lessee and lessor in the Law Fire Office or in some other responsible insurance office to be approved by the lessor. The lessee did not wish to continue the insurance with the Law Fire Office and tendered a similar policy from another insurance company. The landlord withheld his approval on the ground that he had many, many leases and it was convenient to have them all with the one office. The House of Lords — reversing the court of appeal — held that the landlord had an absolute right to withhold his approval (but, alternatively, that his approval was reasonably withheld). Lord Shaw of Dunfermline stated, at pp. 79-80:

> No conditions or provisions are attached to the granting or withholding of this approval. In particular, the case is in that respect completely distinguished from various cases as to assignment or sub-letting which have been cited. These contain, for example, the not unusual clause as in *Houlder Bros. & Co. v. Gibbs*, that the consent of the landlord was "not to be withheld unreasonably in the case of a respectable and responsible person or corporation" being put forward as assignee, or the other not unfamiliar clause applicable also to assignment or sub-letting, as in *Barrow v. Isaacs & Son*, to the effect that the consent of the landlord "should not be arbitrarily withheld."
>
> In the present case no such restriction or condition upon the right of the approval or disapproval by the landlord is imposed. The case is the simple one of one sound office being named, with the alternative given of another responsible office approved by the lessor. If the lessee will not insure in the Law Fire Office nor in any other responsible office which the lessor has approved, the covenant is broken. It is a condition precedent to the alternative being resorted to that the lessor's consent has been given to the other office suggested. I am of opinion in these circumstances that this condition precedent cannot be removed or held as satisfied, because in the opinion of a court of law the lessor's refusal was unreasonable. The Court's opinion upon that subject cannot be allowed to supply the want of the lessor's consent in fact.
>
> The forms of contract, under which the reasonableness of withholding consent is made a term, are perfectly familiar, and they were not adopted in the present case; and the condition of the lessor's consent is a condition precedent in absolute terms. [Footnotes omitted.]

23 Counsel for the applicants submits that the consent should be deemed subject to an implied condition that it can only be withheld if the respondents' financial interests are not adequately protected. She cites the *Law of Contract in Canada* (Fridman), 3rd ed., p. 475, which states that the court may imply a condition in a contract "when it is reasonably necessary, having regard to the surrounding circumstances, and in particular the previous course of dealing between the parties". I am not convinced that it is reasonably necessary to imply the conditions sought by the applicants. It was part of the original transaction between the applicants and respondent, whereby Mr. Johnson sold his shares to Mr. Leibl, that Mr. Leibl undertook not to buy any more without Mr. Johnson's consent. That transaction will work perfectly well with or without the implied condition. It is true that, without the condition, Mr. Leibl is somewhat at the mercy of Mr. Johnson who can be utterly unreasonable in refusing his consent; but it is also true that with such a condition, Mr. Johnson could be drawn into an endless — and perhaps profitless — debate as to whether or not he was being reasonable and whether or not his interests were protected. No doubt that is why the undertaking was drawn in the manner it was so that Mr. Johnson could avoid such disputations. Mr. Leibl cannot complain about this because he was guided by competent legal counsel and agreed to the undertaking.

24 Counsel for the applicants cites the case of *Greenberg v. Meffert* (1985), 18 D.L.R. (4th) 548 (Ont. C.A.). In that case, the terms of an agreement between the defendant real estate company and the plaintiff sales agent provided that in the event that a listing is sold after the agent's employment is terminated, any commission he or she receives will be at the sole discretion

of the company, and the commission earned on the listing will be dispersed at the company's discretion. The plaintiff was the listing agent in respect of a large commercial transaction. He did all that was required of a listing agent prior to terminating his employment with the real estate company. A sale was ultimately concluded and a commission of $175,000 was available for distribution. The company did not pay any commission to the plaintiff, and retained approximately one-third for itself and paid two-thirds to the selling agent. The court held that the company's discretion was not unbridled and had to be exercised using objective standards and awarded judgment to the plaintiff. The court stated, at p. 554:

> Provisions in agreements making payment or performance subject to the "the discretion", "the opinion" or "the satisfaction" of a party to the agreement or a third party, broadly speaking, fall into two general categories. In contracts in which the matter to be decided or approved is not readily susceptible of objective measurement — matters involving taste, sensibility, personal compatibility or judgment of the party for whose benefit the authority was given — such provisions are more likely construed as imposing only a subjective standard. On the other hand, in contracts relating to such matters as operative fitness, structural completion, mechanical utility or marketability, these provisions are generally construed as imposing an objective standard of reasonableness: see, generally, 4 Hals, 4th ed., p. 612, paras. 1198-9; *Corbin on Contracts* (1960), vol. 3A, ss. 644-48; *Williston on Contracts*, 3rd ed. (1957), ss. 675A and 675B; Hudson, *Building and Engineering Contracts*, 10th ed. (1970), chapter 7.

25 She also cites *Empress Towers Ltd. v. Bank of Nova Scotia* (1991), 73 D.L.R. (4th) 400 [[1991] 1 W.W.R. 537 (B.C.C.A.). In that case, a renewal provision in a lease provided that the tenant Bank of Nova Scotia could renew its lease at a rent of "the market rental prevailing at the commencement of that renewal term as mutually agreed between the Landlord and the Tenant". The bank sought to renew the lease by offering to pay $5,400 a month which was an increase from the $3,097.92 it had been paying. The bank indicated that this rental was based on a rate which independent appraisers had said was appropriate. The bank also said that it was willing to negotiate. Empress Towers refused to respond or negotiate and sought to terminate the lease unless the bank paid $15,000 and agreed to a month-to-month tenancy at $5,400 per month. The court held that the renewal term implied two requirements — to negotiate in good faith and not to withhold agreement unreasonably. They held that Empress Towers had breached both requirements and refused to issue a writ of possession.

26 In my view these cases are distinguishable. Here, Mr. Johnson is not bound to exercise a "discretion" or give an "opinion" or to be "satisfied". He has an absolute right to grant or withhold his consent and the court will not impose upon him an obligation to consent based upon the court's own view of what is or is not reasonable. As was stated by Lord Shaw of Dunfermline in *Tredegar v. Harwood* (supra), "The Court's opinion ... cannot be allowed to supply the want of the lessor's consent in fact". Counsel for the respondent cites the case of *Rafferty v. Power* (1993), 15 C.P.C. (3d) 48 (B.C.S.C.), in which Master Brandreth-Gibbs stated at p. 55:

> Consent is a voluntary act of will. Consent cannot be forced. Forced to consent is a non sequitur. A court order cannot make an involuntary act a voluntary one.

27 The applicants submit alternatively that the consent should at least be subject to the requirement to act in good faith. There may, indeed, be a minimal requirement for the respondent to act in good faith: For example, he might at least have to give honest consideration to the applicant's request for the consent. Counsel for the respondent refers to the case of *Fletton Ltd. v. Peat Marwick Ltd.* (1986), 32 B.L.R. 162, a decision of Spencer J. of the British Columbia Supreme Court. There a contract for the sale of certain washer-dryer units was subject to the purchaser giving to the vendor evidence of adequate insurance to protect the vendor from liability for electrical faults known to exist in the machines. The insurance was to be acceptable to the vendor. The vendor refused to accept the insurance proffered by the purchaser and insisted upon a policy which the court found was not attainable anywhere in the world. Nevertheless, the court held that while the vendor could not dishonestly refuse to approve the insurance, the law did not require that they should be reasonable in approving it; following the case of *Canada Egg Products Ltd. v. Canadian Doughnut Co.*, [1955] S.C.R. 398 at 409, in that case, a contract permitted the respondent to return egg powder if it was "not satisfactory"; the court held that the purchaser was within his contractual rights in rejecting the powder, provided he acted honestly even though he may have acted unreasonably.

28 In the instant case, in my opinion, the respondent has acted in good faith.

29 Mr. Johnson has stated, through his solicitors, that a number of conditions must be fulfilled before he would consider giving his consent. In a letter dated July 10, 1995, from his solicitors to the applicants' solicitors, it is stated "We would be prepared to recommend to our client to provide his consent" and then a list of 13 conditions is provided.

30 The applicants are in agreement with most of these conditions, except for the following:

31 (a) the indebtedness of the applicants to Mr. Johnson is to bear interest at the highest of the rates payable on the monies to be borrowed by P. & G. to finance the transaction;

32 (b) the 5,118.5 shares of Perth Services Ltd. held by Nova Services Ltd. are to be hypothecated to the respondent as additional security;

33 (c) the applicants are to pay up to a maximum total amount of $20,000 of the respondent's legal fees, including disbursements and GST, incurred by the respondent in connection with this matter. (The applicants are prepared to pay up to a maximum of $1,000 in legal fees.)

34 Counsel for the applicants submits that the respondent has not been negotiating in good faith in light of the facts that:

35 (a) all relevant details of the proposed transaction have been disclosed to him;

36 (b) the consents of the commercial lenders of Perth's have been obtained and provided to him;

37 (c) all shares purchased will be pledged to him as enhanced security;

38 (d) an opinion letter concerning his security will be provided by P. & G. solicitors;

39 (e) he will have his legal fees up to $1,000 paid in full; and

40 (f) the share hypothecation is impossible.

41 It is true that the commercial lenders, Mutual Life and the Royal Bank, have given their consents and this might have encouraged Mr. Johnson to do so as well; but as his counsel points out, the interests of these lenders are very well secured on the assets of Perth's and, for that reason alone, their position is different from that of Mr. Johnson; in any event, he is entitled to rely on his judgment and not theirs.

42 It is also true that Mr. Johnson's security will be enhanced in that he will be receiving a pledge of all of the shares in Nova; but, on the other hand, he points to the fact that the underlying security; namely, the assets and the financial viability of Perth's will be compromised because Perth's is being asked to give certain guarantees. Counsel for the applicants submits that the obligations being assumed by Perth's will only affect Mr. Johnson's security in a very minimal way and that, on balance, his position has been much improved. She may well be right, but the court is not in a position to give an appropriate answer in the matter, having regard to the fact that there was no expert evidence presented as to the extent to which, if any, Mr. Johnson's security has been either improved or made worse. In any event, that is not the issue. The issue is whether Mr. Johnson is acting in bad faith in entertaining the opinion which he has. In my view, he is not because there are factors to which he can reasonably point as supporting a genuine belief that his security is not as good as it was previously. Whether the court agrees or disagrees with that view is quite beside the point, so long as Mr. Johnson is acting honestly and in good faith.

43 It is to be noted that Mr. Johnson is not saying that he will not give his consent, but he is saying that notwithstanding the deterioration of his position which he perceives, he will consent, provided that he gets a somewhat higher rate of interest to cover what he sees as an additional risk. This may not be a correct view, but I am not prepared to say that it is unreasonable and it is certainly not one entertained in bad faith.

44 It is appropriate that Mr. Johnson's fees should be covered. The consent is for the benefit of the applicants and there is no reason why Mr. Johnson should be out of pocket in the matter. He would need solicitors to advise him of his position

and, of course, they would have to be paid. The fees could be subject to assessment if they did not appear to be reasonable to the applicants.

45 Counsel for the applicants submits that Mr. Johnson is laying down an impossible condition by asking for the hypothecation of the Perth's shares as they have already been hypothecated to the commercial lenders. She argues that the hypothecation involves a physical transfer of the shares and, since they have already been transferred to the lenders by way of hypothecation, they cannot be transferred a second time to Mr. Johnson. She may, strictly speaking, be correct in this, although counsel for Mr. Johnson observes that, in his experience, there can be a secondary hypothecation of assets by either delivering them to the prior security holder on condition that, once the first security interest has been satisfied, they be delivered to the holder of the secondary interest, or by delivering them to a third party; e.g., a solicitor, to be held in trust for the first and secondary security interests respectively. It should not be beyond the wit of man to devise some way in which Mr. Johnson could acquire a secondary interest in the shares, subject to the prior hypothecation, and I can only assume that his solicitor believes — and he has been advised — that something along those lines can be accomplished. Right or wrong, I cannot say that he is acting in bad faith in this regard.

46 All in all, the respondent has addressed himself to the issue of the consent seriously and at length and has acted in good faith. With all due respect, it seems to me that the applicants could very well accede to the respondent's terms without seriously prejudicing their positions and that to do so would not be too high a price to pay for all they have at stake here. They could pay a little more by way of interest; they could pay the reasonable legal fees, subject to assessment by the court, and they could probably work out some kind of secondary security interest with respect to the Perth's shares. But that is for them to decide. The only answer the court can give is to dismiss the application with costs.

Application dismissed.

End of Document

TAB 13

1994 CarswellBC 438
Supreme Court of Canada

Hodgkinson v. Simms

1994 CarswellBC 1245, 1994 CarswellBC 438, [1994] 3 S.C.R. 377, [1994] 9 W.W.R. 609, [1994] B.C.W.L.D. 2658, [1994] S.C.J. No. 84, 117 D.L.R. (4th) 161, 16 B.L.R. (2d) 1, 171 N.R. 245, 22 C.C.L.T. (2d) 1, 49 B.C.A.C. 1, 50 A.C.W.S. (3d) 469, 57 C.P.R. (3d) 1, 5 E.T.R. (2d) 1, 6 C.C.L.S. 1, 80 W.A.C. 1, 95 D.T.C. 5135, 97 B.C.L.R. (2d) 1, J.E. 94-1560, EYB 1994-67089

ROBERT L. HODGKINSON v. DAVID L. SIMMS and JERRY S. WALDMAN, carrying on business as SIMMS & WALDMAN and said SIMMS & WALDMAN, a partnership

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

Heard: December 6, 1993
Judgment: September 30, 1994
Docket: Doc. 23033

Counsel: *Earl A. Cherniak, Q.C., Gregory T. Walsh* and *Kirk Stevens*, for appellant.
Glenn A. Urquhart and *Arthur M. Grant*, for respondents.

Subject: Intellectual Property; Securities; Insolvency; Torts; Property; Corporate and Commercial; Estates and Trusts; Income Tax (Federal); Contracts; Public

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Cases considered by La Forest J.:

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BG Checo International Ltd. v. British Columbia Hydro & Power Authority, [1993] 1 S.C.R. 12, [1993] 2 W.W.R. 321, 75 B.C.L.R. (2d) 145, 5 C.L.R. (2d) 173, 147 N.R. 81, 20 B.C.A.C. 241, 99 D.L.R. (4th) 577, 14 C.C.L.T. (2d) 233 [rehearing refused (1993), 5 C.L.R. (2d) 173n, 14 C.C.L.T. (2d) 233n] — *referred to*

Baskerville v. Thurgood, [1992] 5 W.W.R. 193, 46 E.T.R. 28, 100 Sask. R. 214, (sub nom. *582872 Saskatchewan Ltd. v. Thurgood)* 93 D.L.R. (4th) 694 (C.A.) — *referred to*

Bastian v. Petren Resources Corp., 681 F. Supp. 530(U.S. Dist. Ct., 1988) — *considered*

Baud Corp., N.V. v. Brook, [1979] 1 S.C.R. 633, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.)* [1978] 6 W.W.R. 301, 5 B.L.R. 225, 23 N.R. 181, 12 A.R. 271, 89 D.L.R. (3d) 1 [varied [1979] 1 S.C.R. 677, [1979] 3 W.W.R. 93, 14 A.R. 407, 25 N.R. 451, 97 D.L.R. (3d) 300] — *considered*

Burke v. Cory, [1959] O.W.N. 129, 19 D.L.R. (2d) 252 (C.A.) — *referred to*

Burns v. Kelly Peters & Associates Ltd., 16 B.C.L.R. (2d) 1, [1987] 6 W.W.R. 1, 41 C.C.L.T. 257, [1987] I.L.R. 1-2246, 41 D.L.R. (4th) 577 (C.A.) — *considered*

Canadian Aero Service Ltd. v. O'Malley (1973), [1974] S.C.R. 592, 40 D.L.R. (3d) 371, 11 C.P.R. (2d) 206 — *referred to*

Canadian Pioneer Management Ltd. v. Saskatchewan (Labour Relations Board), [1980] 1 S.C.R. 433, [1980] 3 W.W.R. 214, 31 N.R. 361, 2 Sask. R. 217, 107 D.L.R. (3d) 1, 80 C.L.L.C. 14,018 — *referred to*

Canson Enterprises Ltd. v. Boughton & Co. (1991), [1991] 3 S.C.R. 534, [1992] 1 W.W.R. 245, 61 B.C.L.R. (2d) 1, 85 D.L.R. (4th) 129, 9 C.C.L.T. (2d) 1, 131 N.R. 321, 43 E.T.R. 201, 39 C.P.R. (3d) 449, 6 B.C.A.C. 1 — *considered*

Casella v. Webb, 883 F. 2d 805 (9th Cir., 1989) — *considered*

Chasins v. Smith, Barney & Co., 438 F. 2d 1167 (2nd Cir., 1970) — *applied*

Commerce Capital Trust Co. v. Berk (1989), 5 R.P.R. (2d) 177, 68 O.R. (2d) 257, 57 D.L.R. (4th) 759, 33 O.A.C. 373 (C.A.) [amended (1989), 69 O.R. (2d) 735, 62 D.L.R. (4th) 383, 35 O.A.C. 319 (C.A.)] — *referred to*

Dawson, Re; Union Fidelity Trust Co. v. Perpetual Trustee Co., [1966] 2 N.S.W.R. 211 — *referred to*

Dolton v. Capital Federal Savings & Loan Assn., 642 P. 2d 21(Colo. Ct. App., 1982) [rehearing denied October 8, 1981, certiorari denied March 8, 1982] — *applied*

Elderkin v. Merrill Lynch, Royal Securites Ltd. (1977), 22 N.S.R. (2d) 218, 31 A.P.R. 218, 80 D.L.R. (3d) 313 (C.A.) — *considered*

Fine's Flowers Ltd. v. General Accident Assurance Co. (1977), 17 O.R. (2d) 529, 2 B.L.R. 257, [1978] I.L.R. 1-937, 81 D.L.R. (3d) 139 (C.A.) — *referred to*

Fletcher v. Manitoba Public Insurance Corp., [1990] 3 S.C.R. 191, 5 C.C.L.T. (2d) 1, 1 C.C.L.I. (2d) 1, 30 M.V.R. (2d) 261, 71 Man. R. (2d) 81, [1990] I.L.R. 1-2672, 74 D.L.R. (4th) 636, 116 N.R. 1, 44 O.A.C. 81, 75 O.R. (2d) 373 — *referred to*

Frame v. Smith, [1987] 2 S.C.R. 99, 78 N.R. 40, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, 23 O.A.C. 84, 42 D.L.R. (4th) 81, [1988] 1 C.N.L.R. 152 — *considered*

Glennie v. McDougall & Cowans Holdings Ltd., [1935] S.C.R. 257, [1935] 2 D.L.R. 561 — *referred to*

Granville Savings & Mortgage Corp. v. Slevin (1990), 68 Man. R. (2d) 241, 50 B.L.R. 284, reversed [1992] 5 W.W.R. 1, 24 R.P.R. (2d) 185, 93 D.L.R. (4th) 268, 12 C.C.L.T. (2d) 275, 6 B.L.R. (2d) 192, 78 Man. R. (2d) 241, reversed (1993), [1993] 4 S.C.R. 279, [1994] 1 W.W.R. 257, 160 N.R. 243, 36 R.P.R. (2d) 124, 88 Man. R. (2d) 145, (sub nom. *Granville Savings & Mortgage Corp. v. Campbell)* 108 D.L.R. (4th) 383 — *considered*

Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, (sub nom. *Guerin v. Canada)* 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161 — *applied*

H. Parsons (Livestock) Ltd. v. Uttley, Ingham & Co., [1978] Q.B. 791, [1978] 1 All E.R. 525 (C.A.) — *referred to*

Harry v. Kreutziger (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.) — *referred to*

Hatrock v. Edward D. Jones & Co., 750 F. 2d 767 (9th Cir., 1984) — *considered*

Henderson v. Thompson (1909), 41 S.C.R. 445 — *referred to*

Hospital Products Ltd. v. United States Surgical Corp. (1984), 55 A.L.R. 417, 156 C.L.R. 41 (H.C.) — *considered*

Huddleston v. Herman & MacLean, 640 F. 2d 534 (1981), affirmed in part 459 U.S. 375, 74 L. Ed. 2d 548, 103 S. Ct. 683 (1983) — *considered*

