No. S-224444
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

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

AND

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF CANADIAN DEHUA INTERNATIONAL MINES GROUP INC.

PETITIONER

BOOK OF AUTHORITIES OF RESPONDENTS
TANEMUHATA CAPITAL, LTD. and AREF AMANAT
Re: Approval of Sale and Indemnify Costs

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and Aref Amanat

January 13, 2025 at 10:00 a.m.
Vancouver Registry
Two Days
The Honourable Justice Walker

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Citation: Festing v. Canada (Attorney General)
2001 BCCA 612

Date: 20011105

Docket: CA026973
CA026974
CA027048

Registry: Vancouver

2001 BCCA 612 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

IN THE MATTER OF APPLICATIONS PURSUANT TO SECTIONS 487 AND 488.1 OF THE *CRIMINAL CODE* OF CANADA

CA026973

BETWEEN:

MARK FESTING, ASHLEIGH FESTING, B.W.I. MANAGEMENT LTD. (formerly Phased International Holdings Ltd.), CEJAY EQUITIES LTD., PHASE CONSTRUCTION LTD. (formerly Phased Construction Ltd.), M.P.H. HOLDINGS LTD., O.S. CONSTRUCTION SERVICES LTD., PHASE CONSTRUCTION (W.V. LTD.), PHASE CONSTRUCTION (N.S.) LTD., 475338 BRITISH COLUMBIA LTD., MARASH HOLDINGS LTD., ASHMAR DEVELOPMENTS LTD., ASHMAR LEASING LTD., PHASE REALTY INC., THE KEYSTONE TRUST, ROCKWELL MANAGEMENT LTD., PHASE CONSTRUCTION (R.M.) LTD., and STONE HAVEN DEVELOPMENTS LTD.

AND BETWEEN:

STEVEN O. YOUNGMAN

AND BETWEEN:

PAUL GASTER

APPLICANTS
(RESPONDENTS)

AND:

ATTORNEY GENERAL OF CANADA

RESPONDENT
(APPELLANT)

AND:

LAW SOCIETY OF BRITISH COLUMBIA

INTERVENOR

— and —

CA026974

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT
(APPELLANT)

AND:

ERIC EMERSON HUBER

APPLICANT
(RESPONDENT)

— and —

CA027048

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

ERIC EMERSON HUBER

APPELLANT

Before: The Honourable Madam Justice Prowse
The Honourable Mr. Justice Donald
The Honourable Madam Justice Newbury

J.A. Van Iperen, Q.C. and A. Chan — Counsel for Attorney General of Canada

R.C.C. Peck, Q.C. and J.T. Campbell — Counsel for the Respondent, Steven O. Youngman

M.A. Nathanson — Counsel for the Respondent Paul Gaster

G.P. DelBigio — Counsel for Eric Emerson Huber

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M.G. Underhill — Counsel for the Intervenor, Law Society of British Columbia

Place and Date of Hearing: Vancouver, British Columbia, September 13, 2001

Place and Date of Judgment: Vancouver, British Columbia, November 5, 2001

Written Reasons by:
The Honourable Madam Justice Prowse

Concurred in by:
The Honourable Mr. Justice Donald

Dissenting Reasons by:
The Honourable Madam Justice Newbury (Page 53, para. 87)

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Reasons for Judgment of the Honourable Madam Justice Prowse:

NATURE OF APPEALS

[1] These two appeals concern the constitutionality of ss. 487 and 488.1 of the ***Criminal Code***, R.S.C. 1985, c. C-46 (the "Code") in relation to the search of law offices and the seizure of documents therein. In summary, s. 487 of the Code authorizes the issuance of search warrants for premises, including law offices, and for the seizure of documents at those premises. Section 488.1, in turn, provides a mechanism for solicitor-client privilege to be claimed with respect to documents seized from a law office under a warrant.

[2] On March 10, 2000, Mr. Justice Romilly upheld the constitutionality of s. 487 of the Code but declared s. 488.1 of the Code to be of no force and effect on the basis that it breached ss. 7 and 8 of the ***Canadian Charter of Rights and Freedoms*** (the "Charter"), and could not be saved under s. 1.

[3] The Attorney General of Canada (the "Attorney General") is appealing Mr. Justice Romilly's decision as it relates to s. 488.1 of the Code. Mr. Huber, Mr. Youngman and Mr. Gaster (the "respondents"), are cross-appealing the decision as it relates to s. 487. The Law Society of British Columbia has

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intervened and supports the position of the respondents with respect to both the appeal and the cross-appeal.

RELATED PROCEEDINGS

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[4] In finding that s. 488.1 of the Code breached s. 8 of the Charter, Mr. Justice Romilly followed the decision of the Alberta Court of Appeal in ***Lavallee, Rackel and Heintz v. Canada (Attorney General)*** (2000), 143 C.C.C. (3d) 187. Subsequent to his decision, the Courts of Appeal of Ontario, Nova Scotia and Newfoundland have also held that s. 488.1 of the Code is unconstitutional on the basis that it breaches s. 8 of the Charter. The decisions in that regard are: ***R. v. Claus*** (2000), 149 C.C.C. (3d) 336 (Ont. C.A.); ***R. v. Fink*** (2000), 149 C.C.C. (3d) 321 (Ont. C.A.); ***Canada (Attorney General) v. Several Clients***, [2000] N.S.J. No. 384 (C.A.) (Q.L.); and ***White, Ottenheimer & Baker v. Canada (Attorney General)*** (2000), 146 C.C.C. (3d) 28 (Nfld. C.A.).

[5] In ***Lavallee***, ***Claus***, ***Fink*** *and* **Several Clients**, the courts struck down s. 488.1. In ***White,*** the Newfoundland Court of Appeal concluded that, although s. 488.1 breached s. 8 of the Charter, it could be saved by application of the constitutional remedies of severance and reading in.

[6] The constitutionality of s. 487 of the Code was not in issue in any of these decisions.

[7] The Supreme Court of Canada has granted leave to appeal from the four appellate decisions to which I have referred. The appeals are set to be heard on December 13 and 14, 2001.

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ISSUES

[8] The issues on the appeal and cross-appeal are:

(a) whether Mr. Justice Romilly erred in finding that s. 488.1 of the Code breached ss. 7 and 8 of the Charter and could not be saved under s. 1;

(b) whether Mr. Justice Romilly erred in failing to apply the constitutional remedy of reading down and reading in rather than declaring s. 488.1 to be of no force and effect;

(c) whether Mr. Justice Romilly erred in finding that s. 487 of the Code did not breach either s. 7 or s. 8 of the Charter;

(d) in the event this Court decides that s. 487 of the Code is unconstitutional, whether the Court should apply the constitutional remedies of reading down or reading in to restrict its application to premises other than law offices.

FACTUAL BACKGROUND

[9] It is unnecessary to review in detail the factual background of the searches and seizures giving rise to these constitutional challenges in order to discuss the legal issues

which have been raised on this appeal. That background is set out in the reasons for judgment of Mr. Justice Romilly, reported at (2000), 5 W.W.R. 413. I will, however, refer briefly to the individual circumstances of each of the respondents who is participating in this appeal.

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[10] Mr. Huber is the client of a Kelowna law firm whose offices were searched pursuant to a warrant issued by the Associate Chief Justice of the Supreme Court under s. 487 of the Code in relation to an investigation of Mr. Huber for alleged offences under the ***Controlled Drugs and Substances Act*** 1996, c. 19. In accordance with B.C. practice, a lawyer was appointed custodian of the law practice for the purpose of the search. Some of the documents seized as a result of the search were sealed and given into the custody of the Sheriff in Kelowna pending an application under s. 488.1 of the Code with respect to solicitor-client privilege. Further documents were seized pursuant to a later warrant and are also being held by the Sheriff. An application made by the Attorney General to determine the privilege claim was adjourned generally pending the outcome of the constitutional challenges to ss. 487 and 488.1 of the Code.

[11] Mr. Youngman is a lawyer whose law office and home in Vancouver were subjected to searches pursuant to a warrant

issued by the Associate Chief Justice under s. 487 of the Code in relation to the investigation of certain of Mr. Youngman's clients for alleged offences under the ***Income Tax Act***, R.S.C. 1985, c. 1 (5th Supp.). A custodian was appointed by Supreme Court order for the purposes of the search, and all documents over which privilege was claimed were sealed and given into the custody of the Registry of the Supreme Court in Vancouver. Applications with respect to claims of privilege relating to these documents have been adjourned generally pending the outcome of these proceedings.

[12] Mr. Gaster is an accountant employed by Wolrige Mahon in Vancouver. Search warrants obtained pursuant to s. 487 of the Code were executed both on Mr. Gaster's office in Vancouver and at the storage facilities of Wolrige Mahon in Burnaby with respect to alleged breaches of the ***Income Tax Act*** by certain of Mr. Gaster's clients. Counsel present at the searches asserted privilege over certain documents and those were seized and placed in storage at the Supreme Court Registry in Vancouver.

[13] In accordance with what counsel for the Attorney General advised was a standard practice in British Columbia, all of the warrants leading to the searches and seizures in issue on

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this appeal included an addendum worded substantially as follows:

SPECIAL PROCEDURES

1. Before attending at the premises named in this Warrant to Search, the Peace Officer in charge of executing the Warrant shall advise the Secretary of the Law Society of British Columbia, Ted HUGHES, or the Director of Discipline and Complaints, Jean WHITTOW, of the name and location of the premises to be searched and the time and date of the search in order that the Law Society may designate a representative to attend on its behalf at the search if it sees fit to do so.

2. The Solicitor upon whom this warrant to Search is executed ("the Solicitor") shall immediately be advised by the Peace Officer executing the Warrant to Search that he may immediately contact the Secretary of the Law Society of British Columbia, Ted HUGHES, or Jean WHITTOW or their designate, for guidance regarding his obligation resulting from the execution of the Warrant to Search.

3. In order to give full force and effect to the provisions of Section 488.1 of the Criminal Code, the Peace Officers executing this warrant shall not commence the search of the premises until a representative of the Law Society has attended at the premises or has given the Solicitor the opportunity to confer with him regarding the Solicitor's obligations resulting from the execution of this warrant, but nothing shall be removed from the premises and the Peace Officers executing this Warrant to Search may take such steps as are necessary to secure the premises to prevent the removal of any articles and they may commence their search immediately if anyone attempts to remove anything from the premises.

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4. If the Solicitor cannot be reached, at the premises named in this Search Warrant, and attempts to determine and locate him at his residence fail, entry may be made by force, with notice to a representative of the Law Society of British Columbia of the intention to do so by the Peace Officer executing the search warrant.

5. Where an officer acting under the authority of the Warrant to Search is about to examine copy or seize a document in the possession of the Solicitor, the Solicitor, or a person on his behalf, claims that a named client of his has a solicitor-client privilege in respect of that document, the Officer shall, without examining or making copies of the document,

a. seize the document, place it in a package and suitably seal and identify the package, and

b. place the package in the custody or Office of the Sheriff, [name and address], or if there is agreement in writing that a specified person act as custodian, in the custody of that person.

6. Where a document has been seized and placed in custody pursuant to this Warrant to Search, the Attorney General, or the client, or the Solicitor on behalf of the client, may:

a. within fourteen days from the day the document was so placed in custody, apply on two days' notice of motion, to all other persons entitled to make application, to a judge for an order,

b. appointing a place and a day, not later than 21 days after the date of the Order, for the determination of the question whether the document shall be disclosed, and

c. requiring the custodian to produce the document to the judge at that time and place:

i. serve a copy of the Order on all other persons entitled to make application and on the

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custodian within six days of the date on which it was made; and

ii. if he has proceeded as authorized by paragraph (b), apply, at the appointed time and place, for an order determining the question.

7. Where a document has been seized and placed in custody pursuant to section 488.1(2) of the Criminal Code and a Judge, on the application of the Attorney General, is satisfied that no application has been made under Section 488.1(3)(a) of the Criminal Code or that, following such an application, no further application has been made under Section 488.1(3)(c) of the Criminal Code, the custodian shall deliver the document to the officer who seized the document or to some other person designated by the Attorney General.

[14] The origin of these "Special Procedures" is not entirely clear. They were apparently derived from an early Practice Directive issued by a former Chief Justice of the Supreme Court following the enactment of s. 488.1 of the Code, with a view to providing protections for solicitor-client privilege beyond those contained in s. 488.1.

THE CONSTITUTIONAL ISSUES

(1) The Relevant Statutory Provisions

[15] Section 487 provides, in part:

487. (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

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(*a*) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,

(*b*) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,

(*c*) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or

(*c*.1) any offence-related property,

may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant

(*d*) to search the building, receptacle or place for any such thing and to seize it, and

(*e*) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

. . .

(2.1) A person authorized under this section to search a computer system in a building or place for data may

(*a*) use or cause to be used any computer system at the building or place to search any data contained in or available to the computer system;

(*b*) reproduce or cause to be reproduced any data in the form of a print-out or other intelligible output;

(*c*) seize the print-out or other output for examination or copying; and

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(*d*) use or cause to be used any copying equipment at the place to make copies of the data.

(2.2) Every person who is in possession or control of any building or place in respect of which a search is carried out under this section shall, on presentation of the warrant, permit the person carrying out the search

(*a*) to use or cause to be used any computer system at the building or place in order to search any data contained in or available to the computer system for data that the person is authorized by this section to search for;

(*b*) to obtain a hard copy of the data and to seize it; and

(*c*) to use or cause to be used any copying equipment at the place to make copies of the data.

[16] Section 488.1 provides:

488.1 (1) In this section,

"custodian" means a person in whose custody a package is placed pursuant to subsection (2);

"document", for the purposes of this section, has the same meaning as in section 321;

"judge" means a judge of a superior court of criminal jurisdiction of the province where the seizure was made;

"lawyer" means, in the Province of Quebec, an advocate, lawyer or notary and, in any other province, a barrister or solicitor;

"officer" means a peace officer or public officer.