Huff v. Price (1990), 51 B.C.L.R. (2d) 282, 46 C.P.C. (2d) 209, 76 D.L.R. (4th) 138 (C.A.) [additional reasons (1990), 76 D.L.R. (4th) at 176, leave to appeal to S.C.C. refused (1991), 56 B.C.L.R. (2d) xxxviii, (sub nom. *Charpentier v. Huff)* 4 B.C.A.C. 80, 136 N.R. 409] — *applied*

International Corona Resources Ltd. v. LAC Minerals Ltd., [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57 — *considered*

Island Realty Investments Ltd. v. Douglas (1985), 19 E.T.R. 56 (B.C.S.C.) — *referred to*

Jacks v. Davis, [1983] 1 W.W.R. 327, 39 B.C.L.R. 353, 22 C.C.L.T. 266, 141 D.L.R. (3d) 355 (C.A.) — *referred to*

Jirna Ltd. v. Mister Donut of Canada Ltd. (1971), [1972] 1 O.R. 251, 22 D.L.R. (3d) 639, 3 C.P.R. (2d) 40, affirmed (1973), [1975] 1 S.C.R. 2, 40 D.L.R. (3d) 303, 12 C.P.R. (2d) 1 — *referred to*

Johnson v. Birkett (1910), 21 O.L.R. 319 (H.C.) — *referred to*

K.R.M. Construction Ltd. v. British Columbia Railway (1982), 40 B.C.L.R. 1 (C.A.) — *applied*

Keech v. Sandford (1726), Sel. Cas. T. King 61, 25 E.R. 223 — *applied*

Lapointe c. Hôpital Le Gardeur, [1992] 1 S.C.R. 351, 10 C.C.L.T. (2d) 101, 9 C.P.C. (3d) 78, 90 D.L.R. (4th) 27, (sub nom. *Lapointe v. Chevrette)* 133 N.R. 116, 45 Q.A.C. 262 — *referred to*

Laskin v. Bache & Co. (1971), [1972] 1 O.R. 465, 23 D.L.R. (3d) 385 (C.A.) — *referred to*

Laurentide Motels Ltd. v. Beauport (Ville), [1989] 1 S.C.R. 705, 45 M.P.L.R. 1, 94 N.R. 1, 23 Q.A.C. 1 — *referred to*

Lensen v. Lensen (1987), [1987] 2 S.C.R. 672, [1988] 1 W.W.R. 481, 23 C.P.C. (2d) 33, 79 N.R. 334, 44 D.L.R. (4th) 1, 64 Sask. R. 6 — *referred to*

Lloyds Bank Ltd. v. Bundy, [1975] Q.B. 326, [1974] 3 All E.R. 757 (C.A.) — *applied*

London Loan & Savings Co. of Canada v. Brickenden, [1934] 2 W.W.R. 545, [1934] 3 D.L.R. 465 (P.C.) — *referred to*

M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, 142 N.R. 321, 14 C.C.L.T. (2d) 1, 96 D.L.R. (4th) 289, 57 O.A.C. 321 — *considered*

MacDonald Estate v. Martin (1990), [1990] 3 S.C.R. 1235, [1991] 1 W.W.R. 705, 121 N.R. 1, 77 D.L.R. (4th) 249, 48 C.P.C. (2d) 113, 70 Man. R. (2d) 241 — *referred to*

Maghun v. Richardson Securities of Canada Ltd. (1986), 18 O.A.C. 141, 58 O.R. (2d) 1, 34 D.L.R. (4th) 524 (C.A.) — *considered*

Marbury Management Inc. v. Kohn, 629 F. 2d 705 (2nd Cir., 1980) — *considered*

McGonigle v. Combs, 968 F. 2d 810 (9th Cir., 1992) — *referred to*

McInerney v. MacDonald, [1992] 2 S.C.R. 138, 137 N.R. 35, 7 C.P.C. (3d) 269, 93 D.L.R. (4th) 415, 12 C.C.L.T. (2d) 225, 126 N.B.R. (2d) 271, 317 A.P.R. 271 — *referred to*

McLeod v. Sweezey, [1944] S.C.R. 111, [1944] 2 D.L.R. 145 — *referred to*

Midcon Oil & Gas Co. v. New British Dominion Oil Co., [1958] S.C.R. 314, 12 D.L.R. (2d) 705 — *referred to*

National Westminster Bank plc v. Morgan, [1985] 1 All E.R. 821 (H.L.) — *applied*

Nocton v. Lord Ashburton, [1914] A.C. 932 (H.L.) — *considered*

Norberg v. Wynrib, [1992] 2 S.C.R. 226, [1992] 4 W.W.R. 577, 68 B.C.L.R. (2d) 29, 12 C.C.L.T. (2d) 1, 138 N.R. 81, 9 B.C.A.C. 1, 92 D.L.R. (4th) 449 [additional reasons [1992] 2 S.C.R. 318, [1992] 6 W.W.R. 673, 74 B.C.L.R. (2d) 2] — *considered*

R. v. Kelly, [1992] 2 S.C.R. 170, [1992] 4 W.W.R. 640, 68 B.C.L.R. (2d) 1, 14 C.R. (4th) 181, 137 N.R. 161, 73 C.C.C. (3d) 385, 9 B.C.A.C. 161, 92 D.L.R. (4th) 643 — *applied*

R.H. Deacon & Co. v. Varga (1973), [1975] 1 S.C.R. 39, 41 D.L.R. (3d) 767, 1 N.R. 79 — *referred to*

Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co., [1991] 3 S.C.R. 3, [1991] 6 W.W.R. 385, 59 B.C.L.R. (2d) 129, 8 C.C.L.T. (2d) 225, 84 D.L.R. (4th) 291, 126 N.R. 354, 3 B.C.A.C. 1 — *applied*

Rothko v. Reis, 372 N.E. 2d 291(N.Y. Ct. App., 1977) — *referred to*

Standard Investments Ltd. v. Canadian Imperial Bank of Commerce (1985), 30 B.L.R. 193, 52 O.R. (2d) 473, 22 D.L.R. (4th) 410, 11 O.A.C. 318, leave to appeal to S.C.C. refused [1986] 1 S.C.R. vi, 53 O.R. (2d) 663, 65 N.R. 78, 15 O.A.C. 237 — *referred to*

Thermo King Corp. v. Provincial Bank of Canada (1981), 34 O.R. (2d) 369, 130 D.L.R. (3d) 256, leave to appeal to S.C.C. refused [1982] 1 S.C.R. xi, 42 N.R. 352, 130 D.L.R. (3d) 256n — *referred to*

Varcoe v. Sterling (1992), 7 O.R. (3d) 204 (Gen. Div.) [affirmed (1992), 10 O.R. (3d) 574, leave to appeal to S.C.C. refused (1992), 10 O.R. (3d) xv, 145 N.R. 390, 60 O.A.C. 74] — *applied*

Waddell v. Blockey (1879), 4 Q.B.D. 678 (C.A.) — *not followed*

Wakeford v. Yada Tompkins Huntingford & Humphries (August 1, 1985), Doc. Vancouver C82616, [1985] B.C.W.L.D. 3000, affirmed (1986), 4 B.C.L.R. (2d) 306, 28 D.L.R. (4th) 481 (C.A.) — *referred to*

Waters v. Donnelly (1884), 9 O.R. 391 (C.A.) — *referred to*

White v. R., [1947] S.C.R. 268, 3 C.R. 232, 89 C.C.C. 148 — *referred to*

Cases considered by Iacobucci J.:

International Corona Resources Ltd. v. LAC Minerals Ltd., [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57 — *distinguished*

Cases considered in dissent:

Baud Corp., N.V. v. Brook, [1979] 1 S.C.R. 633, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.)* [1978] 6 W.W.R. 301, 5 B.L.R. 225, 23 N.R. 181, 12 A.R. 271, 89 D.L.R. (3d) 1 [varied [1979] 1 S.C.R. 677, [1979] 3 W.W.R. 93, 14 A.R. 407, 25 N.R. 451, 97 D.L.R. (3d) 300] — *considered*

Canson Enterprises Ltd. v. Boughton & Co. (1991), [1991] 3 S.C.R. 534, [1992] 1 W.W.R. 245, 61 B.C.L.R. (2d) 1, 85 D.L.R. (4th) 129, 9 C.C.L.T. (2d) 1, 131 N.R. 321, 43 E.T.R. 201, 39 C.P.R. (3d) 449, 6 B.C.A.C. 1 — *considered*

Frame v. Smith, [1987] 2 S.C.R. 99, 78 N.R. 40, 9 R.F.L. (3d) 225, 42 C.C.L.T. 1, 23 O.A.C. 84, 42 D.L.R. (4th) 81, [1988] 1 C.N.L.R. 152 — *applied*

Girardet v. Crease & Co. (1987), 11 B.C.L.R. (2d) 361 (S.C.) — *applied*

Guerin v. R., [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, (sub nom. *Guerin v. Canada)* 36 R.P.R. 1, 20 E.T.R. 6, [1985] 1 C.N.L.R. 120, 13 D.L.R. (4th) 321, 55 N.R. 161 — *applied*

Hadley v. Baxendale (1854), 9 Exch. 341, 156 E.R. 145 — *applied*

Hatrock v. Edward D. Jones & Co., 750 F. 2d 767 (9th Cir., 1984) — *considered*

"Heron II" (The); Koufos v. C. Czarnikow Ltd., [1969] 1 A.C. 350, [1967] 3 All E.R. 686 (H.L.) — *referred to*

Hospital Products Ltd. v. United States Surgical Corp. (1984), 55 A.L.R. 417, 156 C.L.R. 41 (H.C.) — *applied*

International Corona Resources Ltd. v. LAC Minerals Ltd., [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57 — *applied*

Keech v. Sandford (1726), Sel. Cas. T. King 61, 25 E.R. 223 — *referred to*

McGonigle v. Combs, 968 F. 2d 810 (9th Cir., 1992) — *applied*

Varcoe v. Sterling (1992), 7 O.R. (3d) 204 (Gen. Div.) [affirmed (1992), 10 O.R. (3d) 574, leave to appeal to S.C.C. refused (1992), 10 O.R. (3d) xv, 145 N.R. 390, 60 O.A.C. 74] — *applied*

Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd., [1949] 2 K.B. 528, [1949] 1 All E.R. 997 (C.A.) — *applied*

Waddell v. Blockey (1879), 4 Q.B.D. 678 (C.A.) — *applied*

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

s. 426(1)(a)*referred to*

Securities Exchange Act, 1934, 15 U.S.C.S.

s. 10(b)*referred to*

Rules considered:

Securities and Exchange Commission Rules, 17 Code of Federal Regulations (U.S.)

R. 10b-5*considered*

Words and phrases considered:

trust

vulnerability

Appeal from judgment of British Columbia Court of Appeal, [1992] 4 W.W.R. 330, 65 B.C.L.R. (2d) 264, 6 C.P.C. (3d) 141, 45 E.T.R. 270, 5 B.L.R. (2d) 236, 11 B.C.A.C. 248, allowing defendant's appeal from judgment of Prowse J. (1989), 43 B.L.R. 122, awarding plaintiff damages for breach of fiduciary duty and breach of contract.

***La Forest J.* (*Gonthier* and *L'Heureux-Dubé JJ.* concurring):**

Introduction

1 This is a case of material non-disclosure in which the appellant alleges breach of fiduciary duty and breach of contract against the respondent in the performance of a contract for investment advice and other tax-related financial services. The respondent, Mr. Simms, was a Chartered Accountant and partner in the respondent firm Simms & Waldman. Though the firm and Mr. Waldman are parties to these proceedings, I shall because of Mr. Simms' central role generally be referring to him when I speak of "the respondent". Mr. Simms had developed a special expertise in relation to multi-unit residential buildings ("MURBs"). In 1980 the appellant Mr. Hodgkinson retained Mr. Simms' services in the areas of tax planning and preparation, and in finding stable, tax-sheltering investments. Mr. Hodgkinson was a "neophyte" in the field of tax planning and tax-related investments. He approached Mr. Simms as an independent professional who would give him the impartial service and advice he was looking for. Mr. Hodgkinson decided to put himself in Mr. Simms' hands with respect to his tax planning and tax sheltering needs. In the course of their relationship, Mr. Simms recommended four MURB projects to Mr. Hodgkinson as meeting his investment criteria. Mr. Hodgkinson duly invested in these projects. What Mr. Hodgkinson did not know, however, was that at the time Mr. Simms was making these recommendations, he was in a financial relationship with the developers of the projects. The more MURBs Mr. Simms sold to Simms & Waldman clients, the larger the fees he reaped from the developers. While Mr. Simms attempted to deny the non-disclosure by arguing at discovery that his relationship with the developers was in fact

disclosed to Mr. Hodgkinson, and then stating at trial that his business relationship with the developers did not commence until after Mr. Hodgkinson had invested in the projects, this line of defence was rejected by the trial judge and was not pursued on appeal. Rather, this appeal concerns the proper characterization of the relationship between the parties and determining the nature and extent of the civil liability, if any, flowing from the non-disclosure.

2 The trial judge, Prowse J., found there was an implied retainer between the parties, one of the terms of which was a contractual duty of material disclosure. She went on to find the respondent in breach of this term. In addition, the trial judge, after a careful and detailed review of the facts, held that the relationship between the parties was such that the respondent owed the appellant a fiduciary duty. This duty carried with it a duty of disclosure, which, again, the respondent was found to have breached. While the finding of contractual liability was upheld by the Court of Appeal, and was not made the subject of a cross-appeal before this Court, the Court of Appeal reversed the trial judge's finding of fiduciary liability. The Court of Appeal took the view that the trial judge misstated the law of fiduciary duties, since she had not had the benefit of this Court's judgment in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574. The Court of Appeal also varied the trial judge's damages award.

3 I should say at the outset that I would restore the trial judge's decision in its entirety. In my view, her statement of fiduciary law was correct, and I cannot find fault with her assiduous findings of fact or her application of the facts to the law. I am also in substantial agreement with her on the issue of damages. In assessing damages, the trial judge rightly focused on the nature of the breach rather than the nature of the loss and, as a result, her calculation of the losses flowing from the breach vindicated the core duties immanent in the relationship between the appellant and the respondent.

Facts

4 The appellant, Mr. Hodgkinson, was in January 1980 a 30-year-old stockbroker working for Canarim Investments Ltd. He had joined Canarim in 1979, after a 7-year stint with A.E. Ames & Co., which he described as a conservative, blue-chip securities firm. By contrast, Mr. Hodgkinson described Canarim as an aggressive firm which dealt in speculative underwritings in the oil and gas and mining trades. At Canarim Mr. Hodgkinson's gross income increased from between $50,000 to $70,000 per year which he had been earning at A.E. Ames & Co. to $650,000 in 1980 and $1.2 million in 1981. Prior to retaining the services of Simms & Waldman, Mr. Hodgkinson had always prepared his own tax returns. His investment experience was quite limited. He had an interest in a ski chalet at Mt. Baker, two units in a MURB townhouse development in White Rock, and some flow-through shares in a mineral exploration tax shelter. In addition, he had bought and sold a small house in West Vancouver. However, with the 10 to 20-fold increase in his gross income, Mr. Hodgkinson decided to seek professional assistance in both accounting for his money and sheltering it from taxation.

5 The respondent Simms was in 1980 a Chartered Accountant and a partner in the firm of Simms & Waldman. He is a member of the Canadian and British Columbia Institutes of Chartered Accountants. While Mr. Simms specialized in providing general tax and business advice to small businessmen and professionals, beginning in 1979 he developed a practice of evaluating real estate "tax shelter" investments, or MURBs, on behalf of clients. According to his evidence at trial, he and Mr. Russ Long, another accountant associated with Simms & Waldman, had analyzed approximately 70 tax shelters in 1979.

6 The remaining two parties to this action are Mr. Jerry Waldman, a partner of Mr. Simms at the relevant time, and the partnership of Simms & Waldman. As the trial judge noted, Mr. Waldman was not involved with the investments in question, and his and the firm's liability, if any, flow from the principles of partnership law.

7 Mr. Hodgkinson first consulted Mr. Simms in early January 1980. He was planning to marry in a few months and wanted to protect a portion of his earnings from the risks associated with the securities markets. In entrusting Mr. Simms with his financial matters, Mr. Hodgkinson placed a premium on the fact that Mr. Simms was not part of the high risk world of "promoters" in which he normally operated in his job at Canarim. He looked to Mr. Simms as someone who could be relied on for independent analysis in the complex area of tax shelter investments. While Mr. Hodgkinson desired assistance in preparing tax returns, his most important objective was to minimize his exposure to income tax while at the same time acquiring some stable long term investments. Mr. Simms suggested MURBs as an ideal instrument for Mr. Hodgkinson in realizing his investment goals. He

and Mr. Hodgkinson shared the view, common at the time, that real estate provided a stable long-term investment. In addition, investment in MURBs generated the potential for significant tax savings. MURBs were a product of a 1974 change in taxation policy made by the Minister of Finance to stimulate investment in rental real estate. Pursuant to Reg. 1100(1) and Sched. B to the *Income Tax Act*, S.C. 1970-71-72, c. 63, individual taxpayers could shelter their income by claiming capital cost allowances from qualifying investments in real estate. As such, real estate developers, rather than selling apartment units on a "turn-key" basis, sold an undivided interest in the vacant land to each investor. The investors then entered into a construction contract with the developer, who would in turn construct the building on behalf of the investors. In this way investors became "mini-developers", and as such could deduct certain related costs (typically financing costs) incurred during the construction period. These deductions were known as "soft costs".

8 The relationship between the parties, and in particular Mr. Hodgkinson's confidence in Mr. Simms, was such that Mr. Hodgkinson did not ask many questions regarding the investments. He trusted Mr. Simms to do the necessary analysis, and believed if he recommended a project it was a good investment. By turns, Mr. Hodgkinson made substantial investments in four MURBs recommended by Mr. Simms. These investments were, in chronological order: (1) "Duncana", a mixed residential-commercial project in Penticton, B.C. (2) "Bella Vista", a 41-unit MURB apartment block also in Penticton, (3) "Oliver Place", a shopping centre in Oliver, B.C., and (4) "Enterprise Way", a warehouse project in Surrey, B.C. The developers of the first three investments were Jerry and Bob Olma; the developer of "Enterprise Way" was Rod Dale-Johnson.

9 As these proceedings attest, Mr. Hodgkinson's investments lost virtually all their value. When the real estate market crashed in 1981, Mr. Hodgkinson lost substantially on all of them. Each of the MURB units he purchased on the advice of Mr. Simms was either sold at a loss to avoid cash calls, or was the subject of foreclosures when they could not be sold or rented.

10 This is not a case of fraud or deceit. Mr. Hodgkinson did not pay any more than fair market value for any of the MURB units he purchased. He does not complain about this. Rather, the gravamen of Mr. Hodgkinson's complaint lies in the fact that, unknown to him, Mr. Simms was during the relevant period acting for the developers in the "structuring" of each of these MURB projects. Specifically, Mr. Simms advised and assisted the developers in the analysis and maximization of tax deductible expenses that could be incorporated into the real estate investments offered for sale. In fact, during 1980 and 1981, Mr. Simms billed the Olma Brothers a total of $172,000, which represented fully one sixth of Simms & Waldman's billables that year. In figuring the developers' bills, the respondent measured not only his time spent on a given project, but also the extent to which the MURB units were in fact purchased by Simms & Waldman clients. Mr. Simms described this billing practice as "bonus billing".

11 Thus, while Mr. Hodgkinson got what he paid for from the developers, the same cannot be said of his relationship with Mr. Simms. Mr. Hodgkinson looked to Mr. Simms as an independent professional advisor, not a promoter. In short, Mr. Hodgkinson *would not have invested* in the impugned projects had he known the true nature and extent of Mr. Simms' relationship with the developers.

12 Mr. Hodgkinson brought an action in the Supreme Court of British Columbia for breach of fiduciary duty, breach of contract and negligence to recover all his losses on the four investments recommended by the respondent Simms. The claim in negligence was dismissed at trial and was not pursued before the Court of Appeal. The trial judge, Prowse J., however, allowed Mr. Hodgkinson's action for breach of fiduciary duty and breach of contract and awarded him damages in the amount of $350,507.62. The British Columbia Court of Appeal upheld the trial judge on the breach of contract issue, but reversed on the issue of fiduciary duties. As well, the Court of Appeal varied the damages award, setting damages at an amount equal to the fees received by Mr. Simms from the developers on account of the four projects, prorated as between the various investors in those projects.

Judgments Below

Supreme Court of British Columbia, 1989, 43 B.L.R. 122 (Prowse J.)

13 Prowse J. first examined the claim for breach of fiduciary duty. She noted that in construing a relationship as fiduciary, everything turns on the particular facts of the relationship. She cited, inter alia, the Australian decision, *Hospital Products Ltd.*

v. United States Surgical Corp. (1984), 55 A.L.R. 417 (H.C.), for the proposition that a fiduciary relationship exists where one party agrees to act on behalf of, or in the best interests of another person and, as such, is in a position to affect the interests of that other person in a legal or practical sense. As such, fiduciary relationships are marked by vulnerability in that the fiduciary can abuse the power or discretion given him or her to the detriment of the beneficiary.

14 On the facts before her, Prowse J. concluded that the parties were indeed in a fiduciary relationship. She found that Mr. Hodgkinson trusted and relied on Mr. Simms to exercise his special skills on Mr. Hodgkinson's behalf, and that Mr. Simms was aware of this fact. She also found as a fact that the particular relationship between the parties was such that if Mr. Simms recommended an investment, Mr. Hodgkinson invested. She stated, at p. 168:

> This was not simply the case of an accountant preparing a client's income tax return, or advising what the tax consequences of tax shelter "A" versus tax shelter "B" would be ... Here, Mr. Simms went far beyond that, to the extent of "analysing tax shelters", which analysis was directed toward the relative merits of location, construction costs, potential revenues and expenses, management of the project, options for financing, obtaining legal advice on the forms of agreement and so on. He never once referred Mr. Hodgkinson out for any other kind of professional advice or suggested that there was any need for it. On the contrary, he led Mr. Hodgkinson to believe that everything was in hand and that he was doing his homework and was in control of the situation. He knew very well that Mr. Hodgkinson was not relying on any other professional advice except his own with respect to all of these projects ... In effect, Mr. Simms assumed the responsibility for Mr. Hodgkinson's choice. He analyzed the investments, he recommended the investments, and he effectively chose the investments for Mr. Hodgkinson.

With respect to the issue of vulnerability, the learned trial judge stated, at p. 165:

> He [Mr. Simms] recognized in Mr. Hodgkinson a "neophyte" taxpayer, with no experience in dealing with large real estate tax shelters. Mr. Simms not only recognized Mr. Hodgkinson's vulnerability in that regard, but he cultivated that vulnerability and trust by impressing upon Mr. Hodgkinson that he knew the developers of these projects, that he had done his homework in his analyses of these projects and, generally, that he was experienced in the field of tax-shelter analysis.

15 Prowse J. acknowledged that during the relevant period Mr. Hodgkinson made several risky investments without consulting Mr. Simms, and in one case proceeded with an investment in a movie financing deal which Mr. Simms in fact opposed. However, she was of the view, at p. 151, that "Mr. Hodgkinson's relationship with his co-investors in other investments ... cannot excuse Mr. Simms for any breach of his own duty to Mr. Hodgkinson." In particular, she found that Mr. Hodgkinson and Mr. Simms had an understanding that Mr. Simms was being relied upon to apply a certain portion of Mr. Hodgkinson's income towards stable, tax sheltering investments which were distinct from the speculative world with which Mr. Hodgkinson was more familiar.

16 Having found that the parties were in a fiduciary relationship, Prowse J. turned to the scope of the fiduciary duties owed by Mr. Simms to Mr. Hodgkinson. She once again cited the *Hospital Products* case, at pp. 169-70, here for the proposition that a fiduciary "'is under an obligation not to promote his personal interest by making or pursuing a gain in circumstances in which there is a conflict ... between his personal interests and those of the persons whom he is bound to protect.'"She found that Mr. Simms violated this duty by failing to disclose to Mr. Hodgkinson that at the time he was advising Mr. Hodgkinson to invest in certain projects, he was also advising and being paid by the developers of these projects. She stated, at p. 170:

> ... Mr. Simms was serving two masters, and was attempting to make both of them happy. One of those masters, the developer, and in particular the Olma brothers, were in a position to provide Mr. Simms with even more lucrative work if he served them well. Part of serving them well was to provide them with purchasers for their projects. Mr. Simms had a vested personal interest in so doing. Thus, he was in a conflict of interest, not only in the sense of potentially preferring one set of clients over another, but also in preferring his own monetary gain above his clients generally.

Prowse J.'s jaundiced view of Mr. Simms' behaviour was supported by the professional standards required of accountants by the accounting profession. These standards required Mr. Simms to disclose any real or potential conflict of interest.

17 Prowse J. then turned to the question of damages for breach of fiduciary duty. In dealing with this issue, Prowse J. was guided by the principles set forth in the "non-disclosure" cases. Based on the principles set forth, inter alia, in *Burns v. Kelly Peters & Associates Ltd.* (1987), 16 B.C.L.R. (2d) 1 [[1987] 6 W.W.R. 1] (C.A.), and *Jacks v. Davis*, [1983] 1 W.W.R. 327 [39 B.C.L.R. 353] (B.C.C.A.), she concluded that Mr. Hodgkinson was entitled to be put in the position he would have been in had he never been induced to make the four investments. These damages should account for the capital invested in the four projects, minus the tax benefits received as a result of the investments, plus an additional amount paid by way of arrears on the income tax reassessments on Bella Vista and Oliver Place relating to overstated "soft cost" write-offs. In addition, Mr. Hodgkinson was entitled to consequential damages, namely, the legal and accounting fees required by Mr. Hodgkinson to extricate himself from each of the MURBs and in settling his accounts with Revenue Canada.

18 With respect to the claim for breach of contract, Prowse J. found that the damages for the breach of contract were the same as those for the breach of the fiduciary duty. Based on the principle that damages for breach of contract should as much as possible be calculated in such a way as to put the injured party in the same position as he or she would have been had the contract been performed, subject to the principle that damages are limited to those losses which would have been in the reasonable contemplation of the contracting parties at the time of contracting. In this case, if the contract had been performed,that is if Mr. Simms had dis closed his affiliation with the developers, Mr. Hodgkinson would not have made the impugned investments. In addition, Prowse J. held that at the time of contracting it was reasonably foreseeable that a change in the economy could adversely affect real estate investments.

19 Prowse J. dismissed the claim for damages based on negligence. She found no evidence that any damage flowed from the manner in which Mr. Simms conducted his investigations into any of the projects.

British Columbia Court of Appeal, 1992, 65 B.C.L.R. (2d) 264, [1992] 4 W.W.R. 330] (McEachern C.J.B.C., Wood and Gibbs JJ.A. concurring)

20 McEachern C.J.B.C. purported to accept the trial judge's findings of fact, though as will become apparent later, I am of the view that he failed to respect those findings on several important points. He did, however, uphold the trial judge's ruling that the respondent owed the appellant a duty of disclosure flowing from the implied retainer between the parties.

21 Turning to the fiduciary duty issue, McEachern C.J.B.C. reversed the trial judge's finding of liability. He noted that the trial judgment was rendered before the judgment of this Court in *LAC Minerals*, *supra*, and observed that while the trial judge felt bound by the majority judgment in *Kelly Peters*, the dissenting view of Lambert J.A. more closely accorded with *LAC Minerals*.

22 Turning to the facts before him, McEachern C.J.B.C. stated that the critical matter was to examine the degree of vulnerability or dependency between the parties. The Chief Justice found that the requisite degree of vulnerability had not been made out. He found that the appellant did not give the respondent any unilateral authority or discretion to prefer his own position or that of the developers to the appellant's disadvantage. In his view, the evidence tended to show that "the choice to invest or not to invest was entirely that of the [appellant]" (p. 275). With respect to the Duncana investment, McEachern C.J.B.C. cited the fact that the appellant was given a chance to meet the developers and was given a written description of the development with accurate projections. Similarly, the appellant discussed the Bella Vista project with the respondent, received a written description of the project 10 days prior to his final decision to invest, and had an opportunity to discuss the project with the developers on the day he signed the cheque. With respect to Oliver Place and Enterprise Way, McEachern C.J.B.C. pointed to the disclaimers in the letter sent to all potential investors describing the project, and the "ample time" the appellant had to consider whether to invest or not. In short, McEachern C.J.B.C. found, at p. 277, that the appellant was "fully acquainted with questions of risk and he was in many respects a free agent".

23 McEachern C.J.B.C. then turned to consider the trial judge's assessment of damages for breach of contract. He held that damages in contract are limited to the damages actually resulting from the breach which would be within the reasonable contemplation of the parties at the time of contracting. Most importantly, he ruled that the losses suffered by the appellant were caused by the unforeseeable collapse of the real estate market, which was a risk the appellant must be taken to have assumed,

rather than any failure of the respondent to disclose. The consequential losses relating to accounting and legal fees, as well the reassessments by Revenue Canada, were similarly attributed to the recession rather than to the respondent's non-disclosure.

24 McEachern C.J.B.C. substituted the trial judge's award of damages with an amount equal to a prorated share of the amounts paid by the developers to the respondent. He stated, at p.280:

> ... the law so dislikes a failure of disclosure of material facts that it assumes the value of the investment was less than the amount paid, at least to the extent of the amounts paid by the developer to the defendant [respondent]. This is because it is reasonable to assume that the cost price to the investor would be reduced by the amount of these payments.

As to costs, McEachern C.J.B.C. ordered that there be no costs to either party either in the Court of Appeal or the trial court.

Analysis

Recovery for Breach of Fiduciary Obligation

The Legal Concept

25 Before turning to the particular facts of this case, it is useful to review the principles underlying the notion of fiduciary duties, for, in my view, liability in this case inexorably flows from these principles. In the famous case of *Lloyds Bank Ltd. v. Bundy*, [1975] Q.B. 326, Sir Eric Sachs of the English Court of Appeal stated the fiduciary principle as follows, at p. 341:

> Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person upon whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded. In addition, there must, of course, be shown to exist a vital element which in this judgment will for convenience be referred to as confidentiality. It is this element which is so impossible to define and which is a matter for the judgment of the court on the facts of any particular case.

From a conceptual standpoint, the fiduciary duty may properly be understood as but one of a species of a more generalized duty by which the law seeks to protect vulnerable people in transactions with others. I wish to emphasize from the outset, then, that the concept of vulnerability is not the hallmark of fiduciary relationship though it is an important indicia of its existence. Vulnerability is common to many relationships in which the law will intervene to protect one of the parties. It is, in fact, the "golden thread" that unites such related causes of action as breach of fiduciary duty, undue influence, unconscionability and negligent misrepresentation.

26 At the same time, however, it is only by having regard to the often subtle differences between these causes of action that civil liability will be commensurate with civil responsibility. For instance, the fiduciary duty is different in important respects from the ordinary duty of care. In *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 571-73 [[1992] 1 W.W.R. 245, 61 B.C.L.R. (2d) 1], I traced the history of the common law claim of negligent misrepresentation from its origin in the equitable doctrine of fiduciary responsibility; see also *Nocton v. Lord Ashburton*, [1914] A.C. 932 at 968-71, per Lord Shaw of Dunfermline. However, while both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty.

27 The concepts of unequal bargaining power and undue influence are also often linked to discussions of the fiduciary principle. Claims based on these causes of action, it is true, will often arise in the context of a professional relationship side by side with claims related to duty of care and fiduciary duty; see Horace Krever and Marion Randall Lewis, "Fiduciary Obligations and the Professions" in (1991), *Special Lectures of the Law Society of Upper Canada, 1990, Fiduciary Duties*, at pp. 291-93. Indeed, all three equitable doctrines are designed to protect vulnerable parties in transactions with others. However, whereas undue influence focuses on the sufficiency of consent and unconscionability looks at the reasonableness of a given transaction, the fiduciary principle monitors the abuse of a loyalty reposed; see G.H.L. Fridman, *The Law of Contract in Canada* (2nd ed.,

1986), at pp. 301-11. Thus, while the existence of a fiduciary relationship will often give rise to an opportunity for the fiduciary to gain an advantage through undue influence, it is possible for a fiduciary to gain an advantage for himself or herself without having to resort to coercion; see *Hospital Products*, *supra*; *Canadian Aero Service Ltd. v. O'Malley* (1973), [1974] S.C.R. 592. Similarly, while the doctrine of unconscionability is triggered by abuse of a pre-existing inequality in bargaining power between the parties, such an inequality is no more a necessary element in a fiduciary relationship than factors such as trust and loyalty are necessary conditions for a claim of unconscionability; see *Waters v. Donnelly* (1884), 9 O.R. 391 at 401 (C.A.); *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 249 [[1992] 4 W.W.R. 577, 68 B.C.L.R. (2d) 29]. Professor Weinrib, for instance, criticizes the use of unequal bargaining power as a proxy for finding a fiduciary duty (Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 6.):

> It cannot be the *sine qua non* of a fiduciary obligation that the parties have disparate bargaining strength ... In contrast to notions of conscionability, the fiduciary relation looks to the relative position of the parties that results from the agreement rather than the relative position that precedes the agreement.

See also P.D. Finn, "The Fiduciary Principle" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989), at p. 45; Peter D. Maddaugh, "Definition of Fiduciary Duty" in *Special Lectures of the Law Society of Upper Canada, 1990, Fiduciary Duties*, at p. 20.

28 Finally, I note that the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations; see *Johnson v. Birkett* (1910), 21 O.L.R. 319 (H.C.); *McLeod v. Sweezey*, [1944] S.C.R. 111; P.D. Finn, "Contract and the Fiduciary Principle" (1989), 12 U.N.S.W.L.J. 76. In other contractual relationships, however, the facts surrounding the relationship will give rise to a fiduciary inference where the legal incidents surrounding the relationship might not lead to such a conclusion; see *Standard Investments Ltd. v. Canadian Imperial Bank of Commerce* (1985), 22 D.L.R. (4th) 410 (Ont. C.A.), leave to appeal refused [1986] 1 S.C.R. vi. However, as Professor Finn puts it, the "end point" in each situation is to ascertain whether "the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests"; see at p. 88.

29 Having distinguished the fiduciary principle from other related equitable and common law doctrines, it is now possible to examine the nature of the fiduciary duty itself with a surer hand. While the legal concept of a fiduciary duty reaches back to the famous English case of *Keech v. Sandford* (1726), Sel. Cas. T. King 61, 25 E.R. 223, until recently the fiduciary duty could be described as a legal obligation in search of a principle. Indeed, commentators busied themselves in an effort to sort out this area of the law; see Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1; P.D. Finn, *Fiduciary Obligations* (1977); J.C. Shepherd, *Fiduciary Law* (1981); Tamar Frankel, "Fiduciary Law" (1983), 71 Cal. L.R. 795; P.D. Finn, "The Fiduciary Principle" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989). As I stated in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at 62, over the past ten years or so this Court has had occasion to consider and enforce fiduciary obligations in a wide variety of contexts, and this has led to the development of a "fiduciary principle" which can be defined and applied with some measure of precision. One may begin with the following words of Dickson J. (as he then was) in *Guerin v. R.*, [1984] 2 S.C.R. 335 at 384 [[1984] 6 W.W.R. 481]:

> ... where by statute, agreement, or perhaps by unilateral undertaking, *one party has an obligation to act for the benefit of another*, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary ...
>
> It is sometimes said that the nature of the fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. *It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty.* The categories of fiduciary, like those of negligence, should not be considered closed. [Emphasis added.]

30 This conceptual approach to fiduciary duties was given analytical structure in the dissenting reasons of Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136, who there proposed a three-step analysis to guide the courts in identifying new fiduciary

relationships. She stated that relationships in which a fiduciary obligation has been imposed are marked by the following three characteristics: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to affect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power. Although the majority held on the facts that there was no fiduciary obligation, Wilson J.'s mode of analysis has been followed as a "rough and ready guide" in identifying new categories of fiduciary relationships; see *LAC Minerals*, *supra*, per Sopinka J., at p. 599, and per La Forest J., at p.646; *Canson*, *supra*, at p. 543; *M.(K.) v. M.(H.)*, *supra*, at pp. 63-64. Wilson J.'s guidelines constitute indicia that help recognize a fiduciary relationship rather than ingredients that define it.

31 In *LAC Minerals* I elaborated further on the approach proposed by Wilson J. in *Frame v. Smith*. I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an *inherent* vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. Two obvious examples of this type of fiduciary relationship are trustee-beneficiary and agent-principal. In seeking to determine whether new classes of relationships are per se fiduciary, Wilson J.'s three-step analysis is a useful guide.

32 As I noted in *LAC Minerals*, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see *supra*, at p. 648. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

33 Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. This idea was well-stated in the American case of *Dolton v. Capitol Federal Savings & Loan Assn.*, 642 P. 2d 21(Colo. Ct. App., 1982), at pp. 23-24, in the banker-customer context, to be a state of affairs:

> ...which impels or induces one party "to relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger." ... [and] ... has been found to exist where there is a repose of trust by the customer along with an acceptance or invitation of such trust on the part of the lending institution.

In relation to the advisory context, then, there must be something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary. For example, most everyday transactions between a bank customer and banker are conducted on a creditor-debtor basis; see *Canadian Pioneer Management Ltd. v. Saskatchewan (Labour Relations Board)*, [1980] 1 S.C.R. 433 [[1980] 3 W.W.R. 214]; *Thermo King Corp. v. Provincial Bank of Canada* (1981), 34 O.R. (2d) 369, leave to appeal refused [1982] 1 S.C.R. xi. Similarly, the relationship of an investor to his or her discount broker will not likely give rise to a fiduciary duty, where the broker is simply a conduit of information and an order taker. There are, however, other advisory relationships where, because of the presence of elements such as trust, confidentiality, and the complexity and importance of the subject matter, it may be reasonable for the advisee to expect that the advisor is in fact exercising his or her special skills in that other party's best interests, unless the contrary is disclosed. Professor Finn describes these kinds of relationships in the following terms in "The Fiduciary Principle", at pp. 50-51:

> ... fiduciary responsibilities will be exacted where the function the adviser represents himself as performing, and for which he is consulted, is that of counselling an advised party as to how his interests will or might best be served in a matter considered to be of importance to his personal or financial well-being, and in which the adviser would be expected both to be disinterested, save for his remuneration, and to be free of adverse responsibilities unless the contrary is disclosed at the outset. *It does seem to be the case, here, that our ready acceptance of a fiduciary expectation is coloured both by our assumption that credence is likely to be given to any advice given and by our perception of the social importance of the advisory function itself.* [Emphasis added.]

J.C. Shepherd has endorsed a similar theory of fiduciary law, which he terms the "transfer of encumbered power theory"; see Shepherd, at pp. 96-110; see also D. Waters, *Law of Trusts in Canada* (2nd ed., 1984), at pp. 712-14.

34 More generally, relationships characterized by a unilateral discretion, such as the trustee-beneficiary relationship, are properly understood as simply a species of a broader family of relationships that may be termed "power-dependency" relationships. I employed this notion, developed in an article by Professor Coleman, to capture the dynamic of abuse in *Norberg v. Wynrib*, *supra*, at p. 255. *Norberg* concerned an aging physician who extorted sexual favours from a young female patient in exchange for feeding an addiction she had previously developed to the pain-killer Fiorinal. The difficulty in *Norberg* was that the sexual contact between the doctor and patient had the appearance of consent. However, when the pernicious effects of the situational power imbalance were considered, it was clear that true consent was absent. While the concept of a "power-dependency" relationship was there applied to an instance of sexual assault, in my view, the concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party. Because of the particular context in which the relationship between the plaintiff and the doctor arose in that case, I found it preferable to deal with the case without regard to whether or not a fiduciary relationship arose. However, my colleague Justice McLachlin did dispose of the claim on the basis of the fiduciary duty, and whatever may be said of the peculiar situation in *Norberg*, I have no doubt that had the situation there arisen in the ordinary doctor-patient relationship, it would have given rise to fiduciary obligations; see, for example, *McInerney v. MacDonald*, [1992] 2 S.C.R. 138.

35 As is evident from the different approaches taken in *Norberg*, the law's response to the plight of vulnerable people in power-dependency relationships gives rise to a variety of often overlapping duties. Concepts such as the fiduciary duty, undue influence, unconscionability, unjust enrichment, and even the duty of care are all responsive to abuses of vulnerable people in transactions with others. The existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards. For instance in *Norberg*, *supra*, the Hippocratic Oath was evidence that the sexual relationship diverged significantly from the standards reasonably expected from physicians by the community. This inference was confirmed by expert evidence to the effect that any reasonable practitioner in the defendant's position would have taken steps to help the addicted patient, in stark contrast to the deplorable exploitation which in fact took place; see also *Harry v. Kreutziger* (1978), 95 D.L.R. (3d) 231 [9 B.C.L.R. 166] (B.C.C.A.), at p. 241 per Lambert J.A.