(2) Where an officer acting under the authority of this or any other Act of Parliament is about to examine, copy or seize a document in the possession of a lawyer who claims that a named client of his

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has a solicitor-client privilege in respect of that document, the officer shall, without examining or making copies of the document,

(*a*) seize the document and place it in a package and suitably seal and identify the package; and

(*b*) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is agreement in writing that a specified person act as custodian, in the custody of that person.

(3) Where a document has been seized and placed in custody under subsection (2), the Attorney General or the client or the lawyer on behalf of the client, may

(*a*) within fourteen days from the day the document was so placed in custody, apply, on two days notice of motion to all other persons entitled to make application, to a judge for an order

(i) appointing a place and a day, not later than twenty-one days after the date of the order, for the determination of the question whether the document should be disclosed, and

(ii) requiring the custodian to produce the document to the judge at that time and place;

(*b*) serve a copy of the order on all other persons entitled to make application and on the custodian within six days of the date on which it was made; and

(*c*) if he has proceeded as authorized by paragraph (*b*), apply, at the appointed time and place, for an order determining the question.

(4) On an application under paragraph (3)(*c*), the judge

(*a*) may, if the judge considers it necessary to determine the question whether the document should be disclosed, inspect the document;

(*b*) where the judge is of the opinion that it would materially assist him in deciding

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whether or not the document is privileged, may allow the Attorney General to inspect the document;

(*c*) shall allow the Attorney General and the person who objects to the disclosure of the document to make representations; and

(*d*) shall determine the question summarily and,

(i) if the judge is of the opinion that the document should not be disclosed, ensure that it is repackaged and resealed and order the custodian to deliver the document to the lawyer who claimed the solicitor-client privilege or to the client, or

(ii) if the judge is of the opinion that the document should be disclosed, order the custodian to deliver the document to the officer who seized the document or some other person designated by the Attorney General, subject to such restrictions or conditions as the judge deems appropriate,

and shall, at the same time, deliver concise reasons for the determination in which the nature of the document is described without divulging the details thereof.

(5) Where the judge determines pursuant to paragraph (4)(*d*) that a solicitor-client privilege exists in respect of a document, whether or not the judge has, pursuant to paragraph (4)(*b*), allowed the Attorney General to inspect the document, the document remains privileged and inadmissible as evidence unless the client consents to its admission in evidence or the privilege is otherwise lost.

(6) Where a document has been seized and placed in custody under subsection (2) and a judge, on the application of the Attorney General, is satisfied that no application has been made under paragraph (3)(*a*) or that following such an application no further application has been made under paragraph (3)(*c*), the judge shall order the custodian to deliver the document to the officer who seized the

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> document or to some other person designated by the Attorney General.
>
> (7) Where the judge to whom an application has been made under paragraph (3)(*c*) cannot act or continue to act under this section for any reason, subsequent applications under that paragraph may be made to another judge.
>
> (8) No officer shall examine, make copies of or seize any document without affording a reasonable opportunity for a claim of solicitor-client privilege to be made under subsection (2).
>
> (9) At any time while a document is in the custody of a custodian under this section, a judge may, on an *ex parte* application of a person claiming a solicitor-client privilege under this section, authorize that person to examine the document or make a copy of it in the presence of the custodian or the judge, but any such authorization shall contain provisions to ensure that the document is repackaged and that the package is resealed without alteration or damage.
>
> (10) An application under paragraph (3)(*c*) shall be heard in private.
>
> (11) This section does not apply in circumstances where a claim of solicitor-client privilege may be made under the *Income Tax Act*.

(2) Decision of the Trial Judge

[17] As earlier stated, Mr. Justice Romilly concluded that s. 488.1 of the Code was unconstitutional on the basis that it violated s. 8 of the Charter. He summarized his conclusions in that regard in the following passage at para. 84 of his reasons for judgment:

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> To summarize, in my view the following features of s. 488.1 *prima facie* operate to violate a client's reasonable expectation of privacy under s. 8:
>
> 1. the absence of any notice provisions for clients, and the prospect that privilege can therefore be effectively lost or waived without notice to the client by operation of s. 488.1(6);
> 2. the above problem is exacerbated by the strict time limits contained in s. 488.1(3), particularly in light of the practical difficulties of notifying clients when multiple files of a lawyer are searched and seized. In the result, privileged documents may "fall through the cracks";
> 3. privilege may be potentially lost to the prosecuting authority by virtue of s. 488.1(4)(b);
> 4. the requirement to name clients under s. 488.1(2) may result in a loss of privilege.

[18] Mr. Justice Romilly also concluded that, since the right to be free from unreasonable search and seizure was a principal of fundamental justice within the meaning of s. 7 of the Charter, the aforesaid breaches of s. 8 of the Charter constituted a *prima facie* breach of s. 7 of the Charter. He did not deal expressly with the question of whether the right to solicitor-client privilege is an independently protected right under s. 7 of the Charter.

[19] Mr. Justice Romilly also found that the Attorney General had not justified the breaches of ss. 7 and 8 of the Charter under s. 1. His reasons in that regard, which apply the analysis set forth by the Supreme Court of Canada in ***R. v.***

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Oakes, [1986] 1 S.C.R. 103, are summarized at paras. 90-91 of his reasons as follows:

> In my view, the purpose of s. 488.1 can rightly be stated as the determination of solicitor-client privilege of documents in the possession of a lawyer upon the execution of a search warrant on a law office. I have no trouble concluding that this objective relates to concerns that are pressing and substantial in a free and democratic society.
>
> Are the means chosen reasonable and demonstrably justified? Clearly underlying the objective of s. 488.1 is the protection of the privacy interests of clients of lawyers whose files are seized. Also underlying the purpose of s. 488.1 is the public interest in an expeditious administration of justice. I find though that s. 488.1 goes too [far] in insuring expediency and efficiency and not far enough in protecting the privacy rights of clients whose files are seized. Even in the interests of expediency and efficiency, there is no pressing and substantial need for the impugned features of the legislation: the naming of clients under s. 488.1(2); privilege lost by default if no action or missed deadline by lawyer; no notice to clients; loss of privilege to the Attorney General under s. 488.1(4)(b). The respondents have failed to show how these impugned provisions are rationally connected to the objective of s. 488.1. They have failed also to show that these provisions minimally impair a client's rights to privacy. And they have failed to show that the salutary effects of s. 488.1 outweigh the deleterious effects. Section 488.1 contemplates the loss of solicitor-client privilege rightly belonging to a client without the consent or knowledge of the client. It contemplates the naming of a client which may itself be a loss of privilege. And it contemplates the loss of privilege to the prosecuting authority. In my mind, that is not laudable legislation and I am certain that there are less intrusive means available.

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[20] Mr. Justice Romilly rejected the Attorney General's invitation to avoid striking down s. 488.1 by applying the constitutional remedies of reading in or reading down. Romilly J. noted that the Alberta Court of Appeal had declined a similar invitation. He concluded, at para. 94, that amending s. 488.1 to comply with the Charter was "a job that is properly left to Parliament."

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[21] Mr. Justice Romilly was not persuaded that s. 487 of the Code breached s. 7 or s. 8 of the Charter. At para. 102 of his reasons for judgment, he stated, in part:

> In my view, s. 487 of the ***Criminal Code*** does not abrogate solicitor-client privilege. Section 487 does not either expressly or implicitly exclude solicitor-client privilege. While peace officers may enter a law office under s. 487, they may not have access to documents upon which solicitor-client privilege exists. Section 487 does not infringe that right. There is no question that s. 487 may occasion invasions of privacy. But that does not make a search of a law office authorized under s. 487 necessarily unreasonable. The search warrant invades privacy insofar as it allows a search of a place. A search warrant issued under the hands of a justice respecting a law office constitutes a lawful breach of a privacy interests [sic]. The search will be unreasonable only insofar as it precludes protection for solicitor-client privilege rights.

[22] Mr. Justice Romilly went on to state that s. 487 does not preclude protection of solicitor-client privilege since justices of the peace have the power to impose conditions to

protect those rights in accordance with the common law. In that regard, Romilly J. placed particular reliance on the decision of the Supreme Court of Canada in ***Descôteaux v. Mierzwinski***, [1982] 1 S.C.R. 860. To the extent that the common law was unable to protect solicitor-client privilege in a particular case, Romilly J. found that the appropriate remedy was the quashing of the search warrant, not the striking down of the legislation authorizing the warrant.

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(3) Section 488.1 of the Code

(a) Does s. 488.1 Breach s. 8 of the Charter?

[23] This issue has been canvassed at length by Mr. Justice Romilly, and by the Courts of Appeal of Alberta, Ontario, Nova Scotia and Newfoundland. I agree with their conclusion that s. 488.1 of the Code breaches s. 8 of the Charter, generally for the reasons given by them and, in particular, for the reasons given by Mr. Justice Romilly. I can see no useful purpose in repeating their thorough analyses of this issue.

(b) Does s. 488.1 Breach s. 7 of the Charter?

[24] Having upheld the decision of Romilly J. that s. 488.1 breaches s. 8 of the Charter, I find it unnecessary to decide whether that section also breaches s. 7 of the Charter. Like

the Courts of Appeal in the four provinces which have considered this question, I decline to express any view on it.

(c) Section 1 of the Charter

[25] I agree with Mr. Justice Romilly that the Attorney General has not established that the breach of s. 8 of the Charter can be justified under s. 1 of the Charter. In that regard, I would adopt the reasons of Mr. Justice Romilly quoted at para. 19 of these reasons. His conclusion with respect to s. 1 is shared by the Courts of Appeal of Alberta, Ontario, Nova Scotia and Newfoundland.

(d) The Appropriate Remedy

[26] As earlier noted, Mr. Justice Romilly concluded that the appropriate remedy was to strike down s. 488.1 of the Code and to declare it to be of no force and effect. The only court which has taken a different approach to the question of remedy is the Newfoundland Court of Appeal in ***White***, *supra*. It concluded that the appropriate remedy was to apply the constitutional remedies of severance and reading in to rectify the deficiencies in s. 488.1 which had been identified. The other courts of appeal declined to engage in this exercise on the basis that correcting the deficiencies in s. 488.1 was the role of Parliament, not the courts.

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[27] None of the parties to this appeal has asked this Court to apply the constitutional remedies of severance, reading in or reading down. All of them agree that, in the event s. 488.1 is found to be unconstitutional, the appropriate remedy is to strike it down and leave it to Parliament to amend the legislation to accord with the Charter. They also agree that it would be appropriate for this Court to suspend the effect of its decision until the issue has been decided by the Supreme Court of Canada.

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[28] With respect to the question of constitutional remedies, counsel referred us to ***Vriend v. Alberta***, [1998] 1 S.C.R. 493. At paras. 144-45 of that decision, Cory and Iacobucci JJ., speaking for the majority, stated:

> The leading case on constitutional remedies is *Schacter* [*v. Canada* [1992], 2 S.C.R. 679] . . . .
>
> In *Schacter*, this court noted that, depending upon the circumstances, there are several remedial options available to a court in dealing with a *Charter* violation that was not saved by s. 1. These include striking down the legislation, severance of the offending provisions, striking down or severance with a temporary suspension of the declaration of invalidity, reading down, and reading provisions into the legislation.

[29] In ***Schacter***, Chief Justice Lamer observed that the purpose of these remedies is "to be as faithful as possible within the requirements of the Constitution to the scheme

enacted by the legislature" bearing in mind that, in some instances, severance, reading down and reading in may result in a greater intrusion into the legislative realm than striking down the offending provisions.

[30] In this case, Mr. Justice Romilly found that s. 488.1 failed both the rational connection and the minimal impairment tests in ***Oakes***, *supra*. Rather than preserving or extending the protection of solicitor-client privilege available at common law, the impugned subsections of s. 488.1 had the opposite effect. Amongst other deficiencies, these provisions permitted solicitor-client privilege to be lost by default, or deemed waiver, within an unduly-restricted time frame and without provision for notice to clients.

[31] As earlier stated, the Newfoundland Court of Appeal concluded that the deficiencies identified in s. 488.1 could be remedied by severance and reading in. In applying these remedies, they engaged in more extensive surgery to a statutory provision than in any of the other authorities to which we were referred: See, for example, ***R. v. Heywood***, [1994] 3 S.C.R. 76, ***Vriend***, *supra,* and ***R. v. Sharpe**,* [2001] 1 S.C.R. 45. Of more significance, however, is the fact that s. 488.1, as "amended", continues to suffer from at least two significant deficiencies which were identified in the cases

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under appeal, and a further deficiency arising out of one of the amendments.

[32] First, the constitutional remedies applied in ***White*** do not address s. 488.1(4)(b), which permits the Attorney General to inspect the document over which privilege has been asserted at the request of the judge who is holding the hearing to determine privilege. This provision clearly gives rise to a loss of privilege when the Attorney General's input is requested.

[33] Secondly, there is no provision for notice to the clients.

[34] Finally, the Newfoundland Court of Appeal provided in s. 488.1(3) that the Attorney General "shall" (formerly, "may") apply for a hearing to determine privilege "on two days notice of motion to all other persons entitled to make application to a judge for an order". The other persons entitled to make application are the solicitor and the client. In some cases, the Attorney General will not know the name of the client, and, even where the name is known, the Attorney General may have no address for service for the client. This problem was identified by Mr. Justice Green of the Newfoundland Supreme Court in ***B. v. B.***, [2001] N.J. No. 203 (Q.L.), one of the

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earliest cases considering the "amended" version of s. 488.1 following the ***White*** decision.