36 In seeking to identify the various civil duties that flow from a particular power-dependency relationship, it is simply wrong to focus only on the degree to which a power or discretion to harm another is somehow "unilateral". In my view, this concept has neither descriptive nor analytical relevance to many fact-based fiduciary relationships. Ipso facto, persons in a "power-dependency relationship" are vulnerable to harm. Further, the relative "degree of vulnerability", if it can be put that way, does not depend on some hypothetical ability to protect one's self from harm, but rather on the nature of the parties' reasonable expectations. Obviously, a party who expects the other party to a relationship to act in the former's best interests is more vulnerable to an abuse of power than a party who should be expected to know that he or she should take protective measures. J.C. Shepherd puts the matter in the following way, at p. 102:

> Where a weaker or reliant party trusts the stronger party not to use his power and influence against the weaker party, and the stronger party, if acting *reasonably*, would have known or ought to have known of this reliance, we can say that the stronger party had notice of the encumbrance, and therefore in using the power has accepted the duty. [Emphasis in original.]

Thus in *LAC Minerals*, *supra*, I felt it perverse to fault Corona for failing to negotiate a confidentiality agreement with LAC in a situation where the well-established practice in the mining industry was such that Corona would have had no reasonable expectation that LAC would use the information to its detriment. To imply that one is not vulnerable to an abuse of power because one could have protected, but did not protect one's self is to focus on one narrow class of "power-dependency relationship" at the expense of the general principle that transcends it. I recognize, of course, that the majority holding in that case was that "the evidence does not establish in this case the existence of a fiduciary relationship" (per Lamer C.J.C., at p.

630). But as I will indicate presently, there is a basic difference between the type of situation that arises here and that which arose in *LAC Minerals*.

37 In summary, the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship. To repeat a phrase used by Lord Scarman, "There is no substitute in this branch of the law for a 'meticulous examination of the facts'"; see *National Westminster Bank plc v. Morgan*, [1985] 1 All E.R. 821 (H.L.), at p. 831.

The Authorities

38 The Court of Appeal relied heavily on this Court's reasons in *LAC Minerals*, and, more particularly, on the reasons of Justice Sopinka. In my view the Court of Appeal erred in importing the analysis in the *LAC Minerals* case to professional advisory relationships. Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest; see *Jirna Ltd. v. Mister Donut of Canada Ltd.* (1971), 22 D.L.R. (3d) 639 (Ont. C.A.), affirmed (1973), [1975] 1 S.C.R. 2; *Midcon Oil & Gas Co. v. New British Dominion Oil Co.*, [1958] S.C.R. 314 . The requirement of vulnerability was addressed in *LAC Minerals* in a context where the parties were engaged in negotiations with a view to entering into a joint mining venture. While I viewed the facts differently, I quite understand the reluctance on the part of some of my colleagues to extend the fiduciary principle to what they perceived to be an arm's length commercial relationship. Similarly, the *Hospital Products* case, *supra*, which was central to Sopinka J.'s analysis of vulnerability in *LAC Minerals*, was a case about two commercial actors dealing at arm's length, there in the context of an exclusive distributorship agreement. No doubt it will be a rare occasion where parties, in all other respects independent, are justified in surrendering their self-interest such as to invoke the fiduciary principle. Put another way, the law does not object to one party's taking advantage of another per se, so long as the particular form of advantage taking is not otherwise objectionable. In *LAC Minerals*, for instance, the majority viewed the particular form of advantage-taking as not unfair. This was primarily owing to their view that International Corona could have protected, but did not protect itself from harm by contract. On the other hand, it was my view that the particular form of advantage-taking was in fact objectionable, given the expectations of the parties generated, inter alia, by industry practice concerning the treatment of confidential information between parties negotiating towards a joint venture; see R.E. Hawkins, "LAC and the Emerging Obligation to Bargain in Good Faith" (1990), 15 Queen's L.J. 65.

39 The situation here is quite different from that which arose in *LAC Minerals*. In the professional advisor context, the situation here, it would be surprising indeed to expect an advisee to protect himself or herself from the abuse of power by his or her independent professional advisor when the very basis of the advisory contract is that the advisor will use his or her special skills on behalf of the advisee. The difficulty with this proposition was forcefully expressed by Macfarlane J.A. in *Burns v. Kelly Peters*, *supra*, at p. 44:

> ... I do not think that an investor must inquire whether his trusted and paid adviser is joined with the developer in making secret profits at his expense, and in concealing facts material to his financial well-being.

Similarly, in *Nocton v. Lord Ashburton*, *supra*, another case of non-disclosure, the House of Lords summarily dismissed the defendant's submission that the client had the means to correct the false impression made on him by his solicitor's misleading statement.

40 In sharp contrast to arm's length commercial relationships, which are characterized by self-interest, the essence of professional advisory relationships is precisely trust, confidence, and independence. Thus, the concern expressed by Wilson J. in *Frame*, *supra*, and echoed by Sopinka J. in *LAC Minerals*, *supra*, about the dangers of extending the fiduciary principle in the context of an arm's length commercial relationship is simply not transferable to professional advisory relationships.

41 I note in passing that the dissenting reasons of Lambert J.A. in *Kelly Peters*, *supra*, upon which the Court of Appeal relied in the present case, turned, at least in part, on the absence of fees between the parties. The plaintiffs in *Kelly Peters* were clients of Kelly Peters & Associates Ltd. ("K.P.A.") (the defendant), a financial planning and counselling concern. K.P.A.

had been retained by the various plaintiffs to set up a "base plan" on their behalf. This included such services as drawing up a will, making arrangements for life insurance, RRSPs, and so on. K.P.A. also offered an "investment plan" whereby clients received counselling regarding the purchase of real estate for investment and tax purposes. As it turned out, the defendants advised the plaintiffs on the purchase of certain Hawaiian MURBs without disclosing that they (the defendants) were receiving a substantial commission on each sale. At the time the plaintiffs were being advised to purchase the Hawaiian MURBs the advisor was not asking for any fee for the advice or making any arrangements to secure payment of a fee. This fact led Lambert J.A. to infer that the plaintiffs must have known that the advice was not independent, but rather that it was tainted by self-interest. He stated, at p. 29:

> ... The plaintiffs must have known that commissions were being paid to someone, and they must have known that K.P.A. Ltd., William Kelly, John Peters, Maureen Kelly, and the associates obtained commission income from transactions. There is no evidence that if the plaintiffs had asked about commissions they would not have been told the precise situation.

I would add, however, that while Lambert J.A. was willing to infer from the absence of fees an understanding on the part of the plaintiffs that the advice of K.P.A. was tainted, the majority was unwilling to draw such an inference. Having said this, I note that the facts in the present case are much stronger than those in *Kelly Peters* with respect to this crucial point. The appellant adduced uncontradicted evidence to the effect that the respondent went out of his way to represent himself as independent, and this factor was of critical importance to the appellant. In fact, the respondent made a conscious decision not to disclose his fee arrangement with the developers to his investor clients for fear it would interfere with his lucrative practice. At a meeting of July 21, 1980 attended by the respondent, the Olma brothers, and the Olmas' attorney, it was explained that any fees and monies paid to the respondent must be disclosed to the investors, otherwise such fees could be construed as a secret commission or bribe under the *Criminal Code*. The discussion then turned to other ways in which the respondent could earn income from the Olmas without having to make disclosure to the investors. By that point the respondent had already billed the Olma brothers in the amount of $24,500.

42 The finding of a fiduciary relationship in the independent professional advisory context simply does not represent any addition to the law. Courts exercising equitable jurisdiction have repeatedly affirmed that clients in a professional advisory relationship have a right to expect that their professional advisors will act in their best interests, to the exclusion of all other interests, unless the contrary is disclosed. J.C. Shepherd states the following in his treatise, *The Law of Fiduciary Duties* (1981), at p. 28:

> It appears to be settled that any person can, by offering to give advice in a particular manner to another, create in himself fiduciary obligations stemming from the confidential nature of the relationship created, which obligations limit the adviser's dealings with the advisee.

Indeed, nobody would argue against the enforcement of fiduciary duties in policing the advisory aspect of solicitor-client relationships; see *Nocton v. Lord Ashburton*, *supra*; *Jacks v. Davis*, *supra*. Similar rules apply in the fields of real estate and insurance counselling; see *Henderson v. Thompson* (1909), 41 S.C.R. 445 (real estate agents); *Fine's Flowers Ltd. v. General Accident Assurance Co.* (1977), 17 O.R. (2d) 529 (C.A.); *Fletcher v. Manitoba Public Insurance Corp.*, [1990] 3 S.C.R. 191 (insurance agents); J.G. Edmond, "Fiduciary Duties Owed by Insurance, Real Estate and Other Agents" in *The 1993 Isaac Pitblado Lectures: Fiduciary Duties/Conflicts of Interest*, at pp. 75-86.

43 More importantly for present purposes, courts have consistently shown a willingness to enforce a fiduciary duty in the investment advice aspect of many kinds of financial service relationships; see *Baskerville v. Thurgood* (1992), 100 Sask. R. 214 [[1992] 5 W.W.R. 193] (C.A.); *Kelly Peters*, *supra*; *Elderkin v. Merrill Lynch, Royal Securities Ltd.* (1977), 80 D.L.R. (3d) 313 (N.S.C.A.) (investment counsellor-client); *Glennie v. McDougall & Cowans Holdings Ltd.*, [1935] S.C.R. 257; *Burke v. Cory* (1959), 19 D.L.R. (2d) 252 (Ont. C.A.); *Maghun v. Richardson Securities of Canada Ltd.* (1986), 34 D.L.R. (4th) 524 (Ont. C.A.) (stockbroker-client); *Lloyds Bank*, *supra*; *Standard Investments Ltd. v. Canadian Im perial Bank of Commerce* (1985), 52 O.R. (2d) 473, leave to appeal refused [1986] 1 S.C.R. vi (banker-client); *Wakeford v. Yada Tompkins Huntingford & Humphries* (unreported, B.C.S.C., August 1, 1985), (Vancouver Reg. No. C826216 [[1985] B.C.W.L.D. 3000]), affirmed (1986), 4 B.C.L.R. (2d) 306 (C.A.) (accountant-client); see, generally, Mark Ellis, "Financial Advisors" (cc. 7 and 8) in

Fiduciary Duties in Canada (looseleaf). In all of these cases, as here, the ultimate discretion or power in the disposition of funds remained with the beneficiary. In addition, where reliance on the investment advice is found, a fiduciary duty has been affirmed without regard to the level of sophistication of the client, or the client's ultimate discretion to accept or reject the professional's advice; see *Elderkin, supra*; *Laskin v. Bache & Co.* (1971), [1972] 1 O.R. 465 (C.A.); *Wakeford, supra*, at p. 8. Rather, the common thread that unites this body of law is the measure of the confidential and trust-like nature of the particular advisory relationship, and the ability of the plaintiff to establish reliance in fact.

44 Much of this case law was recently canvassed by Keenan J. in *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204 (Gen. Div.), in an effort to demarcate the boundaries of the fiduciary principle in the broker-client relationship. Keenan J. stated, at pp. 234-36:

> The relationship of broker and client is not *per se* a fiduciary relationship ... Where the elements of trust and confidence and reliance on skill and knowledge and advice are present, the relationship is fiduciary and the obligations that attach are fiduciary. On the other hand, if those elements are not present, the fiduciary relationship does not exist ... The circumstances can cover the whole spectrum from total reliance to total independence. An example of total reliance is found in the case of *Ryder v. Osler; Wills, Bickle Ltd.* (1985), 49 O.R. (2d) 609, 16 D.L.R. (4th) 80 (H.C.J.). A $400,000 trust for the benefit of an elderly widow was deposited with the broker. An investment plan was prepared and approved and authority given to operate a discretionary account ... At the other end of the spectrum is the unreported case of *Merit Investment Corp. v. Mogil*, Ont. H.C.J., Anderson J., March 23, 1989 [summarized at 14 A.C.W.S. (3d) 378], in which the client used the brokerage firm for processing orders. He referred to the account executive as an "order-taker", whose advice was not sought and whose warnings were ignored ...
>
> The relationship of the broker and client is elevated to a fiduciary level when the client reposes trust and confidence in the broker and relies on the broker's advice in making business decisions. When the broker seeks or accepts the client's trust and confidence and undertakes to advise, the broker must do so fully, honestly and in good faith ... It is the trust and reliance placed by the client which gives to the broker the power and in some cases, discretion, to make a business decision for the client. Because the client has reposed that trust and confidence and has given over that power to the broker, the law imposes a duty on the broker to honour that trust and respond accordingly.

In my view, this passage represents an accurate statement of fiduciary law in the context of independent professional advisory relationships, whether the advisors be accountants, stockbrokers, bankers or investment counsellors. Moreover, it states a principled and workable doctrinal approach. Thus, where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the parties' relationship was such as to give rise to a fiduciary duty on the part of the advisor.

Policy Considerations

45 Apart from the idea that a person has breached a trust, there is a wider reason to support fiduciary relationships in the case of financial advisors. These are occupations where advisors to whom a person gives trust has power over a vast sum of money, yet the nature of their position is such that specific regulation might frustrate the very function they have to perform. By enforcing a duty of honesty and good faith, the courts are able to regulate an activity that is of great value to commerce and society generally.

46 This feature of fiduciary law has been remarked upon by several prominent academics in the area; see Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 15; Shepherd, at pp. 78-83; Tamar Frankel, "Fiduciary Law" (1983), 71 Cal. L.R. 795, at pp. 802-804; Tamar Frankel, "Fiduciary Law: The Judicial Process and the Duty of Care" in *The 1993 Isaac Pitblado Lectures*, 143-62, at p. 145; P.D. Finn, "The Fiduciary Principle", at pp. 27, 50-51; P.D. Finn, "Contract and the Fiduciary Principle", at p. 82; P.D. Finn, "Conflicts of Interest and Professionals", paper presented at Professional Responsibility Seminar, University of Auckland, May 29, 1987, 9-49, at pp. 14-15. For example, Professor Frankel states, at pp. 144-45:

> Fiduciary law regulates the providers of very special services. These services can be divided into two groups. The first group consists of services that require entrustment of property or power to the fiduciary. Without such entrustment the

> services cannot be rendered at all, or they can be rendered with less than maximum efficiency. The second group consists of services requiring skills that are very costly to master; for example, lawyering, and some kinds of investment management.
>
> Because the relationship poses for one party ("the entrustor") substantial risks of misappropriation and monitoring costs and because public policy strongly supports both groups of services, fiduciary law interferes to reduce these risks and costs. The law aims at deterring fiduciaries from misappropriating the powers vested in them solely for the purpose of enabling them to perform their functions ...

Professor Finn puts the matter this way in "Conflicts of Interest", at p. 15:

> In some spheres conduct regulation would appear to be becoming an end in itself and this because there can be a public interest in reassuring the community — not merely beneficiaries — that even the appearance of improper behaviour will not be tolerated. The emphasis here seems, in part at least, to be the maintenance of the public's acceptance of, and the credibility of, important institutions in society which render "fiduciary" services.

Finally, Professor Weinrib speaks in terms of "maintaining the integrity of the marketplace", at p. 15.

47 The social importance of the fiduciary principle is embedded in the very genesis of the legal concept, as it was developed in *Keech v. Sandford*, *supra*. In *Keech* the defendant trustee held a lease of a market in trust for an infant beneficiary. Prior to the expiration of the lease the lessor stated he would not renew the lease to the infant, upon which the trustee took the lease for himself. The court, however, ordered the renewed lease to be held on a constructive trust for the infant beneficiary, and held the defendant to account for the profits. The Lord Chancellor stated the following at p. 223 (E.R.) and at p. 62 (Sel. Cas. T. King):

> ... I very well see, if a trustee, on a refusal to renew, might have a lease to himself, few trust-estates would be renewed to *cestui que* use ... This may seem hard, that the trustee is the only person of all mankind who might not have the lease: *but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to cestui que use.* [Emphasis added.]

48 The desire to protect and reinforce the integrity of social institutions and enterprises is prevalent throughout fiduciary law. The reason for this desire is that the law has recognized the importance of instilling in our social institutions and enterprises some recognition that not all relationships are characterized by a dynamic of mutual autonomy, and that the marketplace cannot always set the rules. By instilling this kind of flexibility into our regulation of social institutions and enterprises, the law therefore helps to strengthen them.

49 I earlier referred to the coincidence of business and accepted morality in *LAC Minerals*, *supra*, at p. 668. The concern there was with reinforcing the established norms by which the development of the natural resources of this country could be most efficiently accomplished. Of greater relevance to the case at bar, I note my colleague Justice Cory's description of the investment advisor-client relationship in *R. v. Kelly*, [1992] 2 S.C.R. 170 [[1992] 4 W.W.R. 640], the criminal counterpart to *Kelly Peters*, *supra*. There, the accused was convicted of corruptly accepting a reward or benefit contrary to s. 426(1)(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46. Cory J., writing for the majority of this Court, stated, at p. 183:

> With increasing frequency financial advisors are acting as agents for their clients. Very often business and professional people earning a good income are too busy earning that income to properly arrange their financial affairs. They turn to financial advisors for assistance. The principal/agent relationship is almost invariably based upon the disclosure by the principal to the agent of confidential information. The relationship is founded upon the trust and confidence that the principal can repose in the advice given and the services performed by the agent.

Cory J. had little difficulty concluding that the relationship between the parties was one of principal-agent which was of course fiduciary in nature. He stated, at p. 186: "There can be no doubt in this case that an agency relationship existed between Kelly and his clients and that Kelly was aware of the existence of that relationship."

50 Further, in many advisory relationships norms of loyalty and good faith are often indicated by the various codes of professional responsibility and behaviour set out by the relevant self-regulatory body. The raison d'être of such codes is the protection of parties in situations where they cannot, despite their best efforts, protect themselves, because of the nature of the relationship. These codes exist to impose regulation on an activity that cannot be left entirely open to free market forces. I have already referred to the function of the professional standards expected of doctors in *Norberg*, *supra*. The professional rules of conduct governing lawyers was considered in *Granville Savings & Mortgage Corp. v. Slevin* (1990), 68 Man. R. (2d) 241, reversed [1992] 5 W.W.R. 1, trial judgment restored [1993] 4 S.C.R. 279 [[1994] 1 W.W.R. 257]. There, the defendant law firm undertook to prepare certain mortgage documents in connection with a mortgage transaction between their client (the mortgagor) and the plaintiff mortgagee. As it turned out, the lawyers negligently represented to the plaintiffs that their mortgage constituted a first charge on the property. The plaintiffs sued in tort, contract, and fiduciary duty. The trial judge allowed the claim on all three heads of liability. This was reversed by the Court of Appeal, but on a further appeal to this Court, the trial judge's judgment was restored. The finding of a fiduciary duty was consistent with Commentary 8, c. 19 of the Canadian Bar Association's *Code of Professional Conduct*, which instructs lawyers to urge un represented parties to seek representation, and, failing that, to ensure that the party "is not proceeding under the impression that the lawyer is protecting such person's interests". The code goes on to warn lawyers that they may have an obligation to a person whom the lawyer does not represent.

51 In the present case, the trial judge found as a fact that the standards set by the accounting profession at the relevant time compelled full disclosure by the respondent of his interest with the developers. Reference was made during the course of the trial to the *Rules of Professional Conduct* of the Institute of Chartered Accountants of British Columbia. Rules 204 and 208.1, both in effect in 1980, stated:

> 204 A member who is engaged to express an opinion of financial statements shall hold himself free of any influence, interest or relationship, in respect of his client's affairs, which impairs his professional judgment or objectivity or which, in the view of a reasonable observer, has that effect.
>
> 208.1 A member or student shall not, in connection with any transaction involving a client, hold, receive, bargain for, become entitled to or acquire any fee, remuneration or benefit without the client's knowledge and consent.

Reference was also made to a document entitled the "Duncan Manson Memorandum", a memorandum prepared by the Public Practice Committee and the Council of the Institute of Chartered Accountants of British Columbia to address concerns raised by accountants engaged in giving investment advice regarding real estate and other tax shelters. These concerns, according to the witness Chambers, stemmed from a view that "the Chartered Accountant's traditional role of providing independent objective advice with integrity and due care was in some cases being eroded". Finally, both experts agreed that while there was no prohibition against the respondent's representing both a developer and an investor in relation to a real estate tax-shelter investment, the respondent should have disclosed the true state of affairs to *both* sides.