[35] While it may be possible for this Court to draft further "amendments" to s. 488.1 to overcome the deficiencies which have been identified as surviving the ***White*** decision, I agree with counsel that this is not an appropriate case in which to do so. Although I am sympathetic to the Newfoundland Court of Appeal's attempts to save the legislation, if possible, their efforts were not entirely successful. (Nor have non-legislated efforts to protect solicitor-client privilege been entirely successful. In that regard, I note that the Special Procedures in British Columbia, particularly conditions, 5, 6 and 7, suffer from some of the defects as s. 488.1.)

[36] Section 488.1 contains several deficiencies of a fundamental nature. There may well be other deficiencies which have not yet been identified. In that regard, counsel referred to emerging problems relating to solicitor-client confidentiality arising from advances in technology and changes in the way in which lawyers practise law which may require more refined approaches to the protection of solicitor-client privilege.

[37] The rapid growth and use of technology in law firms has changed the very nature of a "document" such that computer

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hard drives are now being seized which may contain documents relating to hundreds of clients, most of whom have no connection to the "target" of the search. The interdisciplinary nature of modern law firms has also raised the spectre of seizures from such firms resulting in the potential breach of confidentiality with respect to clients of accountants or other professionals associated with the law firm.

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[38] There is also merit in the suggestion that because the legislation is federal in scope, any solutions to these problems are better imposed by a body which has the ability to invite and consider submissions from interested parties across the country; namely, Parliament.

[39] In the result, I agree with Romilly J. that the appropriate remedy in this case is to declare s. 488.1 to be of no force and effect and, as suggested by counsel, to suspend the implementation of this remedy pending the decision of the Supreme Court of Canada, at which time counsel have liberty to apply for further directions, if necessary.

(4) Section 487 of the Code

(a) Introduction

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[40] It is important to note at the outset of this discussion that the respondents (appellants by cross-appeal) are not attacking the constitutionality of s. 487 at large. Rather, they are challenging its constitutionality only insofar as it authorizes searches and seizures at law offices. By "law offices" the respondents mean any place at which a lawyer carries on a law practice, whether that be the lawyer's home, a conventional law office designated as such, or an office shared with other professionals.

[41] In essence, the respondents submit that any place where a lawyer practises law will necessarily contain privileged documents which are, or should be, immune from search and seizure. Thus, any provision, such as s. 487, which authorizes searches and seizures at law offices without restriction is, to that extent, unconstitutional as infringing section 8 of the Charter. (As in the case of s. 488.1, I do not propose to address the alleged breach of s. 7 of the Charter.)

[42] The respondents assert that the appropriate remedy for breach of s. 8 of the Charter is not a declaration that s. 487

is of no force and effect, but, rather, application of the constitutional remedies of reading in or reading down so that s. 487 does not apply to the search of law offices or other places where lawyers practise law.

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[43] The Attorney General does not dispute that law offices will necessarily contain privileged documents. Thus, a warrant issued under s. 487 of the Code for the search of a law office which does not provide for the protection of privileged documents will almost invariably result in a breach of s. 8 of the Charter. The Attorney General submits, however, that, absent s. 488.1, protection for clients whose documents are subject to solicitor-client privilege is adequately provided by the common law as set forth in ***Descôteaux***. The Attorney General also relies on the additional protections available in British Columbia by virtue of the Special Procedures set forth at para. 13 of these reasons.

(b) <u>The Relationship Between s. 487 and s. 488.1</u>

[44] As earlier noted, s. 487(1) of the Code provides:

> **487.** (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

> (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
> (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of any offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament,
> (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, or
> (c.1) any offence-related property,
> may at any time issue a warrant authorizing a peace officer or a public officer who has been appointed or designated to administer or enforce a federal or provincial law and whose duties include the enforcement of this Act or any other Act of Parliament and who is named in the warrant
> (d) to search the building, receptacle or place for any such thing and to seize it, and
> (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

[45] Thus, it is s. 487, not s. 488.1, which authorizes the issuance of a warrant for the search of a "place", including a law office, and the seizure of any thing, including documents, which there are reasonable grounds to believe fall within the parameters of ss. 487(1)(a) through (c.1). Section 488.1, in turn, sets out the procedure to be followed in carrying out the seizure of any documents in the possession of a lawyer, with a view to protecting solicitor-client privilege. It is fair to say that s. 488.1 anticipates that documents seized

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pursuant to a warrant issued under s. 487 may include those subject to solicitor-client privilege. If that were not so, s. 488.1 would be unnecessary.

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[46] No one has suggested that s. 487 would be unconstitutional if an amended version of s. 488.1 were in place which adequately protected solicitor-client privilege. Thus, the question is one of determining whether s. 487 can withstand Charter scrutiny insofar as the search of law offices is concerned, in the absence of legislative protections for solicitor-client privilege such as those which Parliament unsuccessfully sought to achieve by enacting s. 488.1. In considering this question, I will refer, briefly, to basic principles of statutory interpretation.

(c) General Rules of Interpretation

[47] Unlike s. 488.1, s. 487 does not contain provisions which necessarily result in the breach of s. 8 of the Charter. In other words, there is nothing in s. 487 on its face which requires searches of law offices or the seizure of documents therein which are protected by solicitor-client privilege. Counsel have described s. 487 as "facially neutral" in that respect. To the extent that is so, the words of Madam Justice McLachlin (as she then was) and Mr. Justice Iacobucci,

speaking for the majority in ***R. v. Mills***, [1999] 3 S.C.R. 668 at para. 56, are apposite:

> A posture of respect towards Parliament was endorsed by this Court in *Slaight Communications* [*Inc. v. Davidson* [1989] 1 S.C.R. 1038], at p. 1078, where we held that if legislation is amenable to two interpretations, a court should choose the interpretation that upholds the legislation as constitutional. Thus courts must presume that Parliament intended to enact constitutional legislation and strive, where possible, to give effect to this intention.
>
> [Emphasis added.]

[48] Similar language is found in the earlier decision of Mr. Justice Beetz, speaking for the Court, in ***Manitoba (Attorney General) v. Metropolitan Stores Ltd.***, [1987] 1 S.C.R. 110 at p. 125. There, in referring to the different meanings which have been attributed to the phrase, the "presumption of constitutionality", Beetz J. stated:

> Still another meaning of the "presumption of constitutionality" is the rule of construction under which an impugned statute ought to be construed, whenever possible, in such a way as to make it conform to the Constitution. This rule of construction is well known and generally accepted and applied under the provisions of the Constitution relating to the distribution of powers between Parliament and the provincial legislatures. It is this rule which has led to the "reading down" of certain statutes drafted in terms sufficiently broad to reach objects not within the competence of the enacting legislature. . . .
>
> [Emphasis added.]

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(I note that the phrase, "reading down", used in this context has a different meaning than when it is referred to as a constitutional remedy. In this context, reading down is applied as a rule of interpretation to avoid a finding that the legislation is unconstitutional. When reading down is applied as a remedy, a finding has already been made that the legislation is unconstitutional.)

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[49] Beetz J. noted that the question of whether this rule of interpretation applied to legislation subject to a challenge under the Charter was then a matter of some controversy. In that regard, the later decisions of ***Slaight*** and ***Mills*** make it clear that this rule does apply where, as here, legislation is challenged under the Charter.

[50] Bearing this rule of interpretation in mind, the question remains whether s. 487 can reasonably be read as complying with s. 8 of the Charter insofar as it authorizes the search of law offices and the seizure of documents therein in the absence of statutory provisions for the protection of solicitor-client privilege. The answer to that question depends on what remains to protect solicitor-client privilege once s. 488.1 has been declared to be of no force and effect, and whether that which remains is sufficient to save s. 487 insofar as it relates to searches and seizures at law offices.

Framed in other terms, the question is whether the enactment of s. 8 of the Charter has cast doubt on the adequacy of the common law to protect the right of clients to be secure against unreasonable search and seizure where a warrant has been issued pursuant to s. 487 of the Code for the search of a law office.

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(d) Result of Striking Down s. 488.1

[51] In the absence of a Charter challenge to s. 487 of the Code, the question of how searches and seizures in relation to law offices are to be governed following a declaration that s. 488.1 is of no force and effect was dealt with in a brief endorsement by the Ontario Court of Appeal in ***R. v Piersanti & Co.*** [2000] O.J. No. 4842 (Q.L.). At para. 2 of the endorsement, the court stated:

> Because s. 488.1 of the *Criminal Code* has been found to be unconstitutional, the procedures to be followed when issuing a search warrant in connection with a law office are those set forth in *Descôteaux v. Mierzwinski* (1982), 70 C.C.C. (2d) 385 (S.C.C.). As Justice Lamer pointed out at p. 414 of that decision, the issuing justice "must in any event attach terms of execution to the warrant designed to protect the right to confidentiality of the lawyer's clients as much as possible."

[52] The Nova Scotia Supreme Court also considered this question in ***Canada (Attorney General) v. Several Clients***, [2001] N.S.J. No. 300 (Q.L.), following the declaration of

constitutional invalidity of s. 488.1 by the Nova Scotia Court of Appeal. There, the Crown had argued that, although s. 488.1 was no longer operative, the documents seized pursuant to the procedures set out in that section could be dealt with by a privilege hearing based on the common law in effect before s. 488.1 was enacted. Chief Justice Kennedy rejected that submission and quashed the search warrant. In so doing, he observed that, in striking down s. 488.1, the court had not intended to curtail the searching of lawyers' offices. At paras. 24-26 of the decision, he stated:

> To the extent that a process for judicial determination of solicitor-client privilege existed in common law prior to that flawed legislation, this Court did not intend to address it or compromise it.
>
> Lawyers' offices are not to be immune to search and judicial review of the solicitor-client privilege claims can exist in the absence of a statute.
>
> I agree with the Ontario Court of Appeal [in *Piersanti*] that post s. 488.1, the procedures to be followed when issuing a search warrant in connection with a law office are those set forth in *Descôteaux v. Mierzwinski* and the issuing justice must attach terms of execution to the warrant that are designated to protect the right to confidentiality of the lawyers' clients as much as possible, as Justice Lamer pointed out at p. 414.

[53] In the result, although the courts in ***Piersanti*** and ***Several Clients*** quashed the original search warrants, they

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retained the documents seized pursuant to them pending the Crown obtaining new search warrants.

[54] As earlier stated, none of the decisions to which I have referred which grappled with the constitutionality of s. 488.1 of the Code also faced a challenge to s. 487 of the Code. That is the distinguishing characteristic of this appeal.

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(e) The *Descôteaux* Decision

[55] The Attorney General submits that the ***Descôteaux*** decision supports the constitutionality of s. 487 of the Code by setting forth adequate guidelines for the preservation of solicitor-client privilege where the search authorized by a warrant is for a law office. The Attorney General says that s. 488.1 was intended to supplement the protections provided for solicitor-client privilege at common law, not to supplant them.

[56] The respondents submit that s. 488.1 was intended to codify the requirements for the protection of solicitor-client privilege and that the striking of s. 488.1 has resulted in a legislative lacuna in that regard.

[57] In my view, Romilly J., the Ontario Court of Appeal and the Nova Scotia Supreme Court correctly found that the striking of s. 488.1 results in the common law, as described

in ***Descôteaux***, governing the conditions to be attached to searches and seizures in relation to law offices. While there may be a legislative lacuna created by the striking of s. 488.1, resort to the common law ensures that there is not a total vacuum. The question remains, however, whether the protections available at common law are sufficient to protect solicitor-client privilege to the extent necessary to preserve s. 487 from a successful Charter challenge insofar as it applies to the search of law offices.

[58] I turn then to the ***Descôteaux*** decision. In so doing, I begin by emphasizing that it was decided prior to the enactment of the Charter.

[59] In ***Descôteaux***, Lamer J. (as he then was), speaking for the court, summarized the issues at p. 862 of the decision, as follows:

> This appeal concerns the right of the police to be authorized by a search warrant to search a legal aid bureau and seize the form filled out by the citizen at his interview, for purposes of proving that this crime [fraud on the legal aid society] was committed. This issue raises several others, including, in particular, the scope of and procedures for exercising the authority to search lawyers' offices, in view of the confidential nature of their clients' files. This appeal will also give everyone an opportunity to note the deficiencies in the law in this area and the limited ability of the courts to compensate for them since their role is not primarily legislative.
>
> [Emphasis added.]

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[60] Much of the discussion in ***Descôteaux*** with respect to the importance of solicitor-client privilege has been canvassed at length in the appellate court decisions to which I have referred in relation to the constitutionality of s. 488.1. Amongst other observations, Lamer J. made the following statement upon which the respondents rely for the proposition that, absent the intended protections contemplated by s. 488.1, s. 487 authorizes an "undue interference" with solicitor-client privilege, tantamount to a breach of s. 8 of the Charter (at p. 872):

> It is again owing to the importance of this right [solicitor-client confidentiality] that certain statutes contain special provisions applicable in situations where, were it not for those special provisions, there would be undue interference with the right to confidentiality. An example of such concern for that right can be found in the safeguards set out in s. 232 of the *Income Tax Act*, 1970-71-72 (Can.), c. 63.
>
> [Emphasis added.]

(At this point, I would observe that the provisions of then s. 232 of the ***Income Tax Act*** contain provisions which are similar to s. 488.1.

[61] In discussing the relationship between the predecessor to s. 487 of the Code (s. 443) and the right to confidentiality, Lamer J. focused on s. 443(1)(b) (now s. 487(1)(b)), which is

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the subsection pursuant to which the warrant there was issued. (I understand that s. 487(1)(b) is also the subsection pursuant to which the warrants in these appeals were issued, but we were not provided with copies of those warrants or related documents.) Lamer J. stressed the limited nature of the scope of his analysis of s. 443 at p. 882 of the decision:

> I do not intend to examine all the questions raised by the interpretation of s. 443 and the determination of the duties and powers it confers on the justice of the peace. Nor is it necessary for the purposes of this appeal that we consider the things that can be searched for and seized under s. 443(1)(a) or (c). It is sufficient for the purposes of this appeal to make certain general observations, that suggests a mere reading of s. 443(1)(b).