52 In sum, the rules set by the relevant professional body are of guiding importance in determining the nature of the duties flowing from a particular professional relationship; see *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 [[1991] 1 W.W.R. 705]. With respect to the accounting profession, the relevant rules and standards evinced a clear instruction that all real and apparent conflicts of interest be fully disclosed to clients, particularly in the area of tax-related investment advice. The basis of this requirement is the maintenance of the independence and honesty which is the linchpin of the profession's credibility with the public. It would be surprising indeed if the courts held the professional advisor to a lower standard of responsibility than that deemed necessary by the self-regulating body of the profession itself.

Application to the Case at Bar

53 Turning to the case at bar, it is important to note at the outset that the trial judge made detailed findings of fact which were, to a large extent, based on her assessment of credibility. It is axiomatic that a reviewing court must exercise considerable deference with respect to a trial judge's findings of fact, all the more so when those findings are based on credibility; see *Fletcher v. Manitoba Public Insurance Corp.*, *supra*, at pp. 204-205; *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 S.C.R. 705 at

794, 799; *Lensen v. Lensen*, [1987] 2 S.C.R. 672 at 683 [[1988] 1 W.W.R. 481]; *White v. R.*, [1947] S.C.R. 268 at 272. In my view, the reasons supporting this principle apply with particular force to situations where a trial judge is asked to characterize a relationship for the purposes of determining the nature and extent of civil liability. This point was recently made in *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (C.A.), where the court stated, at pp. 318-19:

> We have set out a passage from the reasons in *Burns v. Kelly Peters & Assoc. Ltd.* which points out the similarities between the circumstances which give rise to a duty of care in negligence and the circumstances which give rise to fiduciary duty. Each duty grows out of the factual circumstances of the particular relationship. In many cases, of which *Jaegli Ent. Ltd. v. Taylor*, [1981] 2 S.C.R. 2, 124 D.L.R. (3d) 415, (sub nom. *Taylor v. Ankenman)* 40 N.R. 4 [B.C.], is only one example, the Supreme Court of Canada has said that when a trial judge has reached the conclusion, on all the evidence, either that there was, or there was not a duty of care, and that there was or there was not a breach of that duty of care, a Court of Appeal should not substitute its own view for the view of the trial judge unless it is satisfied that the trial judge made a material and identifiable error of law or a clear and identifiable error of fact in his appreciation of the evidence. *In our opinion, the same principles apply in the case of a trial judge's finding that there was or there was not a fiduciary duty, and that there was or there was not a breach of that fiduciary duty.* [Emphasis added.]

I agree. Moreover, I stress that the principle of non-intervention stated in this line of cases is not merely cautionary; it is a rule of law. Failing a manifest error, an appellate court simply has no jurisdiction to interfere with the findings and conclusions of fact of a trial judge; see *Lapointe c. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351 at 358-59. While the Court of Appeal stated that it accepted the trial judge's findings, in my view it in fact reversed these on the question of reliance. As such, it committed a reversible error.

54 The Court of Appeal was of the opinion that the parties' relationship lacked the level of vulnerability required by this Court in *LAC Minerals*. The court stated, at p. 270, that *LAC Minerals* represented a "substantial development in the law on the scope of fiduciary duty and it is unfortunate that the learned trial judge did not have the benefit of that judgment". Later, the court continued, at p. 274, "Until *LAC Minerals* the line between reliance and vulnerability to the extent required for the creation of a fiduciary duty seems to have been blurred and any degree of dependency was often sufficient to establish a fiduciary obligation".

55 Two points must be made about this statement. First, as discussed earlier, the Court of Appeal failed to recognize a basic difference between the factual context of *LAC Minerals* and that of this case. I see nothing in *LAC Minerals* that purports to create a new, higher legal standard for the finding of a fiduciary duty. Rather, in *LAC Minerals* this Court grappled with a difficult fact situation and the result was, perhaps not surprisingly, differing views among the various Justices. Second, the trial judge examined the dynamic underlying the parties' relationship, and in doing so, examined the indicia of vulnerability in the way it was set out in *Hospital Products*, *supra*, which is the very test used by Sopinka J. in *LAC Minerals*, at p. 599. Moreover, she quoted the definition of vulnerability set out by Lambert J.A. (dissenting) in *Kelly Peters*, *supra*, which definition the Court of Appeal itself stated, at p. 271, "more closely accord[s] with the judgment [of Sopinka J.] in *LAC Minerals*".

56 In short, I simply cannot agree that the trial judge applied the wrong legal test, or that the test she applied was eclipsed by *LAC Minerals*. On the contrary, her analysis of the facts was on the whole consistent with the relevant authorities, and does not disclose an error of law. The trial judge carefully considered the parties' relationship and found it to have all the characteristics of those relationships the law labels as fiduciary. In the end, she had little difficulty concluding that the appellant relied on the respondent's recommendations in deciding to make the four impugned investments, and that the respondent was aware of this reliance.

57 While the foregoing is sufficient to dispose of the fiduciary issue in favour of the appellant, it is useful to review the trial judge's findings of fact. In so doing, I propose to separate the analysis into two steps. First, I will examine the trial judge's findings with respect to the nature of the parties' relationship, and then I will turn to the question of reliance. In so doing, I recognize that the two are in reality intertwined. Moreover, I caution against the use of this approach in all cases where the issue of a fiduciary duty arises. While the approach is perhaps a useful guide in the professional advisor context, a different fact situation may call for a different approach.

The Nature of the Relationship

58 The trial judge's findings on this point are virtually uncontestable. The respondent under cross-examination admitted that his relationship with the appellant was such that he was under a duty to serve the best interests of the appellant at the expense of his own self-interest. The relevant testimony is as follows:

> Q. But you know that he came to trust you? He trusted you an awful lot, didn't he?
>
> A. Yes he did ...
>
> Q. Now, Mr. Hodgkinson trusted you as his professional advisor, correct?
>
> A. Correct.
>
> Q. He was trusting you to give him independent advice, correct?
>
> A. Correct.
>
> Q. *Advice which was not directed towards protecting your personal interests but was directed exclusively to protecting his interests as your client, correct?*
>
> A. *Correct.*
>
> Q. *And he was trusting you not to protect the interests of someone on the other side of a transaction on which you were advising but to protect exclusively his interests, correct?*
>
> A. *Correct.*
>
> Q. And you assumed that responsibility to provide him with independent advice?
>
> A. Yes, I did.

In my view this testimony, taken by itself, vindicates the appellant's fiduciary expectation. Concepts like "trust", independence from outside interests, disregard for self-interest, are all hallmarks of the fiduciary principle. It lies ill in the mouth of the respondent to argue that the appellant was not vulnerable to a breach of loyalty when he himself concedes that loyalty was the central feature of the parties' business relationship. As it turned out, of course, the respondent used the position of ascendency granted him by the appellant to line his own pockets and the pockets of his developer clients.

59 The frequency with which courts have enforced fiduciary duties in professional advisory relationships is not surprising. The very existence of many professional advisory relationships, particularly in specialized areas such as law, taxation and investments, is premised upon full disclosure by the client of vital personal and financial information that inevitably results in a "power-dependency" dynamic. The case at bar is typical. The respondent testified in cross-examination as follows:

> Q. Now, you told the court in chief that the premise on which you were developing your practice was that you wanted to develop a team relationship with your businessmen and professional clients, a hands on approach, and you wanted to demonstrate to them that you were knowledgable in all of their personal financial matters, am I correct?
>
> A. I think there is [sic] two questions there. Yes, we wanted to create a team approach, a hands on approach. And we wanted to, as best we could, have a fair level of knowledge as to what our clients wanted to do and what their game plan was in the future.
>
> Q. And you had to become familiar with their financial affairs?
>
> A. We would become as familiar with their financial affairs as time would allow and as their privacy would allow.

> Q. That was your object though?
>
> A. Yes, it was, but not always achievable.
>
> Q. And that was the kind of object that you told Hodgkinson you were trying to achieve in your client/accountant relationship with him, correct?
>
> A. Yes.

I would have thought it self-evident that the type of disclosure that routinely occurs in these kinds of relationships results in the advisor's acquiring influence which is equivalent to a discretion or power to affect the client's legal or practical interests. As I stated in *LAC Minerals*, at p. 664, power and discretion in this context mean only the ability to cause harm. Vulnerability is nothing more than the corollary of the ability to cause harm, viz., the *susceptibility* to harm. For this reason, it is undesirable to overemphasize vulnerability in assessing the existence of a fiduciary relationship. In this I am in substantial agreement with the following description of the concept of vulnerability by Lambert J.A. in *Kelly Peters*, *supra*, at p. 25:

> ... the concept of vulnerability as expressed in the *Hosp. Prod.* case is nothing other than a description of the victim's situation when he is in a position where the fiduciary can exert influence over him by abusing his confidence in order to obtain an advantage ...

In the advisory context, the advisor's ability to cause harm and the client's susceptibility to be harmed arise from the simple but unassailable fact that the advice given by an independent advisor is not likely to be viewed with suspicion; rather, it is likely to be followed. Shepherd observes that transfers of power can inform our analysis of the underlying power dependence dynamic. He describes the power dynamic in these types of situations as follows, at p. 100:

> Powers are not only transferred formally. There are many ways of transferring powers either consciously but informally, or totally unconsciously. When an individual relies on another, for example a professional adviser, there is a quite conscious transfer of power, but rarely is there a document in which the beneficiary writes "I hereby grant you the power to influence my decision-making".

A retainer, when combined with the disclosure of confidential information or the vesting of discretion or power, is strong evidence of the existence of an underlying dynamic of power dependency in relation to certain duties. The appellant's testimony confirms the overt, if not explicit, power transfer which in fact occurred. He stated, "I was paying him for his advice. If I didn't want to take it, why would I pay him? I did not disagree with any of his advice." This remark cannot help but strike one as intuitively reasonable, particularly given the appellant's relative inexperience in MURB investing. As I noted earlier, the refusal to protect this reliance on the grounds that the appellant somehow had the means to protect his own interests is to take an impoverished view of the law in this area.

Reliance

60 I have already noted the importance of reliance in relation to fiduciary duties; see *R.H. Deacon & Co. v. Varga* (1973), [1975] 1 S.C.R. 39; *Hospital Products Ltd. v. United States Surgical Corp.*, *supra*, at p. 488 (per Dawson J.). It is important, however, to add further precision about the nature of reliance, particularly as it applies in the advisory context. Reliance in this context does not require a wholesale substitution of decision-making power from the investor to the advisor. This is simply too restrictive. It completely ignores the peculiar potential for overriding influence in the professional advisor and the strong policy reasons, to which I have previously referred, favouring the law's intervention by means of its jurisdiction over fiduciary duties to foster the fair and proper functioning of the investment market, an important social and economic activity that cannot really be regulated in other ways. As I see it, the reality of the situation must be looked at to see if the decision is effec tively that of the advisor, an exercise that involves a close examination of facts. Here, as I see it, the trust and reliance the appellant placed in the respondent (a trust and reliance assiduously fostered by the respondent) was such that the respondent's advice was

in substance an exercise of a power or discretion reposed in him by the appellant. This was the view taken by the trial judge respecting the appellant's investment in the four MURB projects, and her decision is amply supported by the evidence.

61 In this respect, the appellant stated the following during the course of his testimony:

> I was relying on him [the respondent]. It was his recommendation. He was the guy with all the expertise about, number one, analysing real estate ventures, particularly tax shelters, and he was certainly the one that had expertise about the economics of investing — and the economics. He was the one that knew these people that were going to be involved in it, and based on our discussions I took his opinion.

This testimony is corroborated by the appellant's actions concerning another Olma brothers' MURB project which the respondent told the appellant about but which he did not recommend. The appellant did meet with Jerry Olma but, without the respondent's stamp of approval, he decided not to invest. The appellant described this episode in the following terms:

> Q. Given your assessment of Jerry Olma, at any point in 1980 did you ever sit down and have a heart to heart with Dave Simms about really how trustworthy Jerry Olma was?
>
> A. No. I think maybe the only example there in 1980 of my real feelings for Jerry Olma were the fact when I met with him more or less at David's request, or at David's introduction regarding a proposed Ladner shopping centre that he had, I felt uncomfortable enough with the way he approached the deal that without Simms I didn't want any part of it and in fact I chose not to pursue it.

62 Moreover, in finding that the appellant relied on the respondent's recommendations, the trial judge did not simply prefer the appellant's evidence over that of the respondent. On the contrary, she thoroughly examined all the circumstances of the relationship. Consider the following. The appellant approached the respondent as a "neophyte" taxpayer, with no experience in dealing with large real estate tax shelters. The parties developed a relationship that involved frequent telephone and personal contact. The respondent identified the appellant as one of his "special" clients. While the respondent did not hold himself out as an investment counsellor per se, he did not qualify his experience as a tax shelter or investment advisor in any way. He did not refer the appellant to any other professionals for investment advice. In sum, the parties' relationship was such that the trial judge was able to conclude, at p. 168, "*In effect, Mr. Simms assumed the responsibility for Mr. Hodgkinson's choice.* He analyzed the investments, he recommended the investments, and *he effectively chose the investments for Mr. Hodgkinson*" (Emphasis added.).

63 The respondent, for his part, actively cultivated this high degree of reliance. He was fully aware of the appellant's lack of experience with MURBs, and he held himself out as an expert in the assessment of MURB-type investments. The respondent's influence over the appellant was built upon the latter's confidence that the respondent was independent from the developers. During the course of the appellant's examination-in-chief, the following exchange took place:

> Q. Mr. Hodgkinson, would you have followed Mr. Simms' advice had you known that he was acting for and getting paid by the vendors of these projects when he was advising you on the question of whether you should invest or not?
>
> A. No. I would not have ... Had I known and particularly the size of the funds that transferred between Simms and the developers, I wouldn't have gone close to these investments. It would have been an obvious conflict and I wouldn't have been getting the independent professional advice I was looking for.

The trial judge was satisfied, at p. 127, that it was the appellant's intention to, "drop his tax and financial-planning problems into Mr. Simms' lap and to go about his business as a stockbroker". All the while, the respondent was fully aware that the appellant's lack of expertise meant that he wielded considerable influence over the appellant's investment decisions.

64 The case put against the trial judge's findings of fact seems to turn on four points. First, the respondent's letters to his investor clients included various disclaimers to the effect that each individual investor should study the enclosed data to his or her own satisfaction before following the recommendation of Simms & Waldman. Second, with respect to the final two investments a considerable amount of time elapsed between the appellant's being made aware of the opportunity and recommendations and his

decision to invest. Third, the appellant had a chance to meet personally with the developers. Fourth, during the relevant period the appellant made several investments outside of his relationship with the respondent, some of which might be considered "risky". Based on these facts, the Court of Appeal concluded, at p. 277, "The plaintiff [the appellant] was not relying solely upon the defendant for financial advice. He was fully acquainted with questions of risk and he was in many respects a free agent".

65 At the outset, it should be noted that the trial judge did not overlook any of these points in her assessment of the facts; on the contrary, each point was examined and eventually rationalized within the overall factual mix of the case. Turning, then, to the disclaimers. The letter sent out by Mr. Simms to his investor clients regarding Bella Vista stated, in part, "it is your money and you must place your expectations on what you anticipate will happen in the future ..." The disclaimers attaching to the Oliver Place and Enterprise Way projects were even stronger:

> These analyses are based on revenues and expenses estimated by the promoters and not by us. It would be necessary before investing in these projects, to satisfy yourself that these figures are realistic and reflect current conditions in the rental market place ...
>
> We are in no way recommending that you buy one of these investments. We are saying that if you are investing and will be considering a tax shelter this year, that these two projects appear to merit your serious consideration.

The trial judge considered this evidence, but concluded that the appellant did not believe that the disclaimers applied to him based on his "special" relationship with the respondent. She found the letters were reasonably interpreted by Mr. Hodgkinson as endorsements, particularly given the surrounding circumstances of the parties' relationship. It must be kept in mind that throughout the period these investments were made the parties were in frequent contact, by letter, telephone, and in person. The appellant testified:

> At all times he [the respondent] had recommended these investments highly to me and so I didn't think that much of his sentence when he says, "I in no way recommend this investment to you." I felt it was a natural disclaimer that would be there for those that weren't used to dealing with him on the intimate level that I felt I was.

The appellant described the respondent as very enthusiastic about the projects. He even went so far as to fabricate a false sense of scarcity in relation to the Oliver Place project, stating in a September 26, 1980 letter that the high demand for the units required they be allocated on a first-come, first-serve basis. The respondent's enthusiasm was apparently infectious. All but four of the purchasers involved in Oliver Place were Simms & Waldman clients, while the Enterprise Way project, save for two units taken by the developer, was completely sold out to Simms & Waldman investors. In short, I see no reason to disturb the trial judge's dismissal of the effect of the disclaimers. Indeed, in both *Maghun*, *supra* and *Elderkin*, *supra*, the plaintiff investors were well-informed of the potential risks of the market. In *Maghun*, *supra*, at p. 526, the plaintiffs signed a "risk disclosure statement", and in *Elderkin*, *supra*, at p. 325, it was company policy that clients be made aware of "any negative factors involved in a transaction as well as positive ones". In both cases, however, the courts found that the special circumstances of the relationship overrode these disclaimers, and a fiduciary obligation was enforced.

66 With respect to the second point, I do not view the fact that some time elapsed between the recommendations and the investments as particularly relevant. First, this evidence has little or no probative value in relation to Duncana or Bella Vista. The Simms & Waldman letter containing the financial data for these projects was dated April 10. The appellant made downpayments on Duncana and Bella Vista on April 11 and April 20, respectively. Further, the appellant had made a tentative decision to invest in both projects even before he received the letter of April 10, simply on the strength of the respondent's recommendations.

67 The first letter to the investors describing Oliver Place was dated June 16. In it, the respondent stated that Oliver Place offered a significant tax shelter opportunity. A second letter concerning Oliver Place, dated September 26, advised investors that negotiations with the developers had been concluded, and requested investors to order their units by mail consistent with the "first-come, first-serve" system described above. This letter also included a description of Enterprise Way. Oliver Place in fact only closed in November 1980. A few days later the appellant bought five units in Oliver Place. The final pro formas for Enterprise Way were set out in a letter dated November 9, 1980. While it is not clear when the appellant invested in

Enterprise Way, the trial judge put the date as sometime in November. These facts, in my view, militate against any inference of independence based on a time lag. Further, the evidence tends to indicate that the appellant relied on the respondent in timing his investments. He testified:

> We had general discussions on the Oliver Place project. By that time, if I can give you some background, by that time I had developed a great deal of confidence in David [the respondent]. He knew how to put projects, [*sic*] he knew how to present these, he had done a lot of work with these projects. I felt he had worked hard in being able to find good investments ... And so any discussions I had with him up to this point in time were more, rather than being critiques, were more give me [sic] the gist of what's going on and give me the sense of timing.

The trial judge accepted this evidence. She found that by the time of the Oliver Place and Enterprise Way investments, the appellant had reached the point that he no longer asked many questions concerning the investments. In short, I cannot find fault with the trial judge's findings on the basis that the appellant had, as the Court of Appeal put it, at p. 276, "ample time to consider whether he wished to invest".

68 Turning to the third point, it is true that the appellant's meetings with the various developers could conceivably give rise to an inference of independence. When considered in light of all the evidence, however, it is clear that it was the respondent's stamp of approval that was decisive for the appellant. In this context the appellant's decision not to invest in the Ladner Downs project, discussed above, is of particular significance. More generally, the appellant stated: "If I had been approached directly by Jerry Olma, I would have considered him too much the promoter type of individual and I wouldn't have invested in his projects." With respect to the April 11 meeting with the developers concerning Duncana, the appellant testified: "He [the respondent] felt it was important that I know the developers on a firsthand basis." In fact, the appellant had already made up his mind to invest in Duncana based on the respondent's recommendation. As he put it, he approached the meeting with "chequebook in hand". This was in fact the only formal meeting the appellant attended with any of the developers to discuss the MURB projects. While the appellant did happen to meet Mr. Dale-Johnson once as they crossed paths at the Simms & Waldman offices, and he also made one informal stop at Mr. Olma's residence in relation to the Ladner Downs project, these meetings have almost no probative value and I will not comment on them except to acknowledge that they occurred.