[62] Lamer J. distinguished between solicitor-client privilege as an evidentiary rule going to the jurisdiction of the justice of the peace to issue the warrant, and the substantive rule of solicitor-client confidentiality as it relates to the manner in which justices of the peace exercise their jurisdiction. In that regard, Lamer J. emphasized that the jurisdiction of a justice of the peace under s. 443 did not turn on the nature of the place to be searched, but on the existence of a reasonable belief that there are things on the premises covered by ss. 443(1)(b). He went on to say (at pp. 883-84):

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> It then becomes necessary to reconcile the authority to search, a right that society has assumed as being essential to the suppression of crime, with the right to confidentiality, a right that society recognizes as essential for the better administration of justice.
>
> The right to confidentiality enjoyed by a lawyer's client does not, by virtue of the substantive rule, interfere with the jurisdiction of the justice of the peace to authorize the search, but might do so by virtue of the rule of evidence. At the very most, in the present state of the law, the substantive rule requires that a justice of the peace be more demanding before authorizing a search of a lawyer's office or one of his files and will lead him, where necessary, to set out special procedures for the execution of the warrant in order to limit to what is absolutely inevitable the breach of confidentiality.
>
> This leads us to a consideration of the effect of the right to confidentiality on searches, first as a rule of evidence and then as a substantive rule. The rule of evidence affects the jurisdiction of the justice of the peace, while the substantive rule affects how he exercises it.
>
> [Emphasis added.]

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[63] In the result, Lamer J. confirmed that a justice of the peace had no jurisdiction under s. 443 to issue a warrant for the seizure of documents subject to solicitor-client privilege and that the warrant could be challenged prior to seizure in the event that the applicant was of the view that the justice of the peace had acted without jurisdiction. In that respect, the ***Descôteaux*** decision is consistent with the law as it has

developed with respect to search and seizure under s. 8 of the Charter.

[64] The more difficult question, however, is not whether justices of the peace have jurisdiction to issue warrants targeting documents which are subject to solicitor-client privilege (they do not), but whether s. 487 authorizes the issuance of warrants which are not directed to documents subject to solicitor-client privilege, but which will almost invariably result in the seizure of such documents. In that regard, it is interesting to observe what Mr. Justice Côté stated at para. 68 of the ***Lavallee*** decision, *supra*:

> It may be that in theory a search warrant should not be issued to seize papers which are plainly privileged, but that is not the same thing as papers which may or may not be privileged. And all that is theoretical, for a justice of the peace or Provincial Court judge asked to issue a search warrant does not know just what papers exist, let alone why, when, or how they were created. The idea that he or she rules on privilege before issuing the search warrant, can never be more than a pious fiction.

[65] The ***Descôteaux*** decision does not presume that a justice of the peace determines the question of solicitor-client privilege prior to the issuance of the warrant, although clearly the justice of the peace must be alive to that issue. Rather, ***Descôteaux*** suggests procedures for the protection of

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solicitor-client privilege, including suggested conditions which may be set forth in the warrant. I would emphasize, however, that the decision as to the precise nature and extent of the conditions to be included in the warrant is left to the discretion and creativity of the individual justice of the peace. No specific conditions are mandated.

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[66] Lamer J. does, however, set out some general guidelines for the exercise of the discretion by the justice of the peace at pp. 887-88 of ***Descôteaux***:

> In cases where the justice of the peace has the necessary jurisdiction to authorize the search, he should, in exercising that jurisdiction, take into account the need to protect the fundamental right of a lawyer's client to have his communications kept confidential. This may arise where evidence is being sought of communications which, although made in confidence to a lawyer, are no longer protected because they were made in circumstances such that they fall within an exception to the rule; or where a lawyer's office is to be searched for things covered by para. (a) or (c) of s. 443(1) (for example, stolen goods). Although the rule of evidence seems to be applicable only with respect to para. (b) of s. 443(1), the substantive rule will apply to any search affecting the right to confidentiality, regardless of which of the paragraphs of s. 443(1) such search is to be made under. In either case the search should be limited to what is absolutely necessary in order to seize the things for which the search was authorized. A lawyer's file may contain a host of information concerning a client, some of which has remained confidential even though other information is no longer so since it falls within an exception to the rule. Even more serious is the fact that a lawyer's office contains confidential files pertaining to

> other clients which have nothing to do with the crime that is to be proved or with the things searched for under s. 443(1)(a) and (c).

[67] Although he concluded that a justice of the peace had the jurisdiction to authorize the search of a law office even where there was a risk that privileged documents could be seized during the course of the search, Lamer J. emphasized that the justice of the peace must attach conditions to such a warrant to prevent, to the extent possible, privileged documents from being disclosed. The Attorney General relies on these conditions as being sufficient to protect the privilege, and says they are not subject to the same frailties as the impugned provisions of s. 488.1. He places particular emphasis on the conditions referred to in the following passage at pp. 891-92 of the decision:

> Moreover, even if the conditions are met [no reasonable alternative to obtaining the information, or, if other alternatives are available, all reasonable steps to obtain it from that alternative source have been taken] the justice of the peace must set out procedures for the execution of the warrant that reconcile protection of the interests this right is seeking to promote with protection of those the search power is seeking to promote, and limit the breach of this fundamental right to what is strictly inevitable. This is also true of searches under 443(1)(a) or (c), as soon as they threaten a fundamental right.
>
> Generally speaking, where the search is to be made of a lawyer's office, in order to search for things provided for under para. (a),(b) or (c) of s.

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> 443(1), the justice of the peace should be particularly demanding. Where it is a question of evidence (443(1)(b)), although satisfied that there is such evidence on the premises, he should only allow a lawyer's office to be searched if in addition he is satisfied that there is no reasonable alternative to a search. It will sometimes be desirable, as soon as the informant initiates proceedings, for the justice of the peace to see that the district Crown attorney is notified, if he is not aware of such proceedings, as well as the Bar authorities. With their assistance he should normally be more easily able to decide with the police on search procedures acceptable to everyone that respect the law firm's clients' right to confidentiality without depriving the police of their right to search for evidence of the alleged crime.
>
> In this respect he could take guidance from the provisions of the *Income Tax Act*, 1970-71-72 (Can.), c. 63, s. 232, adapting them to fit the particular case, of course.
>
> Moreover, the search should be made in the presence of a representative of the Bar, where possible.
>
> [Emphasis in original.]

[68] Mr. Justice Lamer went on to express his hope that Parliament would see fit to pass legislation which would set guidelines for the search of lawyers' offices, or, in the absence of such legislation, that the bar and the courts would develop, "through rules of court or informally, by means of a uniform practice, a regional procedure that will take account of local circumstances." (p. 892) Later in his reasons, Lamer J. also suggested that a justice of the peace would be

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wise to refer applications for the search of law offices to either a provincial court or a superior court judge. Finally, he suggested provisions for review of the documents by the justice of the peace (or judge) to determine whether the documents contained information protected by solicitor-client privilege, and for the sealing of the documents in that event.

[69] In summary, Lamer J. held that a justice of the peace did not have jurisdiction to order the seizure of documents which would not be admissible in evidence in court on the ground that they were privileged (based on solicitor-client privilege as a rule of evidence). A justice of the peace did have the jurisdiction to issue a warrant for the search of law offices for other documents, however, even where such a search would inevitably cast a net wide enough to encompass documents protected by solicitor-client privilege, as long as terms were included in the warrant to protect the right to solicitor-client confidentiality as much as possible. The terms to be imposed would preferably take the form of nation-wide legislation (such as s. 488.1), but could also be the product of special procedures agreed to by the local bar, law societies and the courts, such as the "Special Procedures" in British Columbia.

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[70] The question remains, however, whether the common law guidelines suggested, but not mandated, in ***Descôteaux*** are sufficient to save s. 487 of the Code from a successful Charter attack in relation to searches of law offices. Do they transform what would otherwise be an unreasonable search and seizure into one which passes Charter muster? I conclude that the answer to these questions is "no" and "no".

(f) Conclusion

[71] Section 487 of the Code is a broadly-drawn provision authorizing a warrant for the search of any "building, receptacle or place" falling within the scope of s-ss. (a) to (c.1), and the seizure of documents therein. Although law offices are not specifically mentioned, they clearly fall within the scope of the section.

[72] While search warrants cannot expressly authorize the search for, and seizure of, documents which are subject to solicitor-client privilege, it is not disputed that any search of a law office will almost invariably result in the search of files, documents, or computer data which contain information subject to solicitor-client privilege. Unless the warrant contains specific and stringent terms for the protection of solicitor-client privilege, that privilege, which has been

referred to in the authorities as a "fundamental right", will be violated.

[73] In ***Descôteaux***, Mr. Justice Lamer warned of the deficiencies in the law relating to the search of law offices pursuant to warrants issued under s. 483 (now s. 487). He made suggestions for the imposition of terms in warrants to offset these deficiencies with a view to providing protections for solicitor-client privilege which were not provided in s. 487, or elsewhere.

[74] Parliament responded to these suggestions by the passage of s. 488.1 of the Code. There is little doubt that this section was intended to give effect to the concerns raised by the ***Descôteaux*** decision, as well as to reflect other concerns raised by interested groups who had input into the legislation. Unfortunately, for the reasons given by Mr. Justice Romilly, and by the appellate courts to which I have referred, s. 488.1 not only failed to provide the protections referred to in ***Descôteaux***, but, in some respects, it eroded some of the protections for solicitor-client privilege which had existed at common law. In particular, waiver of the solicitor-client privilege by default was an unintended consequence of the enactment of s. 488.1.

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[75] I am unable to agree with Mr. Justice Romilly that solicitor-client privilege, the fundamental right so well articulated in his decision and in those appellate decisions to which I have referred, is adequately protected by the discretion afforded justices of the peace under s. 487 to impose terms intended to protect the privilege. Even prior to the enactment of the Charter, Lamer J. recognized "the deficiencies in the law in this area and the limited ability of the courts to compensate for them since their role is not primarily legislative." The fact that Special Procedures were considered desirable in British Columbia and other jurisdictions is some indication that the bench and bar continued to have concerns about the extent of the protection for solicitor-client privilege even after the enactment of s. 488.1.

[76] While the common law clearly prohibits the seizure of documents which are protected by solicitor-client privilege, it does not prevent the seizure of documents which may be subject to such privilege. On the contrary, it is probable that a warrant executed on law offices will result in the seizure of documents subject to the privilege. In the absence of specific and mandatory guidelines for the procedures to be followed in executing warrants on law offices (allowing some

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flexibility to respond to local conditions), the question of whether, and to what extent, the privilege will be protected in fact will vary across the country and even within jurisdictions. Breaches of solicitor-client privilege will occur.

[77] As stated by Southey J. at p. 249 in the trial decision in ***Re Borden & Elliott and The Queen*** (1977), 13 O.R. (2d) 248, it is small comfort to the client that privileged documents which have been seized and disclosed to the Crown or its agents may ultimately be inadmissible as evidence against the client. Similarly, it is small comfort to the client that the privileged documents may be returned if and when the warrant is successfully challenged in court. The purpose of s. 8 of the Charter in this context is to protect against the loss of the privilege to the greatest extent possible, not to engage in damage control once the privilege is lost.

[78] In my view, the clients' right to be secure from unreasonable search and seizure requires a defined standard and specific conditions which must be satisfied before a warrant is issued for the search of law offices. The suggestions in ***Descôteaux*** for the protection of that privilege are a starting point, and were apparently treated as such by Parliament in drafting s. 488.1. But they are simply

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suggestions and, in my view, do not provide adequate protection against unreasonable search and seizure when the place to be searched is a law office.

[79] That is not to say that law offices should not be subject to search and seizure. Rather, Parliament should replace s. 488.1 with legislation which better strikes the balance between the protection of solicitor-client privilege, on the one hand, and the need for effective law enforcement, on the other. Such legislation would afford uniform protection for solicitor-client privilege across the country, provide specific guidance to those responsible for issuing and executing warrants, and reduce the number of successful attacks on warrants. Law offices would not be immune from search and seizure, but clients could have more assurance that their confidences would be respected with a corresponding salutary effect on the administration of justice.

[80] In summary, I conclude that s. 487 of the Code breaches s. 8 of the Charter to the extent that it authorizes the search of law offices and the seizure of documents therein in the absence of adequate safeguards for solicitor-client privilege. As was the case with s. 488.1, I do not find it necessary to decide whether s. 487 of the Code also breaches s. 7 of the Charter.

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[81] The Attorney General has not suggested that if s. 487 of the Code breaches the Charter, it can be saved under s. 1. In any event, it is difficult to see how the Attorney General could successfully argue that s. 487, supplemented by the common law, minimally impairs the right to be free from unreasonable search and seizure, in the absence of mandatory procedures to ensure that the right to solicitor-client privilege is protected.

[82] The question then becomes one of remedy. Counsel for the respondents have suggested that, in the event this Court determines that s. 487 of the Code is unconstitutional, it would be appropriate to either read down the section so that it does not apply to searches of law offices, or read in language to the same effect. The respondents suggest that either remedy should limit the scope of s. 487 so that it does not apply to the searches of and seizures from law offices or other places where lawyers practise law.

[83] It is interesting to note that the protections provided in s. 488.1 were directed to documents "in the possession of a lawyer". I presume that there was a reason for apparently limiting the protection in this regard, although it was probably contemplated that the word "possession" would be interpreted broadly as encompassing not only documents in the

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physical possession of a lawyer but also documents within his or her control. (See the definition of "possession" in s. 4(3) of the Code.) I do not find it useful to speculate in that regard, or to attempt to ascertain all of the reasons why it may, or may not be, appropriate to extend the protection for documents subject to solicitor-client privilege to documents in places other than law offices or in the possession of a lawyer. I leave those matters for consideration by the Supreme Court of Canada in the anticipation that this appeal may make its way to that court in time for the December hearing of the related appeals.

[84] In the result, I conclude that the most appropriate remedy in this case is to read into s. 487 the words, "other than a law office" in the opening words of the section. The introductory words, therefore, would be as follows:

> **487**. (1) A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place, other than a law office, ...

[85] As in the case of s. 488.1, I would also suspend the implementation of this remedy pending the decision of the Supreme Court of Canada in the related appeals, with leave to the parties to apply for further directions, if necessary, at that time.

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SUMMARY

[86] I would dismiss the appeal. I would allow the cross-appeal to the extent set forth at para. 84. I would suspend the implementation of the remedies in relation to s. 487 and s. 488.1 pending the decision of the Supreme Court of Canada, with liberty to apply for further directions following that decision, if necessary.

"The Honourable Madam Justice Prowse"

I AGREE:

"The Honourable Mr. Justice Donald"

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Reasons for Judgment of the Honourable Madam Justice Newbury:

[87] Regretfully, I find myself unable to agree with the conclusions of Madam Justice Prowse in these appeals. In very general terms, my colleagues conclude that s. 488.1, a provision intended to enhance the protections accorded to privilege by the common law, must be struck down in its entirety because of deficiencies of a "fundamental nature" and in particular because of the possibility of "waiver by default"; that the less drastic remedy of modifying s. 488.1 to excise the offending portions is not appropriate; that the common law is inadequate to provide the necessary safeguards for the protection of privilege without some new legislative foray into this difficult area; and that because s. 487 extends *ex facie* to lawyers' offices, it violates s. 8 of the ***Canadian Charter of Rights and Freedoms*** and must also be 'read down' (subject to a suspension pending the decision of the Supreme Court of Canada) so as to prohibit the issuance of any warrant authorizing the search of such premises.

[88] With respect, I disagree with all of these conclusions. In my view, the deficiencies in s. 488.1 are not "fundamental" and can be remedied by deleting those few portions which erode the protections that existed at common law for solicitor-client privilege; even if s. 488.1 had to be declared

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unconstitutional as a whole, it would be an extreme and inappropriate response, not in keeping with the balancing that must take place between the protection of privilege and the effective administration of the criminal law, to declare lawyers' offices beyond the reach of properly authorized search warrants; and s. 487, together with the common law principles relating to solicitor-client privilege, would provide adequate protection for the privilege. After all, the privilege is a creation not of the ***Charter***, but of the common law. I see no basis for believing that Canadian courts would suddenly permit its demise in the absence of the additional protections provided by s. 488.1.

[89] I will briefly state the reasoning behind my conclusions but begin with some comments regarding privilege at common law.

Solicitor-Client Privilege at Common Law

[90] As noted by Lamer J. (as he then was) in ***Descôteaux v. Mierzwinski*** [1982] 1 S.C.R. 860, solicitor-client privilege originated as a rule of evidence in the 16th century. Sopinka, Lederman and Bryant in ***The Law of Evidence in Canada*** (1992) describe its evolution:

> The solicitor-client privilege is the oldest of the privileges for confidential communications with

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> roots in the 16th century. The basis of the early rule was the oath and honour of the solicitor, as a professional man and a gentleman, to keep its client's secret. Thus the early privilege belonged solely to the solicitor, and the client benefited from it only incidentally. By the 18th century, the courts regarded the ascertainment of truth to be more important than professional dignity, and oath and honour alone cease to excuse lawyers from their civic duty to give testimony. In order to preserve the protection, however, the early rationale gave way to the view that the privilege was necessary, not in order to maintain the solicitor's reputation, but for the protection of the client. Effectual legal assistance, it was assumed, could only be given if clients frankly and candidly disclosed all material facts to their solicitors, which, in turn, was essential to the effect operation of the legal system. It was thought that this would not take place if the possibility existed that their confidences might be revealed. [at 635-6]

Having begun merely as a rule of evidence, the privilege developed in this country to the status of a substantive principle which the Supreme Court of Canada described in 1980 as a "fundamental civil and legal right." (*Per* Dickson J. (as he then was) in ***Solosky v. Canada*** [1980] 1 S.C.R. 821 at 839; ***Geffen v. Goodman Estate*** [1991] 2 S.C.R. 353 at 383.)

[91] At the same time, the common law recognized clear limitations on the extent of solicitor-client privilege and has resisted extending it to other relationships. In this connection, Sopinka and Lederman, *supra*, at 626 quote Chief Justice Burger in ***U.S. v. Nixon***, 94 S. Ct. 3090 at 3108 (1974): ". . . Whatever their origins, these exceptions to

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the demand for every man's evidence are not lightly created, nor expansively construed, for they are in derogation of the search for the truth."

[92] Even within the solicitor-client relationship, although all communications are confidential, not everything that is confidential is necessarily privileged: ***Solosky v. Canada***, *supra*, at 829; see also ***B. v. Canada*** [1995] 5 W.W.R. 374 (B.C.S.C.), at 378-81. A report of a Special Committee of the Ontario Branch of the Canadian Bar Association regarding Solicitor-Client Privilege prepared in 1985 made this point and discussed the criteria necessary to establish a claim of solicitor-client privilege:

> The doctrine of solicitor-client privilege does not protect all communications between the solicitor and his client from disclosure. Certain communications between a solicitor and his client, while confidential, may be subject to compulsory disclosure under due process of law. Other communications are protected from disclosure by the rule of privilege provided, of course, that the communications themselves are not made in furtherance of a fraud or other crime.
>
> It has been established for many years that in order for a privilege to exist, certain conditions must apply. The classic statement of those conditions is contained in 8 Wigmore, ***Evidence***, §2285 (McNaughton Rev. 1961) and may be summarized as follows:
>
> 1. The communications must originate in a confidence that they will not be disclosed;

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2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;

3. The relation must be one which in the opinion of the community ought to be sedulously fostered; and

4. The injury that would inure to the relation by the disclosing of the communications must be greater than the benefit thereby gained for the correct disposal of litigation (applied in *Slavutych v. Baker et al.* (1975), 55 D.L.R. (3d) 224, 228-9 (S.C.C.)).

Because communication between a solicitor and his client fulfil these four conditions, the rule of privilege with respect to such communications has been established. The question then becomes to what extent does the privilege apply. As noted above, the privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:

1. there must be a communication, whether oral or written;

2. the communication must be of a confidential character;

3. the communication must be between a client (or his agent) and a legal advisor; and

4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

If these four conditions are satisfied then the communications (and papers relating to it) are privileged.

> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly

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> believe that that whatever they do, and whatever they are told, is privileged merely by the fact that they are lawyers. This is simply not the case. . . .
>
> As noted at the outset, the confusion arises from a failure to distinguish between the rule of privilege and the principle of confidentiality. [at 2]

It is the foregoing criteria, expressed in one form or another, that courts regularly consider in determining whether a document or other communication is privileged or not.

[93] Canadian and other common law courts developed various rules concerning when and how solicitor-client privilege may be asserted, its duration, and how it may and may not be waived or lost. In the latter connection, the Supreme Court of Canada has observed that where it cannot be said a client or his solicitor has waived the client's privilege, the court itself is obliged to step in to prevent a solicitor from disclosing privileged information. As noted in ***Geffen v. Goodman Estate***, *supra*:

> The client may, of course, herself choose to disclose the contents of her communications with her legal representative and thereby waive the privilege. Or, the client may authorize the solicitor to reveal those communications for her. Even then, however, the courts have been cautious in allowing such disclosures, so much so that they have assumed for themselves the role of ensuring that without the client's express consent a solicitor may not testify. Thus, in *Bell v. Smith*, [1968] S.C.R.

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> 664, this Court held that there had been a violation of solicitor-client privilege when a former solicitor of the plaintiffs in a motor vehicle accident claim was subpoenaed by the defendants and testified as to the settlement discussions that had taken place. Spence J. said at p. 671:
>
>> It is rather astounding that Mr. Schreiber should be subpoenaed to give evidence on behalf of the defendants as against his former clients and that he should produce his complete file including many memoranda and other material all of which were privileged as against the plaintiffs and whether the plaintiffs' counsel objected or not that he should be permitted to so testify and so produce without the consent of the plaintiffs being requested and obtained.
>>
>> Lord Chancellor Eldon said, in *Beer v. Ward* (1821), Jacob 77, 37 E.R. 779, at p. 80:
>>
>>> . . . it would be the duty of any Court to stop him if he was about to disclose confidential matters . . . the Court knows the privilege of the client, and it must be taken for granted that the attorney will act rightly, and claim that privilege; or that if he does not, the Court will make him claim it.
>
> [at 383-4; emphasis added.]

[94] A body of case law also exists on what is necessary to waive privilege by implication or "when fairness requires it" after a partial disclosure. As noted by McLachlin J. (then on the Supreme Court of British Columbia) in ***S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*** (1983) 45 B.C.L.R. 218, however, ". . . there is always some manifestation of a voluntary intention to waive the privilege

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at least to a limited extent" for waiver to be found. (at 221.) It has also been held that a person entitled to privilege may obtain injunctive relief to restrain the use of confidential material disclosed in one proceeding, from being used by another person in a subsequent proceeding: see ***Descôteaux*** at 871, and ***Slavutych v. Baker*** [1976] 1 S.C.R. 254. And, although there is ancient authority for the proposition that illegally-obtained evidence, such as a communication between a solicitor and client obtained dishonestly, is admissible in a civil proceeding, that principle seems to be giving way to a rule against admissibility: see ***Re Markovina*** (1991) 57 B.C.L.R. (2d) 73 (B.C.S.C.) and ***Double-E Inc. v. Positive Action Tool Western Ltd.*** (1989) 1 F.C. 163 (F.C.T.D.), both cited by Sopinka and Lederman, *supra*, at 676.

[95] It was also clear, even prior to the enactment of the ***Charter***, that solicitor-client privilege trumped various statutory provisions for the granting of search warrants. In ***Descôteaux***, the Court noted a line of cases in which courts were unwilling to recognize that justices of the peace were entitled to refuse search warrants "on the sole ground that what is sought to be seized could never subsequently be received in evidence because it is protected by solicitor-client privilege." (at 884.) Another line of cases had held

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that a justice of the peace has such a right, either at the time the warrant is being issued, or at the time of an application (under s. 446(3) of the ***Criminal Code***, for example) for the return of the seized items. Lamer J. for the Court in ***Descôteaux*** agreed with the analysis of Southey J., the trial judge in ***Re Borden & Elliott v. The Queen*** (1975) 70 D.L.R. (3d) 579 (Ont. H.C., aff'd Ont. C.A. at 588), who considered whether a search warrant under s. 443 overrode solicitor-client privilege. After reviewing ***Re Steele and The Queen*** (1974) 21 C.C.C. (2d) 278, ***R. v. Colvin*** (1970) 1 C.C.C. (2d) 8, and ***Re Director of Investigation and Research and Shell Canada Ltd.*** (1975) 22 C.C.C. (2d) 70 (F.C.A.), Southey J. in ***Re Borden & Elliott*** concluded that the privilege may be invoked to prevent seizure under a search warrant and that the applicant in that case was entitled to raise privilege as a ground for quashing the search warrant "for lack of jurisdiction on the part of the Justice." (See also ***Re Director of Investigation and Research and Canada Safeway Ltd.*** (1972) 26 D.L.R. (3d) 745 (B.C.S.C.).)

[96] The Court in ***Descôteaux*** concluded that a justice of the peace has "no jurisdiction to order the seizure of documents that would not be admissible in evidence in court on the

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ground that they are privileged (the rule of evidence)" and continued:

> Before authorizing a search of a lawyer's office for evidence of a crime, the justice of the peace should refuse to issue the warrant unless he is satisfied that there is no reasonable alternative to the search, or he will be exceeding his jurisdiction (the substantive rule). When issuing the warrant, to search for evidence or other things, he must in any event attach terms of execution to the warrant designed to protect the right to confidentiality of the lawyer's clients as much as possible. [at 893]

[97] The Court also noted the suggestion of Nemetz C.J.S.C. (as he then was) in ***Re Pacific Press Ltd. and The Queen*** (1977) 37 C.C.C. (2d) 487, that a justice of the peace 'should have reasonable information before him to entitle him to judicially decide whether such warrant should issue or not.' In Chief Justice Nemetz's analysis, such reasonable information would have to include:

> 1. whether a reasonable alternative source of obtaining the information was or was not available, and
>
> 2. if available, that reasonable steps had been taken to obtain it from that alternative source.

Lamer J. in ***Descôteaux*** continued:

> It could be advanced that the two conditions set out by Nemetz C.J. should be met before a warrant is issued whenever a search is sought to be

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> conducted, under 443(1)(b), of premises occupied by an innocent third party which are not alleged by the information to be connected in any way with the crime. It is not necessary for purposes of this appeal to decide that point. It is sufficient to say that in situations such as the one in *Re Pacific Press Ltd.*, where the search would interfere with rights as fundamental as freedom of the press, and as in the case at bar a lawyer's client's right to confidentiality, the justice of the peace may and should refuse to issue the warrant if these two conditions have not been met, lest he exceeds the jurisdiction he had *ab initio*. I would add one qualification to these two conditions. The reasonable alternative referred to is not an alternative to the method of proof but to the benefits of search and seizure of the evidence. As I have already stated, a search warrant is not only a means of gathering evidence but also an investigative tool. Therefore a determination of what is reasonable in each case will take into account the fact that a search makes it possible not only to seize evidence but also to ascertain that it exists, and even sometimes that the crime was in fact committed and by whom. Seizure makes it possible to preserve the evidence.
>
> Moreover, even if the conditions are met, the justice of the peace must set out procedures for the execution of the warrant that reconcile protection of the interests this right is seeking to promote with protection of those the search power is seeking to promote, and limit the breach of this fundamental right to what is strictly inevitable. This is also true of searches under 443(1)(a) or (c), as soon as they threaten a fundamental right. [at 890-91; emphasis added.]