69 Finally, with respect to the other outside investments made by Mr. Hodgkinson, some of which were high risk ventures, the trial judge stated, at p. 151: "The fact that Mr. Hodgkinson invested and lost money with other investors does not mean that he did not rely upon Mr. Simms with respect to these particular investments." I agree. A similar point arose in *Elderkin, supra*, in that instances were cited by the defendants where the plaintiffs did not follow the defendants' advice to buy and sell certain shares other than "Multico", the shares which in that case gave rise to the action. The court dismissed the point, stating, at p. 324: "Be that as it may, what we are here concerned with are shares of Multico." In addition, it is not without significance that in each case where the appellant invested independently of the respondent, he was in large part persuaded to invest by the personalities and track records of his co-investors. For instance, his enthusiasm for the "Akroyd II" MURB project was explained by the fact that it was his first opportunity to invest with senior management at Canarim, his new employer. While the appellant may have been a "free agent" to the extent that he wrote the cheques, the circumstances of the outside investments could easily be interpreted to support an inference of the appellant's lack of independence generally in the area of tax-related investments.

Conclusion on Fiduciary Duty Issue

70 To conclude, I am of the view that the trial judge did not err in finding that a fiduciary obligation existed between the parties, and that this duty was breached by the respondent's decision not to disclose pecuniary interest with the developers.

Damages

71 The trial judge assessed damages flowing from both breach of fiduciary duty and breach of contract. She found the quantum of damages to be the same under either claim, namely the return of capital (adjusted to take into consideration the tax benefits received as a result of the investments), plus all consequential losses, including legal and accounting fees. As I stated at the outset, I cannot find fault with the trial judge's disposition of the damages question.

72 It is useful to review some key findings of fact that bear on the issue of damages. The trial judge found the appellant paid fair market price for each of the four investments. However, she found that throughout the period during which the appellant was induced by the respondent's recommendations into making the investments, the respondent was in a financial relationship with the developers of the projects. In short, the trial judge found the respondent stood to gain financially if the appellant invested according to his recommendations. She further found that if the appellant had known of the true relationship between the respondent and the developers, he would not have invested. She also found that had the parties turned their minds to the potential consequences of the respondent's relationship with the developers it would have been reasonably foreseeable that the appellant would not have invested.

73 I turn now to the principles that bear on the calculation of damages in this case. It is well established that the proper approach to damages for breach of a fiduciary duty is restitutionary. On this approach, the appellant is entitled to be put in as good a position as he would have been in had the breach not occurred. On the facts here, this means that the appellant is entitled to be restored to the position he was in before the transaction. The trial judge adopted this restitutionary approach and fixed damages at an amount equal to the return of capital, as well all consequential losses, minus the amount the appellant saved on income tax due to the investments.

74 The respondent advanced two arguments against the trial judge's assessment of damages for breach of fiduciary duty. Both raise the issue of causation, and I will address these submissions as they were argued.

75 The respondent first submitted that given the appellant's stated desire to shelter as much of his income as possible from taxation, and his practice of buying a wide variety of tax shelters, the appellant would still have invested in real-estate tax shelters had he known the true facts. The main difficulty with this submission is that it flies in the face of the facts found by the trial judge. The materiality of the non-disclosure in inducing the appellant to change his position was a live issue at trial which the judge resolved in the appellant's favour, a finding accepted by the Court of Appeal. For reasons given earlier, I agree with this finding.

76 What is more, the submission runs up against the long-standing equitable principle that where the plaintiff has made out a case of non-disclosure and the loss occasioned thereby is established, the onus is on the defendant to prove that the innocent victim would have suffered the same loss regardless of the breach; see *London Loan & Savings Co. of Canada v. Brickenden*, [1934] 2 W.W.R. 545 (P.C.), at pp. 550-51; see also *Huff v. Price*, supra, at pp. 319-20; *Commerce Capital Trust Co. v. Berk* (1989), 57 D.L.R. (4th) 759 (Ont. C.A.), at pp. 763-64. This Court recently affirmed the same principle with respect to damages at common law in the context of negligent misrepresentation; see *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3 at 14-17 [[1991] 6 W.W.R. 385, 59 B.C.L.R. (2d) 129]. I will return to the common law cases in greater detail later; it suffices now to say that courts exercising both common law and equitable jurisdiction have approached this issue in the same manner. In *Rainbow*, Sopinka J., on behalf of a 6-1 majority of this Court, had this to say, at pp. 15-16:

> The plaintiff is the innocent victim of a misrepresentation which has induced a change of position. It is just that the plaintiff should be entitled to say "but for the tortious conduct of the defendant, I would not have changed my position". A tortfeasor who says, "Yes, but you would have assumed a position other than the *status quo ante*", and thereby asks a court to find a transaction whose terms are hypothetical and speculative, should bear the burden of displacing the plaintiff's assertion of the *status quo ante*.

Further, mere "speculation" on the part of the defendant will not suffice; see ibid., at p. 15; *Commerce Capital*, *supra*, at p. 764. In the present case the respondent has adduced no concrete evidence to "displac[e] the plaintiff's assertion of the *status quo ante*", and this submission must, therefore, be dismissed.

77 The respondent also argued that even assuming the appellant would not have invested had proper disclosure been made, the non-disclosure was not the proximate cause of the appellant's loss. Rather, he continued, the appellant's loss was caused by the general economic recession that hit the British Columbia real estate market in the early 1980s. The respondent submits

that it is grossly unjust to hold him accountable for losses that, he maintains, have no causal relation to the breach of fiduciary duty he perpetrated on the appellant.

78 I observe that a similar argument was put forward and rejected in the *Kelly Peters* case, supra. There the plaintiffs, like the appellant in the present case, had approached the defendant investment advisors for, inter alia, investment advice particular to the real estate tax shelter market; see *supra*, at p. 38. The defendants, like the respondent here, used their position of influence to put the plaintiffs in those specific real estate projects in which they had a pecuniary interest, namely, "Kona condominiums" located in Hawaii. The plaintiffs suffered heavy losses when the real estate market for Hawaiian MURBs crashed. As I noted earlier, the defendants were eventually found liable for breach of fiduciary duties. The defendants argued that damages should be assessed with reference to the date of sale on the grounds that neither the buyer nor the seller should be affected by later market fluctuations. This argument was rejected at trial and in the Court of Appeal. In a passage cited with approval by Macfarlane J.A., the trial judge, at p. 49, stated that a purchaser has a right to recovery of losses, "up to the time he learns of the fraud and whether or not the losses result from a falling market."

79 The similarity between *Kelly Peters* and the present case is striking. Both the defendant in *Kelly Peters* and the respondent here induced parties into investments they would not otherwise have made by deliberately concealing their own financial interest. These respective investors were thereby exposed to *all* the risks, i.e., including the general market risks, of these investments. On the finding of facts, these investors would not have been exposed to *any* of the risks associated with these investments had it not been for their respective fiduciary's desire to secure an improper personal gain. In short, in each case it was the particular fiduciary breach that initiated the chain of events leading to the investor's loss. As such it is right and just that the breaching party account for this loss in full.

80 Contrary to the respondent's submission, this result is not affected by the ratio of this Court's decision in *Canson Enterprises*, *supra*. *Canson* held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. *Canson* does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of a fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate; see also *McInerney v. MacDonald*, *supra*, at p. 149. Writing extra-judicially, Huband J.A. of the Manitoba Court of Appeal recently remarked upon this idea, in "Remedies and Restitution for Breach of Fiduciary Duties" in *The 1993 Isaac Pitblado Lectures*, 21-32, at p. 31:

> A breach of a fiduciary duty can take many forms. It might be tantamount to deceit and theft, while on the other hand it may be no more than an innocent and honest bit of bad advice, or a failure to give a timely warning.

Canson is an example of the latter type of fiduciary breach, mentioned by Huband J.A. There, the defendant solicitor failed to warn the plaintiff, his client, that the vendors and other third parties were pocketing a secret profit from a "flip" of the subject real estate such that the property was overpriced. See also *Jacks*, *supra*. In this situation, the principle of full restitution should not entitle a plaintiff to greater compensation than he or she would otherwise be entitled to at common law, wherein the limiting principles of intervening act would come into play.

81 Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law. As I noted in *Canson*, at pp. 587-88, this approach is in accordance with the fusion of law and equity that occurred near the turn of the century under the auspices of the old *Judicature Acts*; see also *M. (K.) v. M. (H.)*, *supra*, at p. 61. Thus, properly understood *Canson* stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded. As I stated in *Canson*, at p. 581:

> ... barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.

In other words, the courts should look to the harm suffered from the breach of the given duty, and apply the appropriate remedy.

82 Returning to the facts of the present case, one immediately notices significant differences from the wrong committed by the defendant in *Canson* as compared to the character of the fiduciary breach perpetrated by the respondent. In *Canson* there was no particular nexus between the wrong complained of and the fiduciary relationship; this was underlined, at p. 577, by my colleague, McLachlin J., who followed a purely equitable route. Rather, the fiduciary relationship there arose by operation of law, and was in many ways incidental to the particular wrong. Further, the loss was caused by the wrongful act of a third party that was unrelated to the fiduciary breach. In the present case the duty the respondent breached was directly related to the risk that materialized and in fact caused the appellant's loss. The respondent had been retained specifically to seek out and make independent recommendations of suitable investments for the appellant. This agreement gave the respondent a kind of influence or discretion over the appellant in that, as the trial judge found, he effectively chose the risks to which the appellant would be exposed based on investments which in his expert opinion coincided with the appellant's overall investment objectives. In *Canson* the defendant solicitor did not advise on, choose, or exercise any control over the plaintiff's decision to invest in the impugned real estate; in short, he did not exercise any control over the risks that eventually materialized into a loss for the plaintiff.

83 Indeed, courts have treated common law claims of the same nature as the wrong complained of in the present case in much the same way as claims in equity. I earlier referred to *Rainbow Industrial Caterers*. The plaintiff there had contracted to cater lunches to CN employees at a certain price per meal. The price was based on the estimated number of lunches the defendant would require over the period covered by the contract. This estimate was negligently misstated, and the plaintiff suffered a significant loss. The Court was satisfied that but for the misrepresentation, the plaintiff would not have entered into the contract. The defendant, however, alleged that much of the loss was not caused by the misrepresentation but rather by certain conduct of CN employees, e.g., taking too much food. This argument was rejected by the Court in the following terms, at p. 17:

> ... CN bore the burden of proving that Rainbow would have bid even if the estimate had been accurate. That was not proved, and so it is taken as a fact that Rainbow would *not* have contracted had the estimate been accurate. The conduct referred to in para. 49 [i.e. the conduct of the CN employees] would not have occurred if there had been no contract, and therefore the loss caused thereby, like all other losses in the proper execution of the contract by Rainbow, is directly related to the negligent misrepresentation. [Emphasis in original.]

Thus, where a party can show that but for the relevant breach it would not have entered into a given contract, that party is freed from the burden or benefit of the rest of the bargain; see also *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 at 40-41 [[1993] 2 W.W.R. 321, 75 B.C.L.R. (2d) 145] (per La Forest and McLachlin JJ.). In short, the wronged party is entitled to be restored to the pre-transaction status quo.

84 An identical principle was applied by the British Columbia Court of Appeal in *K.R.M. Construction Ltd. v. British Columbia Railway Co.* (1982), 40 B.C.L.R. 1, a case relied upon by Macfarlane J.A. in *Kelly Peters*. In *K.R.M.* the defendant railway company, which was renegotiating a major contract with the plaintiff due to an earlier misrepresentation, induced the plaintiff into a settlement when it was agreed that the defendant would grant permission to the plaintiff to work out of one camp rather than two, thereby effecting a savings to the plaintiff of $1.6 million. During the course of this negotiation, the plaintiff had been informed that the coming winter's line revisions would be minor. In fact, the defendant was planning a major revision. As it turned out, the plaintiff experienced considerable delays and failed to meet the completion date for the project. The contract was eventually terminated by mutual agreement and the plaintiff brought an action for damages. It was found as a fact that the plaintiff was induced into signing the amending agreement and the release of its past claims by the non-disclosure concerning the line revision. The railway company argued, however, that the proximate cause of the delay was not related to the non-disclosure but to the unusually warm winter weather. Indeed the court, at p. 32, stated, "It would appear that a very significant factor in the respondents' difficulties and delays was the unusually mild winter weather. It was a factor adversely affecting work, major line revision or not." Nonetheless, the court found in favour of the plaintiffs. It stated, at p. 32:

> ... in our view considering and weighing these matters is not the proper approach ... As the result of the second deceit they [the respondents] resumed work on revised terms ... The resumption of work subjected them to all contingencies including

> adverse weather. *Without the second deceit the respondents would not have been exposed to those contingencies, and the heavy losses suffered in the subsequent work would not have been incurred.* [Emphasis added.]

85 The respondent points to a number of cases in which courts have refused to compensate plaintiffs for losses suffered owing to general market fluctuations despite the existence of "but for" causation; *Waddell v. Blockey* (1879), 4 Q.B.D. 678 (C.A.); *Huddleston v. Herman & MacLean*, 640 F. 2d 534 (5th Cir., 1981), affirmed in part 459 U.S. 375 (1983); *McGonigle v. Combs*, 968 F. 2d 810 (9th Cir., 1992).

86 The respondent placed considerable reliance on the *Waddell* case. There the defendant sold rupee paper of his own to the defendant on the fraudulent basis that the paper belonged to persons other than the defendant. After the purchase the rupee paper rapidly fell in value owing to an unrelated decline in the market for such paper. The plaintiff eventually sold the paper five months later at a loss of £43,000. The English Court of Appeal, reversing, held that despite the proven fraudulent misrepresentation, the plaintiff was not entitled to any damages on the grounds that there was "no natural or proximate connection between the wrong done and the damage suffered"; per Thesiger L.J., at p. 682.

87 The first thing one notices about this case is its age. *Waddell* was decided in 1879, well before the English courts began to expand the fiduciary concept beyond the strict trust context to reach professional relationships such as the one in the present case. The modern approach to professional advisory relationships was launched in *Nocton v. Lord Ashburton*, where the fiduciary principle was used as a means of putting pressure on solicitors (and others in a "special relationship" with the public) in the performance of their special skills; see Viscount Haldane, at p. 955; see also Gummow J., "Compensation for Breach of Fiduciary Duty" in Youdan, at pp. 57-62; *Lloyds Bank*, *supra*. I observe that while there is some mention of a fiduciary relationship in *Waddell*, there is no mention of any equitable remedial principles such as would have been dictated by a strict trust approach. Put another way, the court treated the case on the same footing as a case of common law fraud in which the evil complained of relates exclusively to the price or value of the underlying security.

88 It is worthy of note as well that the trial judge in *Waddell* awarded the plaintiff the full extent of his loss. Thus it appears that, even as early as 1879, there was at least a measure of disagreement on the issue. I observe that in *Allan v. McLennan* (1916), 31 D.L.R. 617 [[1917] 1 W.W.R. 513], the British Columbia Court of Appeal came to the result opposite to that in *Waddell* on virtually identical facts. In *Allan* the plaintiff bought shares from the defendant based on the representation that they belonged to the Bank of Vancouver, whereas they in fact belonged to the defendant, who would receive the proceeds of the sale. This misstatement caused the plaintiff to inquire less carefully into the matter than he otherwise would have. The trial judge, at p. 618, concluded that "these representations were relied upon by the respective plaintiffs and induced them to purchase the shares". The measure of damages was held to be the difference in value of the shares *at the time of discovery of the misstatement* and what was paid for them. In short, to the extent that *Waddell* and the cases that follow it support the respondent's position, I do not agree with them. This authority is displaced by the more recent jurisprudence in this area which I have set forth earlier, and which, in my view, adopts the correct principle.

89 The respondent also referred us to a line of American authority in the securities fraud context. These cases distinguish between "transaction causation" and "loss causation", the former corresponding to the "but for" test and the latter to ordinary tort notions of proximate causation. In *Huddleston*, for instance, the court stated, at p. 549:

> The plaintiff must prove not only that, had he known the truth, he would not have acted, but in addition that the untruth was in some reasonably direct, or proximate, way responsible for his loss. The causation requirement is satisfied in a Rule 10b-5 case only if the misrepresentation touches upon the reasons for the investment's decline in value.

The policy supporting these cases is that absent the requirement of causation an action for fraud would become an "insurance plan for the cost of every security purchased in reliance upon a material misstatement"; see idem. The policy direction taken by the American courts is no doubt prompted by a concern about the detrimental effects of the explosion in securities fraud litigation on the efficiency of the capital markets. One obvious means of limiting potential liability is by developing a strict causation requirement, and this is precisely what the United States courts have done. I would have thought it obvious that the application of this policy imperative to the present situation is tenuous to say the least.

90 Moreover, there exists a second line of United States authority that has a greater affinity to the case at bar. These cases deal with the self-interested behaviour of stockbrokers and other professionals in the investment industry. Here, the American courts have apparently decided that the policy against giving the investor an"insurance plan" against market fluctuations is outweighed by the need to ensure that persons with power over individual investors act in good faith in the carrying out of their professional services, and have awarded damages on the principle of full restitution. In *Chasins v. Smith, Barney & Co.*, 438 F. 2d 1167 (1970), the Second Circuit Court of Appeals held that where a stockbroker induces a client to invest in a stock without disclosing that he is making a market in that particular stock (i.e., holding himself out as being willing to buy and sell particular securities for his own account on a continuous basis otherwise than on a national securities exchange), the stockbroker is required to compensate the client for the whole of his loss, notwithstanding the fact that the investor paid no more than fair market value. The court stated, at p. 1173:

> The issue is not whether Smith, Barney was actually manipulating the price on Chasins or whether he paid a fair price, but rather the possible effect of disclosure of Smith, Barney's market-making role on Chasin's decision to purchase at all on Smith, Barney's recommendation. It is the latter inducement to purchase by Smith, Barney without disclosure of its interest that is the basis of this violation; *the evil in such a case is that recommendations to clients will be based upon the best interests of the dealer rather than the client.* [Emphasis added.]

Chasins was relied on by the Ninth Circuit Court of Appeals in the context of "churning" in *Hatrock v. Edward D. Jones & Co.*, 750 F. 2d 767 (1984). Churning occurs when a broker who exercises control over a customer's account engages in trading for the purpose of realizing increased commissions or for some other purpose that is not in the best interests of the client. Like securities fraud, "churning" is a violation of s. 10(*b*) of the *Securities Exchange Act, 1934* and R. 10b-5 promulgated pursuant to that statute. The *Hatrock* court stated, at pp. 773-74:

> The plaintiff ... should not have to prove loss causation where the evil is not the price the investor paid for a security, but the broker's fraudulent inducement of the investor to purchase the security ...
>
> The investor may recover excessive commissions charged by the broker, and the decline in value of the investor's portfolio resulting from the broker's fraudulent transactions.

91 The policy underlying the doctrine of loss causation has been the subject of rather spirited academic and judicial debate in the United States; see, for instance, *Marbury Management Inc. v. Kohn*, 629 F. 2d 705 (2nd Cir., 1980), per Meskill J. (dissenting); *Bastian v. Petren Resources Corp.*, 681 F. Supp. 530(U.S. Dist. Ct., 1988); RobertB. Thompson, "The Measure of Recovery under Rule 10B-5: A Restitution Alternative to Tort Damages" (1984), 37 Vanderbilt L.R. 349; Michael J. Kaufman, "Loss Causation: Exposing a Fraud on Securities Law Jurisprudence" (1991), 24 Indiana L.R. 357; Andrew L. Merritt, "A Con sistent Model of Loss Causation in Securities Fraud Litigation: Suiting the Remedy to the Wrong" (1988), 66 Texas L.R. 469. Despite this controversy, however, the courts continue to hold defendants liable for the plaintiff's gross loss in cases of churning and other such misbehaviour by those in a position of power and ascendency over investors; see *Casella v. Webb*, 883 F. 2d 805 (9th Cir., 1989).