(It may be observed that the foregoing analysis bears a strong similarity to the 'minimal impairment' and 'proportionality' tests applied under s. 1 of the ***Charter***.)

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[98] Last, the Court in ***Descôteaux*** expressed the hope that in view of the willingness of "everyone so far" to recognize the importance of solicitor-client confidentiality, courts in the provinces would rectify the "legislative gap by developing, through rules of court or informally, by means of a uniform practice, a regional procedure that will take account of local circumstances." These observations, of course, were what led to the adoption of the so-called "Special Procedures" in British Columbia and evidently, to the enactment of s. 488.1 itself in 1985 (then s. 444.1 of the ***Code).***

[99] I see nothing in the wording of s. 488.1 to suggest that it was intended to supplant or codify the law relating to privilege, and I did not understand counsel to suggest it did so. Thus I would have thought, for example, that the requirement confirmed in ***Descôteaux*** that a justice of the peace who is issuing a search warrant in respect of a lawyer's office should first satisfy himself that there is no reasonable alternative to the search and should limit its scope to protect the confidentiality of the lawyer's clients as much as possible, remains applicable (see ***Piersanti and Co. v. H.M.T.Q.*** [2000] O.J. No. 4842 (Q.L.), as would the principle established in ***Beer v. Ward***, referred to in ***Geffen v. Goodman Estate***, *supra*.

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[100] Section 488.1 (like its counterpart in the ***Income Tax Act***, S.C. 1970-71-72, c. 63, s. 232) provides a uniform procedure whereby the Attorney General or a lawyer or a client may have a claim of privilege determined summarily by a judge. Its basic thrust was thus to enhance the protection of the privilege, and in my opinion, it accomplished its purpose in large measure. Subsection (8) prohibits any officer who is executing a search warrant, from making copies of or seizing any document without affording a "reasonable opportunity" for a claim of solicitor-client privilege to be made; s-s. (2) requires that where the privilege is claimed by a lawyer, the officer must seal the document and place it in the custody of a sheriff or other custodian; s-s. (4) requires that the question of privilege be determined by a judge and that if the judges is of the opinion the document should not be disclosed, it is to be re-delivered to the lawyer; and under s-s. (10), the hearing is required to be conducted in private.

[101] It would appear that in general the summary procedure has worked as it was intended to work. I am unable to recall any criminal case in which documents were seized at a law office but because of absence from the office or illness on the part of a client or lawyer, solicitor-client privilege was somehow inadvertently "lost." Certainly our attention was not

drawn to any case in which a privileged document had actually "fallen through the cracks" so that a client lost the benefit of privilege, or even confidentiality, because of the execution of a search warrant of a lawyer's office. In British Columbia, s. 488 is supplemented by the Special Procedures, which instruct peace officers not to commence a search of law office premises until a representative of the Law Society has either attended at the premises or has given the lawyer the opportunity to confer in the Law Society regarding the lawyer's obligation. In the case of the Festing investigation, counsel claimed privilege over 21,000 documents and computer records that were seized, a custodian was appointed for the property of Mr. Youngman, a lawyer, for the purpose of the search of his premises, and the seized documents were placed in storage at the Supreme Court Registry. Privilege was also claimed over some or all of the documents seized at the offices of Mr. Gaster, who is an accountant rather than a lawyer, and a similar procedure was followed. In the case of the Huber investigation, counsel was also present during the search of the law offices of Mr. Gunnlaugson and solicitor-client privilege was claimed in respect of the material seized, which was placed in boxes, sealed and delivered to the sheriff in Kelowna. Thereafter, a lawyer appointed by the Court as custodian of Mr.

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Gunnlaugson's practice seized further documents which he deposited with the sheriff and which remain with the sheriff, although they were subsequently seized by the R.C.M.P. under subsequent warrant.

[102] The foregoing procedures, indeed, together with the general duty of a solicitor codified in the Rules of Professional Conduct of the Law Society of British Columbia, to hold in strict confidence most information of the client acquired in the course of the professional relationship, would seem to cover most "reasonable hypotheticals." (See ***R. v. Morrisey*** [2000] 2 S.C.R. 90, at para. 29.) In this connection, I agree with the observations of Dambrot J., the trial judge in ***R. v. Fink*** (2000) 143 C.C.C. (3d) 566, rev'd at (2000) 149 C.C.C. (3d) 321, who observed:

> If, as the Applicant asserts, "[A]n individual has a reasonable expectation that his lawyer's office will be a safe repository of protect communications", then surely it is his lawyer to whom he has entrusted his communications, and whom he expects to safeguard his privacy by advancing his legitimate claims of privilege over the documents in his possession. Parliament has not expropriated the client's rights to lawyers; the client has retained a lawyer to protect these very rights.
>
> In addition, in this province, as counsel for the Respondent has properly reminded me, the Rules of Professional Conduct provide that
>
>> "The lawyer has a duty to hold in strict confidence all information concerning the

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> business and affairs of the client acquired in the course of their professional relationship, and should not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so."
>
> I am confident that virtually all members of the legal profession would operate in accordance with these principles even without the existence of the Rule. In the case of doubt, they would claim the privilege, and then obtain instructions from the client as to whether a claim should be pursed. Accordingly, I see little risk that a lawyer whose office is a subject of a search would place a client's interests at risks by casually concluding that a document was not privileged, or thoughtlessly choosing not to assert his or her client's privilege. Once again, I see no basis to characterize the provision as creating a presumption of waiver. [paras. 17-19]

When one considers as well that the common law requires that some "intentional acts" on the part of the client must have occurred for privilege to be waived, and that a court itself will step in to prevent a solicitor from disclosing privileged information, I wonder whether the concerns expressed by my colleagues and by the appellate courts in the other cases concerning "deemed waiver" are more apparent than real.

Deficiencies in s. 488.1

[103] I do agree, however, that s. 488.1 does erode some of the protections for solicitor-client privilege that existed at common law and to that extent constitute a *prima facie* violation of s. 8 of the ***Charter***. In particular, I agree that

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s-s. (4)(b), which permits a judge to allow the Attorney General to inspect a document where the judge is of the opinion that it would materially assist the court in its determination, and s-s. (6), which requires a judge to turn over the seized documents to the Crown where no application has been made under s-s. (3)(a) or (3)(c), do impair privilege or place it at risk and would require justification under s. 1. No such justification was offered by the Crown in this case. I will return below to the question of "remedy".

[104] The second concern expressed in the other cases and by Prowse J.A. with respect to s. 488.1 relates to the time limitations of 14 days in para. (3)(a) and 21 days in subpara. (3)(a)(iii). These were of particular concern to the Alberta Court of Appeal in ***Lavallee***, where Côté J.A. observed:

> Counsel for the appellant federal Crown argued that within 14 days, all that s. 488.1(3)(a) requires is a simple motion to the court to fix a time and date for the hearing on privilege. He suggested that little or no evidence is needed at that stage. I am not sure whether that is correct or not; possibly it is.
>
> But it is perfectly clear that counsel for the client would need evidence in time for the definitive hearing, which must be fixed for 21 or fewer days later. As the Crown says, the client bears the onus of proof. Crown counsel again told us that in practice counsel on both sides agree to extend or adjourn that 21 days. Maybe that is often so, but the statute does not oblige the Crown to consent to that, and indeed contains no provision

> for the court to extend the time. So it is doubtful that it can be extended without consent. In at least some cases, the Crown has refused to consent to even the most necessary extension, where there was no scheduled court sitting within 21 days! *Vespoli v. R. (#1)* [1983] 1 F.C. 337. . . . The Federal Court there interpreted the 21 days as not requiring the impossible. A Manitoba judge managed to find a power to extend the time, in *A.-G. Can. v. Swim* [1998] 2 W.W.R. 427, 119 Man. R. (2d) 297, but over the objections of the federal Crown, whose counsel submitted authority to the contrary. The Crown there cited *Solvent Petroleum Extraction v. M.N.R.* 90 D.T.C. 6261 (F.C.), where the Federal Court held that the time under the similar section in the *Income Tax Act* cannot be extended. The cases cited show that it is sometimes dangerous to rely upon the good will and cooperation of some Crown counsel. [paras. 42-43]

[105] The Newfoundland Court of Appeal in ***White***, whilst agreeing with Côté J.A.'s "preoccupation" with the "time limits prescribed in s. 488.1(3) and the lack of discretion given to the judge hearing the application to extend those times" concluded that a new subsection (6) should be inserted empowering a judge to do so "where circumstances warrant." It is not clear whether a court has the ability to postpone a hearing to be held under s. 488.1 if in the particular circumstances of the case, it would be overly harsh to proceed. Roberts J.A. in ***White*** cited ***Canada (Attorney General) v. Swim*** (1997) 119 Man. R. (2d) 297 (Q.B.), where the Court extended the 14-day period in s-s. (3)(a), and ***Gray v. Canada*** [1994] 2 C.T.C. 409 (Ont. Gen. Div.); but various

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decisions decided in the context of the comparable provision in the ***Income Tax Act*** suggest there is no such discretion: see ***Solvent Petroleum Extraction Inc. v. M.N.R.*** (1990) 90 D.T.C. 6261 (F.C.T.D.) and ***Vespoli v. R.*** [1982] 82 D.T.C. 6314 (F.C.T.D.). If the latter cases are correct and there is no discretion to postpone, it seems to me that the best solution is simply to delete the two time limitations, allowing an application to be made under s-s. (3)(a) at any time and allowing the court to fix the hearing date in its discretion. This is more faithful to the original version and to the admonition in ***Schachter***, *infra*, than the addition of a new subsection as suggested by the Court in ***White***.

[106] Another concern expressed by my colleagues and the other appellate courts arises from the word "named" in s. 488.1(2). As noted in Schiff in ***Evidence and the Litigation Process*** (1993), most of the authorities at common law deny the privilege to evidence of the client's communication of his name, because "such information will rarely be communicated in confidence for the purpose of the legal consultation." (At 1458, n. 15, citing ***Re Ontario Sec. Comm'n*** (1983) 41 O.R. (2d) 328, 338 (Ont. Div. Ct); ***Bursill v. Tanner*** (1885) 16 Q.B.D. 1 (C.A.); ***Colton v. United States*** (1962), 306 F.2d 633, 637 (U.S.C.A., 2d Cir.), *cert. denied*, 371 U.S. 951 (U.S.S.C.);

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Frank v. Tomlinson (1965), 351 F.2d 384 (U.S.C.A., 5th Cir.) *cert. denied*, 382 U.S. 1028 (U.S.S.C.); 8 ***Wigmore***, *supra*, s. 2313, at 609.)

[107] Nevertheless, the common law recognized that in some circumstances, the client's name itself might be properly the subject of privilege — i.e., that it might be a 'confidential communication' within the meaning of the Wigmore criteria. Thus it was held in the well-known decision of the Ontario Court of Appeal in ***Re United States of America v. Mammoth Oil Co.*** [1925] 2 D.L.R. 966, that an Ontario lawyer was entitled to claim privilege for an unknown client in proceedings brought by the United States District Court to examine the lawyer and other members of his firm in Toronto about an alleged fraud arising out of the "Teapot Dome" scandal. The trial judge, Riddell J. ([1925] 2 D.L.R. 66, 56 O.L.R. 307 (H.C.)), had reasoned:

> The first point to be considered is whether the solicitor can be compelled to disclose the name of his client. In this matter there can be no question as to the ordinary rule in litigation. Each litigant is entitled to know against whom he is fighting, and it has never been considered that the name of the client in litigation can be concealed. That is not disputed. But in this case it is said that the client is not litigating. . . . [at 74]

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On appeal, however, Ferguson J.A. for the majority of the Court of Appeal disagreed. In his analysis:

> Nor am I prepared to say that the result of the authorities is that privilege cannot be claimed without disclosing to the Court the name of the client or person on whose behalf it is claimed. I have read and considered the cases cited by counsel and, in my opinion, they do not carry the law that far, and it seems to me it should not be so held on principle. The principle is that mankind should be able and free to consult professional legal advisers without fear that their confidential communications to such professional legal advisers shall be disclosed.
>
> Let us stop to consider the now too common automobile accident in which some one is killed by a car driven by an unknown person, after which the unknown driver goes to counsel, and, after communicating the facts for advice, directs the counsel to attend the inquest, watch the proceedings, and keep him advised. What would become of the principle enunciated if the counsel attending such inquest may be put in the witness-box and questioned as to why and for whom he is attending and watching the proceedings? I am clearly of opinion that counsel so employed could and should refuse to answer such questions. [at 976]

[108] In ***Lavallee***, the Alberta Court of Appeal took a similar view:

> Giving up the clients' names may not be a light matter. The search warrant shows that the police think that the lawyer's files reveal criminal activity. The money-laundering sections of the Criminal Code mean that the transactions and papers in the lawyer's office may themselves be the (client's) crime, and not mere evidence of a crime. Those were the crimes alleged in the present case.