92 From a policy perspective it is simply unjust to place the risk of market fluctuations on a plaintiff who would not have entered into a given transaction but for the defendant's wrongful conduct. I observe that in *Waddell*, *supra*, Bramwell L.J. conceded, at p. 680, that if restitutio in integrum had been possible, the plaintiff could probably have recovered in full. Indeed counsel for the appellant argued that the proper approach to damages in this case was the monetary equivalent of a rescissionary remedy. I agree. In my view the appellant should not suffer from the fact that he did not discover the breach until such time as the market had already taken its toll on his investments. This principle, which I take to be a basic principle of fairness, is in fact reflected in the common law of mitigation, itself rooted in causation; see S.M. Waddams, *The Law of Contracts* (3rd ed. 1993), at p. 515. In *Baud Corp., N.V. v. Brook, (*sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.)* [1979] 1 S.C.R. 633 [[1978] 6 W.W.R. 301], this Court held that in an action for breach of the duty to return shares under a contract of bailment, the obligation imposed on the plaintiff to mitigate by purchasing like shares on the open market did not commence until such time as the plaintiff learned of the breach or within a reasonable time thereafter.

93 There is a broader justification for upholding the trial judge's award of damages in cases such as the present, namely, the need to put special pressure on those in positions of trust and power over others in situations of vulnerability. This justification is evident in American case law, which makes a distinction between simple fraud related to the price of a security and fraudulent inducements by brokers and others in the investment business in positions of influence. In the case at bar, as in *Kelly Peters* and the American cases cited by the appellant, the wrong complained of goes to the heart of the duty of loyalty that lies at the core of the fiduciary principle. In redressing a wrong of this nature, I have no difficulty in resorting to a measure of damages that places the exigencies of the market-place on the respondent. Such a result is in accordance with the principle that a defaulting fiduciary has an obligation to effect restitution in specie or its monetary equivalent; see *Re Dawson; Union Fidelity Trust Co. v. Perpetual Trustee Co.*, [1966] 2 N.S.W.R. 211; *Island Realty Investments Ltd. v. Douglas* (1985), 19 E.T.R. 56 (B.C.S.C.), at pp. 64-65; *Rothko v. Reis*, 372 N.E. 2d 291(N.Y. Ct. App., 1977). I see no reason to derogate from this principle; on the contrary, the behaviour of the respondent seems to be precisely the type of behaviour that calls for strict legal censure. Mark Ellis puts the matter in the following way in *Fiduciary Duties in Canada*, at p. 20-2:

> ... the relief seeks primarily to protect a party owed a duty of utmost good faith from deleterious actions by the party owing the fiduciary duty. The vehicles by which the Court may enforce that duty are diverse and powerful, but are premised upon the same desire: to strictly and jealously guard against breach and to redress that breach by maintenance of the pre-default status quo, where possible.

The remedy of disgorgement, adopted in effect if not in name by the Court of Appeal, is simply insufficient to guard against the type of abusive behaviour engaged in by the respondent in this case. The law of fiduciary duties has always contained within it an element of deterrence. This can be seen as early as *Keech* in the passage cited *supra*; see also *Canadian Aero*, supra, at pp. 607 and 610; *Canson*, *supra*, at p. 547, per McLachlin J. In this way the law is able to monitor a given relationship society views as socially useful while avoiding the necessity of formal regulation that may tend to hamper its social utility. Like-minded fiduciaries in the position of the respondent would not be deterred from abusing their power by a remedy that simply requires them, if discovered, to disgorge their secret profit, with the beneficiary bearing all the market risk. If anything, this would encourage people in his position to in effect gamble with other people's money, knowing that if they are discovered they will be no worse off than when they started. As a result, the social benefits of fiduciary relationships, particularly in the field of independent professional advisors, would be greatly diminished.

94 In view of my finding that there existed a fiduciary duty between the parties, it is not in strictness necessary to consider damages for breach of contract. However, in my view, on the facts of this case, damages in contract follow the principles stated in connection with the equitable breach. The contract between the parties was for *independent* professional advice. While it is true that the appellant got what he paid for from the developers, he did not get the services he paid for from the respondent. The relevant contractual duty breached by the respondent is of precisely the same nature as the equitable duty considered in the fiduciary analysis, namely, the duty to make full disclosure of any material conflict of interest. This was, in short, a contract which provided for the performance of obligations characterized in equity as fiduciary.

95 Further, it remains the case under the contractual analysis that but for the non-disclosure, the contract with the developers for the MURBs would not have been entered into. The trial judge found as a fact that it was reasonably foreseeable that if the appellant had known of the respondent's affiliation with the developers, he would not have invested. This finding is fully reflected in the evidence I have earlier set forth. Put another way, it was foreseeable that if the contract was breached the appellant would be exposed to market risks (i.e., in connection with the four MURBs) to which he would not otherwise have been exposed. Further, it is well established that damages must be foreseeable as to kind, but not extent; as such any distinction based on the unforeseeability of the *extent* of the market fluctuations must be dismissed; see *H. Parsons (Livestock) Ltd. v. Uttley, Ingham & Co.*, [1978] Q.B. 791 at 813; *Asamera, supra*, at p. 655. See also S.M. Waddams, *The Law of Damages* (2nd ed. 1991), at paras. 14.280 and 14.290.

96 The Court of Appeal's approach to contractual damages is puzzling in that it seemed to accept the finding that if the contractual duty had not been breached the investments would not have been made, yet it proceeded to award damages in proportion to the amounts paid by the developer to the defendant. It is clear, however, that there would have been no such fees

had the investments not been made. In short, I am unable to follow the Court of Appeal's reasoning on the issue of damages for breach of contract, and I would restore the award of damages made by the trial judge.

Disposition

97 I would allow the appeal, set aside the order of the British Columbia Court of Appeal and restore the order of the trial judge, with costs throughout, including letter of credit costs to avoid a stay and allow recovery on the trial judgment pending appeal to the Court of Appeal.

***Sopinka* and *McLachlin JJ.* (dissenting) (*Major J.* concurring):**

98 This appeal raises two issues: first, whether a fiduciary duty arises and second, the amount of damages recoverable.

I. The Facts

99 In January, 1980, the appellant Mr. Hodgkinson was a 30-year-old stock broker working for a Vancouver investment firm. He had recently moved from a more conservative firm dealing primarily with blue-chip securities to one dealing with the speculative underwriting of junior resource stock and his income had increased dramatically. Prior to the move, he had grossed between $50,000 and $70,000 per year. In the year following his move, his gross income was $650,000. A year later, it was in excess of $1 million.

100 Mr. Hodgkinson had never employed an accountant. He had always prepared his own income tax returns and arranged his own investments. These included an interest in a ski chalet at Mt. Baker, two units in a Multiple Unit Residential Building ("MURB") in White Rock and some "flow-through" shares in a mineral exploration tax shelter. He had also bought and sold a small house in West Vancouver. His financial picture, however, was growing increasingly complex and he was planning to marry in a few months. He wanted to "shelter" his money from immediate taxation while securing sound long-term investments. He decided he needed a "financial manager" and sought advice from Mr. Simms.

101 Mr. Simms was a chartered accountant and a partner in the firm of Simms & Waldman. Until 1979, he had specialized in providing general tax and business advice to small businessmen and professionals. During 1979 he began to offer investment advice to his clients with respect to real estate tax shelters. He also developed the concept of "cross-pollenization" of clients. He would put clients in one area of business together with clients in another area of business with an eye to their mutual profit. He would suggest to clients wishing to invest in tax shelters that he could put them together with a developer and they could then deal with one accountant, one lawyer and one developer. In this way, he functioned as the linchpin in what he viewed as a "win-win" situation for everyone concerned.

102 At their first meeting in 1980, Mr. Hodgkinson and Mr. Simms quickly settled on MURB's as the most promising investment vehicle for the appellant. On Mr. Simms' advice, Mr. Hodgkinson invested substantial sums in two MURB's which a real estate developer named Olma Bros. was developing in the Okanagan region of the province. Later in the year, the appellant invested in a third Okanagan development of Olma Bros. Mr. Simms billed Olma Bros. for the financial services he was performing in connection with these MURB's. He did not disclose this to Mr. Hodgkinson.

103 In late 1980, Mr. Hodgkinson, on Mr. Simms' advice, invested in a development called Enterprise Way promoted by Mr. Dale-Johnson, a friend and client of Mr. Simms. Mr. Dale-Johnson paid fees to Mr. Simms for "structuring" this project which Mr. Simms did not disclose to Mr. Hodgkinson.

104 During the time Mr. Hodgkinson was investing in MURB's on Mr. Simms' recommendations, he was also making other investments on his own. These included a MURB in Richmond to which he committed over $900,000; a $250,000 investment in a joint venture development, also in Richmond; a $95,000 investment in the Montreal Allouette Football Club; a $122,435 investment in "flow-through" shares of Platte River Resources; and a $24,000 investment in a movie.

105 In 1981, the price of real estate crashed. Mr. Hodgkinson sustained large losses. He sold some of his investments at a loss to avoid cash calls. Others were foreclosed upon when they could not be sold or rented.

106 In 1985, Mr. Hodgkinson learned that the respondent may have received fees and payments from Olma Bros. with respect to the three Okanagan projects. In 1986, he sued Mr. Simms in negligence. In early 1987, further documents came to light indicating that Simms & Waldman had been collecting fees on the projects but the extent of their involvement remained unclear. As evidence accumulated, the pleadings were amended to include a claim for breach of fiduciary duty.

II.Judgments Below

Supreme Court of British Columbia (1989), 43 B.L.R. 122 (Prowse J.)

107 Mr. Hodgkinson sought to recover all losses on the four investments recommended by Mr. Simms based upon breach of fiduciary duty, breach of contract and negligence. He essentially founded his claim upon Mr. Simms' failure to disclose the payments he had taken for "structuring" the projects he recommended.

108 Prowse J. found, at p. 168, a fiduciary relationship between Mr. Hodgkinson and Mr. Simms based on the fact that Mr. Simms, "took it upon himself to investigate and make recommendations on the relative merits of tax shelter investments for a client he knew was dependent upon him for that advice and who accepted that advice and acted upon it" and thus "assumed the responsibility for Mr. Hodgkinson's choice." This fiduciary duty required Mr. Simms to disclose to Mr. Hodgkinson "all facts material to Mr. Hodgkinson's decision whether to invest in these projects" (at p. 170). Prowse J. concluded that Mr. Simms had breached his fiduciary duty by failing to disclose the nature and extent of his relationship with both Olma Bros. and Mr. Dale-Johnson, and by writing billing and reporting letters in such a way as to suggest that the investors were the sole source of payment for the work which he was doing on the tax shelters.

109 Prowse J. assessed damages for breach of fiduciary duty at $350,507.62. The calculation of these damages included the return of the capital Mr. Hodgkinson had invested in the four projects, adjusted to take into consideration the tax benefits which the appellant received, as well as the consequential losses flowing from his investment in the projects.

110 Prowse J. also found Mr. Simms liable for breach of contract. She held that Mr. Simms' professional contract with Mr. Hodgkinson obliged Mr. Simms to disclose all material facts concerning prospective tax shelters and investments. The contract further required the respondent to disclose if he was acting for a developer or vendor of a project in which he was advising the appellant as an investor, and to disclose the nature and extent of any affiliation with the vendor of tax shelters upon which he was advising. For substantially the same reasons that the respondent was found in breach of his fiduciary obligations, Prowse J. held that he was also in breach of the terms of the contract.

111 Prowse J. accepted that damages for breach of contract are limited to those in the reasonable contemplation of the parties at the time they entered into the contract: *Baud Corp., N.V. v. Brook*, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.)* [1979] 1 S.C.R. 633 [[1978] 6 W.W.R. 301]. See also *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, [1949] 1 All E.R. 997, [1949] 2 K.B. 528 (C.A.), and *"Heron II" (The); Koufos v. C. Czarnikow Ltd.*, [1969] A.C. 350 (H.L.). She concluded that at the time of making the contract it was reasonably foreseeable that: (1) had Mr. Simms made proper disclosure, Mr. Hodgkinson would not have invested; and (2) that a change in the economy could adversely affect any investments. Concluding that Mr. Hodgkinson's losses had been caused by a combination of the consequences of non-disclosure and the downturn in the economy, Prowse J. held Mr. Simms liable in contract for the full amount of the loss sustained by the appellant as a result of entering into the investments, the same amount she had awarded with respect to the breach of fiduciary duty.

112 The claim in negligence was dismissed by the judge at trial and abandoned by the appellant on appeal.

British Columbia Court of Appeal, 1992, 65 B.C.L.R. (2d) 264 (McEachern C.J.B.C., Wood and Gibbs JJ.A.)

113 The Court of Appeal, per McEachern C.J.B.C., allowed the appeal on the grounds that the respondent owed no fiduciary duty to the appellant and that the trial judge's assessment of damages for breach of contract was too high.

114 The court concluded against a fiduciary duty on the basis of the decision of this Court in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, which was released after the decision at trial. McEachern C.J.B.C. held that the necessary characteristics of a fiduciary relationship were absent. Mr. Hodgkinson had not given Mr. Simms the necessary authority or discretion. The choice of whether to invest or not invest lay at all times with Mr. Hodgkinson. Finally, Mr. Hodgkinson was not "peculiarly vulnerable to" or at the mercy of the respondent.

115 The Court of Appeal agreed that Mr. Simms was liable for breach of contract. However, it found error in the assessment of damages. While the trial judge had cited the correct principles, she had erred, in the court's view, in her application of those principles to the facts before her. McEachern C.J.B.C. rejected the submission that the losses suffered by Mr. Hodgkinson through the sale or foreclosure of the properties or other consequential losses such as legal and accounting fees were within the contemplation of the parties as flowing from the breach of contract by Mr. Simms. He held that all such losses were the result of the unforeseeable collapse of the real estate market and that Mr. Hodgkinson has assumed that risk. In his view, the proper measure of damages was the difference between what the appellant had paid for his investments and their real value at that time, plus any further damages flowing from the breach which were in the reasonable contemplation of the parties at the time of entering into the contract.

III. The Issues

116 The issues on appeal are:

1. Did a fiduciary duty arise?;

2. If not, did the trial judge err in her assessment of damages for breach of contract?

1. Did a Fiduciary Duty Arise?

A. The Law of Fiduciaries

117 At the heart of the fiduciary relationship lie the dual concepts of trust and loyalty. This is first and best illustrated by the fact that the fiduciary duties find their origin in the classic trust where one person, the fiduciary, holds property on behalf of another, the beneficiary. In order to protect the interests of the beneficiary, the express trustee is held to a stringent standard; the trustee is under a duty to act in a completely selfless manner for the sole benefit of the trust and its beneficiaries (*Keech v. Sandford* (1726), 25 E.R. 223) to whom he owes "the utmost duty of loyalty." (Waters *Law of Trusts in Canada* 2nd ed. (Toronto: Carswell, 1984) at p. 31). And while the fiduciary relationship is no longer confined to the classic trustee-beneficiary relationship, the underlying requirements of complete trust and utmost loyalty have never varied.

118 Certain relationships and actors have always been subject to the duties and obligations imposed by courts of equity upon fiduciaries. These traditional categories include, among others, solicitor-client, principal-agent, directors and partners. These per se fiduciary relationships, however, are not exhaustive of the principle. Fiduciary relationships may also be found in other trust-like relationships. To determine whether a fiduciary obligation lies, one must look carefully at the particular relationship between the parties. As Dickson J. (as he then was) stated in *Guerin v. R*, [1984] 2 S.C.R. 335 at 384 [[1984] 6 W.W.R. 481]:

> It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. *It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty.* [Emphasis added.]

119 In *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136, Wilson J. defined the characteristics of a fiduciary relationship as follows:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.

(2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

And although Wilson J. wrote in dissent, this list of the characteristics of a fiduciary relationship was adopted by the majority of this Court, per Sopinka J., in *LAC Minerals*, *supra*. Sopinka J. cautioned that the list was a description, not an absolute legal test and stated at p. 599, "It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship". Sopinka J., however, identified vulnerability as "The one feature ... which is considered to be indispensable to the existence of the relationship" and at pp. 599-600 quoted Dawson J. in *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417 at 488 (H.C.), who stated:

> There is ... the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other ...

120 Prior to addressing the nature of the relationship between Mr. Hodgkinson and Mr. Simms in greater detail, we mention two considerations which may act as false indicators of a fiduciary relationship.

121 The first is the presence of conduct which attracts judicial sanction. As Sopinka J. stated in *LAC Minerals*, at p. 600:

> ... the presence of conduct that incurs the censure of a court of equity in the context of a fiduciary duty cannot itself create the duty. In *Tito v. Waddell (No. 2)*, [1977] 3 All E.R. 129, at p. 232, Megarry V.-C. said:
>
> > If there is a fiduciary duty, the equitable rules about self-dealing apply: but self-dealing does not impose the duty. Equity bases its rules about self-dealing upon some pre-existing fiduciary duty: it is a disregard of this pre-existing duty that subjects the self-dealer to the consequences of the self-dealing rules. I do not think that one can take a person who is subject to no pre-existing fiduciary duty and then say that because he self-deals he is thereupon subjected to a fiduciary duty.

122 La Forest J., in the same case, discussed three uses of the term "fiduciary". He found the third use reflected this precise error. In his view, at p. 652, "this third use of the term fiduciary, used as a conclusion to justify a result, reads equity backwards. It is a misuse of the term."

123 The second consideration which may act as a false indicator of a fiduciary obligation is the "category" into which the relationship falls. Professional relationships like doctor-patient and lawyer-client often possess fiduciary aspects. But equally, many of the tasks undertaken pursuant to these relationships may not be trust-like or attract a fiduciary obligation. As Southin J. (as she then was) stated in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (S.C.), at p. 362:

> The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. But "fiduciary" comes from the Latin "fiducia" meaning "trust". Thus, the adjective, "fiduciary" means of or pertaining to a trustee or trusteeship. That a lawyer can commit a breach of the special duty of a trustee, e.g., by stealing his client's money, by entering into a contract with the client without full disclosure, by sending a client a bill claiming disbursements never made and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words. The obligation of a solicitor of care and skill is the same obligation of any person who undertakes for reward to carry out a task. One would not assert of an engineer or physician who had given bad advice and from whom common law damages were sought that he was guilty of a breach of fiduciary duty. Why should it be said of a solicitor? I make this point because an allegation of breach of fiduciary duty carries with it the stench of dishonesty — if not of deceit, then of constructive fraud. See *Nocton v. Lord Ashburton*, [1914] A.C. 932 (H.L.). Those who draft pleadings should be careful of words that carry such a connotation.

124 Just as not every act in a so-called fiduciary relationship is encumbered with a fiduciary obligation, so conversely fiduciary obligations may arise in relationships which have not been traditionally considered as fiduciary. As J.C. Shepherd states in *The Law of Fiduciary Duties* (1981), at p. 28:

> It appears to be settled that any person can, by offering to give advice in a particular manner to another, create in himself fiduciary obligations stemming from the confidential nature of the relationship created, which obligations limit the adviser's dealings with the advisee.

125 This brings us to the crux of the issue in this case. The relationship between these parties was not a traditional "fiduciary relationship" like trustee and beneficiary or lawyer and client. The question, however, is whether aspects of it assumed a fiduciary character.

126 Our colleague La Forest J., as we understand his reasons, holds that the giving of independent professional advice may give rise to a fiduciary duty toward the person seeking the advice (pp. 28 ff.). The essence of such relationships, he suggests at p. 29 [p. 27], is "trust, confidence, and independence." He states, at p. 33 [p. 30], that "where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the parties' relationship was such as to give rise to a fiduciary duty on the part of the advisor." The facts are looked at in order to determine whether they disclose that the advice was given in the context of a relationship of trust and confidence. As La Forest J. puts it at p. 32 [p. 29], "the common thread that unites this body of law is the measure of the confidential and trust-like nature of the particular advisory relationship, and the ability of the plaintiff to establish reliance in fact."

127 The difficulty lies in determining *what* measure of confidence and trust are sufficient to give rise to a fiduciary obligation. An objective criterion must be found to identify this measure if the law is to permit people to conduct their affairs with some degree of certainty. The contexts in which investment advice is given are multitudinous. They range from newspaper advertisements through personal "tips" to cases akin to the classic trust. Clearly they do not all attract fiduciary duties, but where is the line to be drawn? Accepting that a bright line may be elusive, is there some hallmark that provides a reliable indicator of the acceptance of a fiduciary obligation? The vast disparity between the remedies for negligence and breach of contract — the usual remedies for ill-given advice — and those for breach of fiduciary obligation, impose a duty on the court to offer clear assistance to those concerned to stay in the former camp and not stray into the latter.

128 As we have seen, the cases suggest that the distinguishing characteristic between advice simpliciter and advice giving rise to a fiduciary duty is the ceding by one party of effective power to the other. It is this mutual conferring and acceptance of power to the knowledge of both parties that creates the special and onerous trust obligation. WilsonJ. referred in *Frame v. Smith*, at p. 136, to the "scope for the exercise of ... discretion or power" in the fiduciary and to the power of the fiduciary to "*unilaterally* exercise that power or discretion so as to affect the beneficiary's legal or practical interests" (Emphasis added.). She also referred to the beneficiary's being "at the mercy" of the fiduciary. Sopinka J. approved this language in *LAC Minerals*, at pp. 599-600, and underscored the indispensible nature of the feature of vulnerability requiring "'the protection of equity acting upon the conscience of that other'" (per Dawson J. in *Hospital Products*, *supra*).

129 Vulnerability, in this broad sense, may be seen as encompassing all three characteristics of the fiduciary relationship mentioned in *Frame v. Smith*. It comports the notion, not only of weakness in the dependent party, but of a relationship in which one party is in the power of the other. To use the phrase of Professor Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 7, quoted in *Guerin* at p. 384 and in *LAC Minerals* at p. 600, "... the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion."

130 Vulnerability does not mean merely "weak" or "weaker". It connotes a relationship of dependency, an "implicit dependency" by the beneficiary on the fiduciary (D.S.K. Ong, "Fiduciaries: Identification and Remedies" (1984), 8 Univ. of Tasmania L. Rev. 311, at p. 315); a relationship where one party has ceded power to the other and is, hence, literally "at the mercy" of the other.

131 This then is the hallmark to which a court looks in determining whether a fiduciary relationship exists; is one party dependent upon or in the power of the other. In determining if this is the case, the court looks to the characteristics referred to by Wilson J. in *Frame v. Smith*. Does one party possess power or discretion over the property or person of the other? Can that power or discretion be exercised unilaterally, that is, without the consent of the other? In the final analysis, can the powerless party be said to be "peculiarly vulnerable" or "at the mercy of" the party who holds the power? To quote Keenan J. in *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204 (Gen. Div.), at p. 236, relied upon by our colleague La Forest J., at pp. 33-34 [pp. 29-30], "Because the client has reposed that trust and confidence and *has given over that power* to the broker, the law imposes a duty on the broker to honour that trust and respond accordingly" (Emphasis added.).

132 Phrases like "unilateral exercise of power", "at the mercy of the other's discretion" and "has given over that power" suggest a total reliance and dependence on the fiduciary by the beneficiary. In our view, these phrases are not empty verbiage. The courts and writers have used them advisedly, concerned for the need for clarity and aware of the draconian consequences of the imposition of a fiduciary obligation. Reliance is not a simple thing. As Keenan J. notes in *Varcoe v. Sterling* at p. 235, "The circumstances can cover the whole spectrum from total reliance to total independence." To date, the law has imposed a fiduciary obligation only at the extreme of total reliance.

133 This is in accordance with the concepts of trust and loyalty which lie at the heart of the fiduciary obligation. The word "trust" connotes a state of complete reliance, of putting oneself or one's affairs in the power of the other. The correlative duty of loyalty arises from this level of trust and the complete reliance which it evidences. Where a party retains the power and ability to make his or her own decisions, the other person may be under a duty of care not to misrepresent the true state of affairs or face liability in tort or negligence. But he or she is not under a duty of loyalty. That higher duty arises only when the person has unilateral power over the other person's affairs placing the latter at the mercy of the former's discretion.

134 This is a question that was decided by the majority in *LAC Minerals*. We are unable to agree with our colleague, at p. 26 [p. 25], that the Court of Appeal "erred in importing the analysis in the *LAC Minerals* case to professional advisory relationships". He would distinguish the latter from business entities on the following basis at pp. 26-27 [p. 25]:

> Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest ...

The reasons of both the majority and minority in *LAC Minerals* canvassed the entire spectrum of fiduciary and potential fiduciary relationships. Professional relationships as such were not identified as a separate category which attracted special consideration. Rather, the preoccupation was with respect to the different treatment to be accorded certain relationships which traditionally have been recognized as giving rise to fiduciary obligations and others which may be found to be so by reason of the presence of characteristics commonly associated with traditional fiduciary relationships. As previously noted, these characteristics or criteria are those enumerated by Wilson J. in *Frame*, *supra*, and adopted by Sopinka J. in *LAC Minerals*.

135 It is not suggested in this case that the relationship in question is one of those traditional relationships that are presumed to be fiduciary. Indeed, our colleague adopts the statement of Keenan J. in *Varcoe v. Sterling*, at p. 234, that the "relationship of broker and client is not *per se* a fiduciary relationship" as a correct statement of the law applicable to, inter alia, "accountants". The analysis in *LAC Minerals* is, therefore, directly applicable to determine whether, applying the relevant criteria, fiduciary obligations should be extended to apply to this case. We see no reason to depart from the principles so recently stated in *LAC Minerals* by reason of a supposed distinction between professional advisers and other "commercial interactions". It cannot be assumed that the latter are always based on self-interest and the former are not. Moreover, as far as social utility is concerned, it could be debated whether advice as to how to add to one's personal wealth while paying the least amount of tax is to be preferred over business dealings which may lead to the development of a mine providing employment to many Canadians.

136 Nor are we persuaded that we should depart from *LAC Minerals* on other grounds of principle or policy. We agree with Professor Frankel, at p. 144, cited by our colleague La Forest J. at p. 35 [p. 30], that policy considerations may support a

fiduciary duty's being imposed on services "requiring skills that are very costly to master" such as "*some kinds* of investment management" (Emphasis added.). In the case of such special skills, the client is effectively obliged to give exclusive power to the investment manager; the client lacks the special skills to effectively monitor and make the decisions involved. For this reason, a fiduciary obligation may be appropriate. As Professor Frankel puts it at p. 145, "The law aims at deterring fiduciaries from misappropriating the powers vested in them solely for the purpose of enabling them to perform their functions". We agree as well with Professor Finn at p. 15, cited by our colleague, at p. 35 [p. 31], that imposition of fiduciary obligations in some cases may be justified on the ground of "maintenance of the public's acceptance of, and the credibility of, important institutions in society which render 'fiduciary' services". But neither of these rationales would appear to justify imposing a fiduciary obligation on the purveyor of investment advice where the client retains the power and ability to make the decisions of which he later complains. And neither undermines our colleague's view, which we share, that once imposed, the fiduciary "rule should be strictly pursued": *Keech v. Sandford, supra*, at p. 223. Ultimately, the stringent measure of compensation for breach of fiduciary duty, which may take a different view of loss causation than tort and contract law, can be justified only in cases where true trust in the sense of complete reliance is demonstrated.

137 The question then, as we see it, is whether the facts in this case are capable of demonstrating the unilateral exercise of power by the alleged fiduciary and the correlative total reliance on that person by the beneficiary required to establish a fiduciary obligation.

B. Application of the Principle to the Relationship at Bar

138 We acknowledge at the outset that we accept the principle that a court of appeal must not interfere with the findings of fact of the trial judge unless they are clearly unsupported on the evidence. In our view the trial judge's error in this case lay elsewhere. It lay in her failure to ask herself whether Mr. Hodgkinson had given and Mr. Simms had assumed total power over the affairs in question. In fact, the evidence, however it may be construed, falls short of establishing the contention that this total concession of power occurred. In other words, it is not a question of interfering with the trial judge's findings of fact, but rather of concluding that there was no evidence upon which the trial judge could reasonably have concluded that Mr. Simms had assumed a fiduciary obligation to Mr. Hodgkinson. In saying this, we do not wish to be taken as offering any criticism of the trial judge. She did not have the advantage of this Court's reasons in *LAC Minerals* when she made her decision.

139 The Court of Appeal focused directly on the requirement of a concession of unilateral power by the beneficiary to the trustee as explained by Wilson J. in *Frame* as adopted in *LAC Minerals*. McEachern C.J.B.C. stated, at p. 275:

> As the authorities suggest, the power or discretion of the alleged fiduciary to deal with the property of the victim is a highly significant feature of a fiduciary relationship. There is in this case no suggestion that the plaintiff gave the defendant any unilateral authority or discretion to prefer his own position or that of the developers to the disadvantage of the plaintiff.
>
> This is because, with respect to each investment, the choice to invest or not to invest was entirely that of the plaintiff.

140 McEachern C.J.B.C. reviewed individually the investment decisions made by Mr. Hodgkinson. He found that in every case Mr. Hodgkinson was given complete and accurate information with respect to the financial projections and the anticipated tax savings. There was, in fact, no allegation of fraud or dishonesty made against Mr. Simms. Neither does it appear that Mr. Hodgkinson was placed under time pressures with respect to the investments or that he was subjected to any "hard-sell" techniques to obtain his investment dollars. Most importantly, there was nothing in the evidence to support the theory that Mr. Hodgkinson had conferred any discretion or power on Mr. Simms, or that Mr. Simms used his position to exercise unilateral power over the legal or practical interests of Mr. Hodgkinson.

141 The evidence shows that Mr. Hodgkinson looked to Mr. Simms for advice with respect to investments and tax shelters. As the trial judge found, he accepted that advice. But it flies in the face of the evidence to suggest that he did so unreflectively. Mr. Hodgkinson discussed each investment with Mr. Simms. He was given an accurate and fair written description of each development and was aware of the financial projections and the estimated tax savings. Mr. Hodgkinson met with the developers

on more than one occasion. He took time for consideration. Finally, he chose to invest. As McEachern C.J.B.C. put it at p. 278, "the plaintiff was not peculiarly vulnerable, let alone at the mercy of or under the domination of the defendant."

142 We add that this does not mean that advisors, financial or otherwise, can never be subject to fiduciary obligations. Each relationship must be examined on its own facts. A relationship where one party unreflectively and automatically accepts the advice of the other might raise different considerations. The critical question, as noted earlier, is whether there is total assumption of power by the fiduciary, coupled with total reliance by the beneficiary. In short, that the beneficiary was vulnerable in the sense of being at the mercy of the fiduciary's discretion. That is not, on the evidence, the sort of relationship which is before us on this appeal.

143 On the facts of this case, no fiduciary obligation arises. Mr. Simms' only liability is for breach of contract. We turn then to the measure of damages for breach of contract in these circumstances.

2. Damages

A. The Compensation Principle

144 In *Asamera Oil Corp. v. Sea Oil & General Corp.*, *supra*, Estey J., for the Court, set out the general principle of compensation underlying damages for breach of contract, at p. 645, stating:

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

However, the harshness which the compensation principle would visit on defendants, if rigidly applied, has been recognized and its rigours mitigated in law. As Asquith L.J. noted in *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.*, *supra*, at p. 539 [K.B.]:

> It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed ... *This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule.* [Emphasis added.]

145 In order to avoid either under-compensation or over-compensation, the measure of damages in law is limited by the concept of the foreseeability of the resulting loss. Moreover, the principles must be sufficiently flexible in their application to insure that the measure of damages is reasonable in the circumstances of the individual case.

B. The Foreseeability Limitation on the Compensation Principle

146 In *Hadley v. Baxendale* (1854), 9 Exch. 341, 156 E.R. 145, the House of Lords held that the contract breaker was responsible for losses which fairly and reasonably could be considered to have arisen from the breach of contract itself *or* may reasonably have been within the contemplation of the parties at the time of contracting as the probable result of the breach. Therefore, two considerations have emerged in the legal analysis associated with the measure of damages, causation and the reasonable contemplation of the parties.

(a) Causation

147 The appellant in this case does not allege that the losses which he incurred were caused directly by the respondent's breach of contract. Instead, he claims that "but for" the respondent's breach of the first contract, the appellant would not have entered into subsequent investment contracts which, due to an economic downturn, were significantly devalued. A literal application of the "but for" approach to causation has been rejected in British, Canadian and American case law, in the context of both equitable and common law claims.

148 In *Waddell v. Blockey* (1879), 4 Q.B.D. 678, a case involving an action for fraudulent misrepresentation, the Queen's Bench Division ordered damages in the amount of the difference between the price paid by the individual represented by the plaintiff and the fair market value of the item sold. Although the rupee paper would not have been purchased had the defendant made full disclosure of the fact that he owned the paper which he sold to the purchaser, the defendant was not held liable for the resulting losses sustained by the purchaser due to devaluation of the item. Thesiger L.J. reasoned as follows in this regard at p. 682 and at p. 684:

> There is [in this case] no natural or proximate connection between the wrong done and the damage suffered ...
>
> But the present case is complicated by the circumstance of the defendant's fiduciary position in the matter of the purchase, and by the fact that the fraud did not touch the value of the article sold ... *It would seem, however, strange if under such circumstances a plaintiff who has got the article he bargained for, upon whom no fraud as regards its value has been practised, could, after the article has been depreciated and resold at a loss owing to a cause totally unconnected with the fraud, claim to recover all the loss which he has thereby sustained. I cannot see upon what principle such a claim could be based.* [Emphasis added.]

Similarly, in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 [[1992] 1 W.W.R. 245, 61 B.C.L.R. (2d) 1], at p. 580, this Court recognized that the results of supervening events beyond the control of the defendant are not justly visited upon him/her in assessing damages, even in the context of the breach of an equitable duty.

149 A similar line of authority has developed in several U.S. cases involving common law claims of fraudulent and negligent misrepresentation and the application of the *Securities Exchange Act of 1934*, 15 U.S.C. ¶78j(b) and S.E.C. R. 10b-5. In *McGonigle v. Combs*, 968 F. 2d 810 (1992), the Ninth Circuit of the United States Court of Appeals stated the following with respect to the causal requirement in cases involving allegations of misrepresentation leading to investments with third parties, at p. 821:

> Plaintiffs would have us interpret the "causal connection" requirement of ... [*Accord Securities Investor Protection Corp. v.*] *Vigman* [908 F.2d 1461 (9th Cir. 1990)] very broadly. They argue that their loss was "caused" by the misrepresentations simply because the misrepresentations of the "quality" of their investment induced them to buy the shares which then declined in value. The misrepresentations, they argue, caused the loss because the loss would not have occurred if the misrepresentations had not been made. We reject this interpretation, because it renders the concept of loss causation meaningless by collapsing it into transaction causation. The dual and independent requirements of transaction causation and loss causation, as we noted in *Vigman*, are analogous to the basic tort principle that a plaintiff must demonstrate both "but for" and proximate causation ... As the Fifth Circuit stated in *Huddleston*, 640 F.2d at 549, "*[t]he plaintiff must prove not only that, had he known the truth, he would not have acted, but in addition that the untruth was in some reasonably direct, or proximate, way responsible for his loss*. The causation requirement is satisfied in a Rule 10b-5 case only if the misrepresentation touches upon the reasons for the investment's decline in value." [Emphasis added.]

150 This decision reflected prior jurisprudence of that Court which determined that in an action under R. 10b-5 for material omissions or misstatements, "the plaintiff must prove both transaction causation, that the violations in question caused the plaintiff to engage in the transaction, and loss causation, that the misrepresentations or omissions caused the harm": *Hatrock v. Edward D. Jones & Co.*, 750 F. 2d 767 (9th Cir., 1984), at p. 773.

151 Although these U.S. cases involve interpretation of a protective provision in securities exchange legislation, the basic premise underlying those decisions is consistent with the concern for avoiding undue harshness in damage awards expressed in English and Canadian cases previously mentioned. While we would not wish to be taken as agreeing with this particular approach to damages in a situation where a material misrepresentation resulted in a loss to an investor, we do agree with the application of the principle in situations where the representation itself is not causally connected to the devaluation. In such situations, where the losses incurred by a plaintiff are related to the contractual breach of the defendant merely on a "but for"

basis, it would be unduly harsh to impose liability for all of the losses upon the defendant, especially where the direct cause of the loss is outside of the defendant's control.

(b) Reasonable Contemplation

152 The law in relation to the reasonable contemplation of the parties in assessing damages was elaborated upon by Asquith L.J. in *Victoria Laundry*, *supra*, at pp. 539-40:

> (2.) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting *as was at the time of the contract reasonably foreseeable as liable to result from the breach*...
>
> (5.) In order to make a contract-breaker liable ... it is not necessary that he should actually have asked himself what loss is liable to result from a breach ... It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result ...
>
> (6.) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. [Emphasis added.]

C. Application to the Case at Bar

153 In assessing the damages for respondent's breach of contract it is necessary to ask whether the loss sustained by the appellant arose naturally from a breach thereof *or* whether at the time of contracting the parties could reasonably have contemplated the loss flowing from the breach of the duty to disclose. In the event that either criterion is satisfied, the respondent should be held liable for that loss. Finally, the damage assessment as a whole must represent a fair resolution on the facts of this case.

(a) Causation

154 In our view, it cannot be concluded that the devaluation of the appellant's investments arose naturally from the respondent's breach of contract. The loss in value was caused by an economic downturn which did not reflect any inadequacy in the advice provided by the respondent. We would reject application of the "but for" approach to causation in circumstances where the loss resulted from forces beyond the control of the respondent who, the trial judge determined, had provided otherwise sound investment advice. Therefore, the respondent cannot be held liable for the appellant's losses under the first arm of the test set out in *Hadley*, *supra*.

(b) Reasonable Contemplation

155 Turning to the second arm of the *Hadley* test, the trial judge made certain findings of fact as to what the reasonable contemplation of the parties had been at the time of contracting. With respect to the first contract, between the appellant and the respondent, the trial judge concluded that the respondent fulfilled his requirement to give sound investment advice to the appellant and found that there had been no negligent misrepresentation with respect to the quality of the investments in question. The trial judge also concluded that if the parties had turned their minds to the potential consequences of the respondent's failure to make full disclosure to the appellant under the first contract, they would have contemplated that the appellant would not have entered the subsequent investment contracts and that a change in the economy could adversely affect any investment.

156 However, the material question to be considered is whether the parties would reasonably have contemplated the losses associated with an economic downturn as liable to result from the respondent's breach of his duty to make full disclosure: *Victoria Laundry*, *supra*. This question can only be answered in the negative. It would simply not be reasonable for the parties to have contemplated that the respondent's failure to make full disclosure was likely to result in devaluation of the investment due to an economic downturn. As indicated previously, the two events were in no way causally related. The answer might have been

different had the respondent's services been defective with respect to assessing the likelihood of economic downturn or the likely effect of an economic downturn on the future value of the investments. However, no such defects were revealed in this case.

157 Moreover, the fact that the breach of the duty to disclose was a continuing one does not affect our conclusion in this regard. The factual finding was that the investments were sound ones, but for the economic downturn, and there is no evidence to indicate that, had the respondent disclosed his conflicting interests prior in time to the economic downturn, the appellant would have sold his interest in the investments. In fact, it would be unreasonable to infer that he would have done so, given that the investments were sound ones.

158 In situations involving breach of a duty to disclose, courts have consistently recognized the right of plaintiffs to compensation for losses equivalent to the difference between the price which they paid for a particular investment and the actual value of the investment purchased: *Waddell, supra, Canson, supra.* In the case at bar, the trial judge concluded that there was no evidence to indicate that the appellant had paid anything more than the fair market value for the investments which he made. Therefore, it would appear that no damages should have been assessed. However, McEachern C.J.B.C. in the Court of Appeal concluded, at p. 280, that "the law so dislikes a failure of disclosure of material facts that it assumes the value of the investment was less than the amount paid, at least to the extent of the amounts paid by the developer to the defendant." There was no cross-appeal from the judgment of the Court of Appeal. In these circumstances we are not entitled to reduce the award of damages made by the Court of Appeal.

IV. Conclusion

159 For the foregoing reasons, we would dismiss this appeal and maintain the damage award ordered by the British Columbia Court of Appeal. Pursuant to that order, the appellant is entitled to his prorated share of the fees paid by the developers to the respondent on the four projects. If the parties are unable to agree upon the exact amount, the matter should be referred back to the trial court.

***Iacobucci J.* (concurring):**

160 I agree with La Forest J. that the trial judge did not err in finding that a fiduciary duty existed between the parties, and that the respondent breached this duty by not disclosing the pecuniary interest with the developers. I also agree with my colleague's views on the question of damages. Although I agree with much of my colleague's excellent reasons, I prefer to treat *International Corona Resources Ltd. v. LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, by simply distinguishing that case from the present one.

161 I would dispose of the appeal in the manner proposed by La Forest J.

Appeal allowed.

THE TRUSTEES OF THE LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA et al v. SINO-FOREST CORPORATION et al.

CV-11-431153-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

RESPONDING BOOK OF AUTHORITIES OF SFC LITIGATION TRUST
(Settlement Approval Motion Returnable May 11, 2015)

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