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> To reveal the names of all the clients on a file may be to create direct evidence of a vital link in the Crown's chain of proof: identity of the wrongdoer.
>
> *R. v. Fink*, *supra*, suggests that the police must know the client's name already. But they may only suspect it, and they may well not know the names of all the clients.
>
> What is more, that is conscripted self-incriminating evidence in the narrowest and truest sense. Charter law is very tender to that. [paras. 58-60]

[109] On the other hand, Dambrot J. at the lower court level in ***Fink***, *supra*, dismissed this objection as unrealistic:

> In most cases, the relationship between the client and the lawyer will be known when the warrant is sought, and will provide the rationale for seeking the client's documents from the lawyer's possession. Admittedly, there will be circumstances where a document will actually be the subject of a claim of privilege on the part of a third party client not known to the authorities. But given that it will already have been judicially determined that the document is evidence of an offence, I do not understand how an assertion that a privilege attaches to such a document could conceivably be advanced in the abstract. The assertion could only be made, and adjudicated upon, on behalf of a named person. Whatever privilege attaches to the identification of lawyer's client, it obviously must give way when a legal claim is asserted on behalf of that client by his or her lawyer. [para. 16; emphasis added.]

With respect, I disagree with the underlined words above and agree with the more recent decisions which point out that the "determination" made by the justice of the peace cannot

realistically extend to the purpose or contents of documents that have not, at the time the warrant is being issued, been seized or inspected. I do agree, however, that cases in which the client's name *per se* is the subject of privilege or is confidential will be rare.

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[110] In the case at bar, counsel for the Attorney General contented himself with citing the last two sentences quoted above and did not elaborate on why, in his view, it was necessary to require that the client be "named" — as opposed to identified by initials or file numbers, for example — for the lawyer to assert a claim of privilege and for the Crown to be in a position to oppose the claim if appropriate. In the absence of some justification of this kind, I can only conclude that the wording of s-s. (2) runs the risk of abrogating what would or could be privileged at common law, and has not been shown to meet the "minimal impairment" test.

[111] The final major concern expressed by the appellate courts in ***Lavallee***, ***Claus***, ***Fink***, and ***Other Clients*** with s. 488.1 is the lack of a mechanism for "notice to clients." As it is written, s. 488.1 places the onus upon the solicitor to notify his or her clients of any seizure and ultimately to obtain instructions as to whether privilege will be asserted. What alternative is there to the placing of that onus? It

could surely not be suggested that the Crown or the police officer executing a warrant should be required to notify the client or clients of the lawyer in question. In my view, the legislation places the onus on the only person on whom it could appropriately rest and on the person whose very role is to protect privilege - the solicitor. As earlier suggested, it is almost inconceivable that a lawyer would not notify a client that documents belonging to him or her had been seized, and s-s. (8) requires that an officer afford a reasonable opportunity for a claim of privilege to be made under s-s. (2). It would surely erode the privilege to a much greater extent if the Crown were obliged to notify the clients of a lawyer whose premises had been subject of a warrant, since that would make it necessary for the Crown to determine the clients' names and whereabouts. Obviously, that would in turn entail a more widespread breach of confidentiality, and possibly, of privilege.

[112] In summary, I do not agree that the mechanism provided by s. 488.1 places an inappropriate or unreasonable onus on a lawyer to notify his or her clients to seek instructions to assert a claim of privilege. The mechanism has apparently worked well in practice and it is only by positing rather far-fetched hypotheticals that the prospect of an unreasonable

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search or seizure arises. One of the core functions of a lawyer is to maintain confidences, and in my view it is not unreasonable to expect lawyers to carry out that function, even when the lawyer's office is a subject of a search warrant.

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Must s. 448.1 be struck down?

[113] Madam Justice Prowse states at para. 35 of her Reasons that this is not an appropriate case in which to overcome the deficiencies in s. 488.1 by "judicial amendments." She notes that advances in technology may lead to further deficiencies, as yet unidentified, and that the rise of interdisciplinary firms raises the spectre of potential breaches of confidentiality with respect of accountants or other professionals associated with law firms. Finally, she notes that any solutions are "better imposed by a body which has the ability to invite and consider submissions from interested parties across the country; namely, Parliament."

[114] There can be no argument with the latter principle, but that is why, in my view, the courts must defer to the extent possible to the choices Parliament has made and choose less drastic remedies, if available, over a sweeping declaration of invalidity. That is the clear lesson of ***Schachter v. Canada*** [1992] 2 S.C.R. 679, as the Newfoundland Court of appeal noted

in ***White***. In the context of the present case, I do not agree that it would be "inappropriate" to modify s. 488.1 merely because as modified, it does not constitute a perfect system for the protection of privilege in every conceivable situation and to the farthest conceivable extent. Revised as I propose, s. 488.1 does not erode the common law protections of privilege in any material way and continues to operate in a reasonable manner, albeit not in a perfect manner. But it is unlikely that even Parliament will be able to draft a new provision that ensures perfection in the eyes of all lawyers, judges and clients. Any time limitation may be seen as too short and any lawyer may fail in his or her duty to assert privilege where appropriate, but these difficulties can be remedied by the court. The seizure of documents from a lawyer's office will always result in inconvenience and may require lawyers (for both sides) to work under pressure. No system will, in other words, accomplish perfect justice as opposed to justice that is "fundamentally fair." (*Per* McLachlin J. (as she then was) in ***R. v. O'Connor*** [1995] 4 S.C.R. 411, at para. 193.)

[115] But if the matter of privilege is to be legislated by Parliament rather than left to the discretion of justices of the peace and judges to deal on a case-by-case basis, some

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balance must be struck between the protection of the fundamental principle of solicitor-client privilege, and the administration of criminal law. Parliament has made an attempt to do so and the procedure it has chosen appears to work reasonably in practice. The procedure is not so seriously defective that s. 488.1, many aspects of which enhance solicitor-client privilege, must be struck down in its entirety. Nor should one lose sight of the fact that where privilege is abrogated and an unreasonable search takes place, the evidence so obtained may be excluded under s. 24(2) of the ***Charter***.

Section 487

[116] Having upheld the core provisions of s. 488.1, I do not find it necessary to embark on an examination of s. 487 in its applicability to lawyers' offices. With all due respect to my colleagues, however, had I found that it was necessary to strike down s. 488.1 under s. 8 or 7 of the ***Charter***, I would not have thought that s. 487 must be read down so as to prohibit the seizure of documents and other materials in lawyers' offices. In my view, that would be an extreme measure indeed and would resemble not so much a remedy as a denial of the valid public interests behind criminal law enforcement, which must extend even to law firms. As I hope I

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have shown, the protections afforded privilege by the common law prior to the enactment of the ***Charter*** were substantial, and there is no reason to think that Canadian courts would cease to respect the principle in the absence of the procedure contemplated by s. 488.1 and even in the context of duly authorized search warrants executed under s. 487.

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Disposition

[117] I would allow the appeal to the extent that I would not strike down s. 488.1 but would modify it as follows:

(a) by deleting the word "named" in s-s. (2);

(b) by deleting the words "within fourteen days from the day the document was so placed in custody" in para. (a) of s-s. (3) and the words "not later than twenty-one days after the date of the order" from subpara. (a)(i) of s-s. (3);

(c) by deleting subpara. (4)(b) in its entirety;

(d) by deleting the words "whether or not the judge has, pursuant to paragraph (4)(b), allow the Attorney General to inspect the document" in s-s. (5); and

(e) by deleting s-s. (6).

I would dismiss the cross-appeal.

"The Honourable Madam Justice Newbury"

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.,* 2019 BCCA 66

Date: 20190222
Docket: CA45252

Between:

Greater Vancouver Sewerage and Drainage District

Respondent
(Appellant)

And

Wastech Services Ltd.

Appellant
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Stromberg-Stein
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated April 16, 2018 (*Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.*, 2018 BCSC 605, Vancouver Docket S174259).

Counsel for the Appellant: D.G. Cowper, Q.C.

Counsel for the Respondent: I.G. Nathanson, Q.C.

Place and Date of Hearing: Vancouver, British Columbia
January 22 and 23, 2019

Place and Date of Judgment: Vancouver, British Columbia
February 22, 2019

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Stromberg-Stein
The Honourable Madam Justice Fisher

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Summary:

Appeal from a Supreme Court judge's order allowing an appeal of an arbitrator's award in favour of the appellant "Wastech". The litigants were parties to a long-term and complex agreement providing for the removal and hauling of solid wastes by Wastech on behalf of the respondent District ("Metro".) Wastech claimed compensation when Metro substantially re-allocated wastes in 2011 between short- and long-haul destinations, which increased Wastech's costs such that it could not meet a so-called "Target Operating Ratio" or "OR" as defined in the Agreement. This ratio, which was fixed at 0.89, represented the proportion of Wastech's costs as against revenues and if met would give it operating profit of 11% p.a. Various adjustments were provided for in the contract, and Metro paid Wastech some $2.8 million as a result of the re-allocation, but the parties had consciously chosen not to provide adjustments beyond a certain point. The actual OR for the year, after the one adjustment, was .96.

Wastech took its claim to arbitration, arguing that a term should be implied or that a duty of good faith should apply so as to entitle it to a further $2.8 million. The arbitrator declined to imply a term in light of the parties' deliberate choice not to include such an adjustment, but found that although Metro's conduct had been honest and reasonable from its own point of view, it had failed to give "appropriate regard" to Wastech's interests or expectations. He found that this constituted "dishonesty" for purposes of the duty of good faith as explained in Bhasin (SCC).

Metro obtained leave to appeal under s. 31 of the Arbitration Act on two questions of law. On appeal to this court, Wastech's appeal of the leave order was dismissed. The Court of Appeal approved the two questions of law proposed by Metro for appeal to the SCBC.

The SCBC chambers judge allowed the appeal, apparently ruling that Bhasin had not created a free-standing obligation on a contracting party not to disregard the interests of the other party. However, he went on to make other comments and did not clearly address the two questions of law brought to the Court. Wastech appealed to this court.

Appeal dismissed (for reasons somewhat different from those of the chambers judge.) The arbitrator had erred in law in the manner referred to in the two questions of law brought to the Court. More particularly, he had erred in law in failing to address whether Wastech had had a legitimate contractual expectation that Metro would compensate it over and above the adjustment provided for in the contract; failing to consider the effect of his rejection of an implied term in his analysis of good faith; concluding that a breach of the duty of good faith occurs whenever a party fails to give "appropriate regard" to the other's interests in the absence of a finding that the contract has been "eviscerated" or "nullified"; and in finding "dishonesty" and thus breach of the duty of good faith without any element of dishonesty, improper motive, of bad faith as understood in existing law.

Reasons for Judgment of the Honourable Madam Justice Newbury:

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[1] This appeal tests the nature and scope of changes made recently by the Supreme Court of Canada in both the substantive law of contract (in *Bhasin v. Hrynew* 2014 SCC 71) and the law relating to the appellate review of arbitral decisions resolving contractual disputes (in *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53 and *Teal Cedar Products Ltd. v. British Columbia* 2017 SCC 32.) In the case at bar, the court below is said to have found that an arbitrator erred in law in ruling that the conduct of the respondent Greater Vancouver Sewerage and Drainage District (referred to as “Metro” by the parties) had been “dishonest” only by reason that it was “at odds” with the legitimate contractual expectations of the appellant Wastech Services Ltd. (“Wastech”.) In the result, the Court set aside the arbitrator’s award of damages to Wastech in the amount of $2,888,162 for breach of the duty of good faith.

[2] On appeal to this court, Wastech asserts certain errors of law on the part of the chambers judge. It also suggests in its factum that the judge failed to determine whether the questions on which leave to appeal to the Supreme Court of British Columbia had been granted, were “reviewable issues under the narrow compass of the *Arbitration Act*.” Section 31 of the *Act* (R.S.B.C. 1996, c. 55) states that only questions of law arising from an arbitral award may be appealed, that the result must be important to the parties and that the court’s intervention must be necessary to prevent a miscarriage of justice.

Characterization

[3] Obviously, then, this case has engaged the process of characterizing issues of law as opposed to those of mixed law and fact, or fact alone. In the arbitral context, as in the realm of judicial review, this process has become a vexed one. In *Sattva*, the Supreme Court saw similarities in the appellate review of arbitral cases and judicial reviews: both involve the examination of decisions of non-judicial decision-makers by appellate courts. Expertise on the part of such decision-makers is “a factor”, as it may be presumed they are chosen because of their expertise in a

given field or are otherwise qualified in a manner acceptable to the parties – just as administrative tribunals are presumed to have expertise in their areas of jurisdiction. On the other hand, there are differences between the two contexts. One identified in *Sattva* is that parties engage in arbitration by "mutual choice" rather than by statutory process; another is that as mentioned, the *Arbitration Act* limits appeals to questions of law, thus 'forbidding' review of an arbitrator's factual findings, whereas in judicial review the court is not precluded from reviewing a decision, although it must apply a deferential standard. (At para. 104.)

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[4] With respect to standard of review, the Supreme Court in *Sattva* and *Teal Cedar* suggested that a standard of reasonableness (as explained in *Dunsmuir v. New Brunswick* 2008 SCC 9), now the norm in administrative law, applies to *all* questions of law on appeal in commercial arbitrations, 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." (See *Sattva* at para. 106; *Teal Cedar* at para. 74.) Since the Court in *Sattva* also decided that in future, questions of contractual interpretation were to be regarded as questions of mixed fact and law, only a very small window for appellate review of arbitral decisions remains.

[5] Nevertheless, counsel for appellants from arbitral awards continue – not surprisingly – to argue in favour of the existence and significance of questions of law to which the correctness standard applies. This has led the Supreme Court to direct appellate courts repeatedly to be "vigilant" against attempts to find extricable questions of law when in reality the objection is to how the arbitrator applied the law to the facts. As stated by Justice Rothstein in *Sattva*:

> … 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.

> 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 [*Arbitration Act*], 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. [At paras. 53-4.]

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[6] Similarly, in *Teal Cedar*, Gascon J., speaking for the Court, built on *Sattva* in describing the "process for characterizing" a question of law, fact or mixed fact and law. In his words:

> In particular, it is not disputed that legal questions are questions "about what the correct legal test is"…; factual questions are questions "about what actually took place between the parties"…; and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts"…
>
> That said, while the application of a legal test to a set of facts is a mixed question, if, in the course of that application, the underlying legal test may have been altered, then a legal question arises. For example, if a party alleges that a judge (or arbitrator) while applying a legal test failed to consider a required element of that test, that party alleges that the judge (or arbitrator), in effect, deleted that element from the test and thus altered the legal test. ...
>
> Such an allegation ultimately challenges whether the judge (or arbitrator) relied on the correct legal test, thus raising a question of law... Accordingly, such a legal question, if alleged in the context of a dispute under the *Arbitration Act*, and assuming the other jurisdictional requirements of that Act are met, is open to appellate review. These "extricable questions of law" are better understood as a covert form of legal question — where a judge's (or arbitrator's) legal test is implicit to their application of the test rather than explicit in their description of the test — than as a fourth and distinct category of questions. [At paras. 43-4; emphasis added.]

He also warned against taking too wide a view of questions of law:

> …mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question – for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments – are transparent... A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law...), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

> ... The identification of an alleged legal error should be based on the arbitrator's application of the wrong test, not on the fact that one would have applied the appropriate legal test differently. [At paras. 45, 59; emphasis added.]

This restrictive approach is said to be consistent with the principles of finality and deference (see *Teal Cedar* at para. 45); parties seeking correctness in the application of law to the facts are effectively left without recourse. (Whether the Supreme Court intends to discourage the selection of arbitration as opposed to judicial determination is unclear, as is whether contracting parties who provide for arbitration in their agreements are likely to be aware of the limited scope for appellate review in the event of arbitral error.)

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[7] In *Richmont Mines Inc. v. Teck Resources Limited* 2018 BCCA 452, this court recently applied *Sattva* and *Teal Cedar* in connection with an appeal from an order of a chambers judge in the Supreme Court of British Columbia granting leave to appeal an arbitrator's decision. The appeal was taken on the basis that the chambers judge had erred in law in, *inter alia*, identifying an extricable question of law where none existed and applying the incorrect standard of review to decide if the proposed appeal had some merit. Since the chambers judge had in reaching his decision agreed with the respondent's interpretation of a recital and had not addressed whether an extricable question of law had been demonstrated, this court allowed the appeal and set aside the order granting leave.

The Duty of Good Faith in Bhasin

[8] With the warnings of *Sattva* and *Teal Cedar* in mind, I turn to the substantive law relating to the duty of good faith between contracting parties as explained in *Bhasin.* This was the subject of the majority of counsels' submissions over the two days of the hearing of this appeal.

[9] It is perhaps unnecessary to recount the facts of *Bhasin* in detail. It should be sufficient to recall that the plaintiff Mr. Bhasin had a three-year 'evergreen' agency contract with the defendant "Can-Am" i.e., one that was automatically renewable unless one of the parties gave written notice of termination to the other within the

time specified in the agreement. The trial judge found that Can-Am had repeatedly misled Mr. Bhasin concerning its plans for the business in which the parties were engaged, and concerning the state of negotiations between Can-Am and a third party about a possible merger. It had also engaged in a civil conspiracy with the other defendant, Mr. Hrynew. As Mr. Justice Cromwell for the Supreme Court recounted:

> 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, that Mr. Hrynew had intentionally induced breach of contract, and that the respondents were liable for civil conspiracy.
>
> The trial judge found that <u>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</u> 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. [At paras. 14-5; emphasis added.]

At the Court of Appeal level, Can-Am's appeal was allowed on the basis that Mr. Bhasin's pleadings had been deficient and that the lower court had erred by implying a term of good faith into an "unambiguous contract containing an entire agreement clause." (See para. 16.)

[10] The Supreme Court of Canada allowed Mr. Bhasin's appeal. Cromwell J. began his analysis at para. 32, reviewing the "unsettled and incoherent body of law" that had developed in various pockets of contract law. Notably for our purposes, he observed that good faith often plays a role in the law of implied terms, since the implying 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". (At para. 44.) He noted the suggestion of Kerans J.A. in *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.* 1994 ABCA

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94 that when judges imply a term, they actually have good faith in mind. (At para. 22, quoted in *Bhasin* at para. 44.)

[11] At para. 47, Cromwell J. recalled that in *The Law of Contracts* (2nd ed., 2012), Professor McCamus had identified three broad types of situations in which a duty of good faith had been found to exist. One of these was where one party exercises a discretionary power under the contract. As an example, the Court noted *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada* [1995] 2 S.C.R. 187, in which the lessee of a helicopter had an option to purchase it at the "reasonable fair market value of the helicopter as established by Lessor". The Court held that that this clause did not permit the lessor to choose any amount it felt was appropriate; rather, the lessor was bound to act in good faith to determine the reasonable fair market value. Without such a requirement, it was said, the option would have been a mere agreement to agree and thus unenforceable. (See *Mesa* at para. 22; see also *Greenberg v. Meffert* (1985) 50 O.R. (2d) 755 (C.A.) and *Sherry v. CIBC Mortgages Inc.* 2016 BCCA 240.)

[12] Overall, Cromwell J. stated, the situations in which terms are implied as a matter of law, as a matter of intention or as a matter of interpretation, are sometimes "blurred or even ignored, resulting in uncertainty and a lack of coherence at the level of principle." (At para. 52.) He described various other types of situations in which a duty of good faith is already recognized – in employment contracts, contracts of insurance, and in the tendering context. However, a "stand-alone doctrine" had not yet been adopted in the U.K., Australia or Canada.

[13] In Cromwell J.'s view, it was time to take two incremental steps to make the common law in Canada "less unsettled and piecemeal, more coherent and more just." The first step was to recognize good faith as a "general organizing principle" – i.e., a principle that "states in general terms a requirement of justice from which more specific legal doctrines may be derived." It was thus "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". (At para. 64.)

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[14] That organizing principle of good faith, he said, was "simply that *parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.*" (At para. 63.) He continued:

> 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.
>
> 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. [At paras. 65-6; citations omitted; emphasis added.]

He also emphasized that the principle:

> … 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… [At para. 69.]

[15] The principle of good faith should be applied, he said, consistently with the 'commitment' of the common law of contract to the freedom of contracting parties to pursue their individual self-interest. Again in his words:

> In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest... Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency... The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the

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> organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.
>
> 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. [At paras. 70-1; citations omitted; emphasis added.]

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[16] The plaintiff's objection to the defendant's conduct in *Bhasin* did not, however, fit within any of the existing relationships in which a duty of good faith had been found, and classifying Can-Am's decision not to renew the contract as a contractual "discretion" would "constitute a significant expansion of the decided cases under that type of situation." (At para. 72.) As well, it would be difficult to say that a duty of good faith should be implied, given the existence of an 'entire agreement' clause in the parties' agency contract. Cromwell J. therefore turned to his second step in the "way forward" – the creation of a new common law duty of "honesty in contractual performance" under the umbrella of the organizing principle of good faith. He described this duty as follows:

> 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... 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… [At para. 73; citations omitted; emphasis added.]

and at para. 74:

> ….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. [Emphasis added.]

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(Mr. Cowper on behalf of Wastech acknowledged that his client does not rely, and did not rely in the arbitration, on any breach of the ‘new’ duty of honest performance, but only on the organizing principle of good faith.)

[17] The Court warned at para. 86 of *Bhasin* that the proposed duty of honest performance should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract, it said, has no general duty to subordinate his or her interest to that of the other party. (At para. 86.) On this point, the Court cited an American decision, *United Roasters, Inc. v. Colgate-Palmolive Co.* 649 F. (2d) 985 (4th Cir. 1981), in which a lessee who was entitled to terminate a lease and who had decided to do so, did not give notice of its intention until the time specified in the lease. The Court declined to find that the lessee had breached its duty of good faith in failing to give notice as soon as its decision was made. In its analysis:

> 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. [At 989-90.]

[18] In *Bhasin* itself, the Court declined to adopt a broader duty of good faith (i.e., broader than the “modest, incremental change” proposed by Cromwell J.) or to endorse the trial judge’s conclusion that because of its breach of the duty, Can-Am should not be permitted to exercise its right of termination. Effectively, that conclusion had turned a three-year contract that contained a right of termination into a contract of indefinite duration. Cromwell J. continued:

> …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. [At para. 90; emphasis added.]

At the end of the day, the Court agreed that Can-Am's breach of the duty of good faith had consisted of its *failure to be honest* with Mr. Bhasin about its contractual performance and in particular, with respect to its settled intentions concerning renewal. The Court awarded the plaintiff damages of $87,000, being the approximate value of Mr. Bhasin's business around the time of renewal. (See para. 110.)

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[19] At para. 93, the Court summarized "the principles" as follows:

> (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.

The Parties' Agreement and the Arbitrator's Findings

[20] I turn next to the terms of the parties' contract dated December 20, 1996 (the "Agreement") and the arbitrator's findings of fact in the case at bar. As Mr. Cowper emphasized, the Agreement was complex, had a term of 20 years, and had been negotiated over many months. It had replaced and superseded four separate agreements between Metro and Wastech or its predecessors dating back to as early as 1986. As one might expect in a contract of this kind, it contained many defined terms, was augmented by various schedules, and contained many common 'boilerplate' clauses, including an 'entire agreement' clause at section 32.17. It also provided for events of Force Majeure (section 31), "Fundamental Default" and "Minor Default" on the part of Wastech (sections 20, 22), and obviously, the settlement of claims and disputes by arbitration.

[21] Recital B of the Agreement confirmed that the parties intended to:

> … enter into a comprehensive agreement providing for the delivery of an essential public service entailing the operation of an integrated, comprehensive municipal solid waste transfer system… and sanitary landfill in a reliable, cost-effective and environmentally-sound manner and in accordance with the Greater Vancouver Regional Solid Waste Management Plan…

Recital C also confirmed their intention that the Agreement would, *inter alia*:

> 2. provide incentives for both GVS&DD [Metro] and Wastech to maximize efficiency and minimize costs;
>
> 3. provide for the sharing between GVS&DD and Wastech of risks and benefits, with risks to be allocated to the party best able to manage them;
>
> ...
>
> 6. provide for the maximization of the municipal solid waste disposal capacity of the Cache Creek Landfill….; and
>
> 7. be durable, but sensitive to significant changes in operating standards, services or system configuration….

[22] In general terms, the Agreement (referred to by the arbitrator as the "CA") contemplated that Wastech would provide the "Services" in accordance with the terms of the Agreement and all applicable permits, laws and insurance and bonding requirements. "Services" was defined in Schedule B to include providing all services necessary for the receiving, transport and disposal of waste and recyclables, and the administration of certain facilities in connection therewith.

[23] Under section 4.4 of the Agreement, Wastech was bound to accept all Municipal Solid Waste provided to it by Metro from time to time and, under Schedule B, to transport the same to the Cache Creek Landfill (a "Long-Haul") or to the Burnaby Incinerator or the Vancouver Landfill ("Short-Hauls") as directed. Metro was obliged to make monthly payments to Wastech for Short-Haul and Long-Haul services as well as certain operating expenses and capital expenses allocable to each Operating Year. Given the long-term nature of the Agreement, many variables, including the Short-Haul and more lucrative Long-Haul rates and fixed operating and capital expenses, had to be adjusted from time to time in accordance with formulas set out in the Agreement.

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[24] Section 30.1, for example, required Metro to provide Wastech, at the Cache Creek Landfill, such "total amount or amounts of trailer capacity… during such period or periods, all as may be determined by [Metro] in its absolute discretion." (This was referred to as the "Trailer Capacity Guarantee"). If the guaranteed volume was not met, Metro was required to pay all costs and expenses incurred by Wastech in replacing any shortfall in Trailer Capacity provided by Metro. As noted by the arbitrator, the purpose of this provision was to give Wastech the opportunity to make "back-hauling" commitments to third parties. As well, Short- and Long- Haul rates were to be adjusted on the occurrence of a "Major Event" having an impact of less than 10% on Waste Volumes (section 14.15) or more than 10% (section 14.16.) "Major Events" included "external events" beyond the parties' control (including changes in law), and specified events as a result of which either party 'demonstrated' that an adjustment in rates was 'warranted'. (No Major Event was alleged to have occurred in this case.)

[25] More importantly for our purposes, the parties employed the mechanism of a Target Operating Ratio, or "OR", which the arbitrator described as follows:

> The concept of a Target OR of .89 is an important feature of the CA. It balanced the interest of Wastech in receiving appropriate compensation over the life of the CA with the interest of Metro in not being obliged to make payments that might over time be considered excessive.
>
> When the CA was made, both parties knew that the actual operating ratio achieved in any year would depend on a number of variable factors. The revenues received by Wastech would depend on the volume of waste it handled and the rates payable for that waste. Because of the Long-Haul Rates and Short-Haul Rates were different, Wastech's revenue also depended on the volumes of waste allocated for delivery to [Cache Creek Landfill] (to which Long-Haul Rates applied) and to [Vancouver Landfill] (to which Short-Haul Rates applied). Wastech's operating costs also were subject to variation for a number of reasons, including the varying financial demands of its sub-contractors, suppliers and employees. The volumes allocated to the disposal facilities impacted costs, which were not allocated proportionately to long-haul and short-haul services. Although operating costs would generally increase or decrease in absolute terms as waste volumes increased or decreased, operating costs could be reduced on a per-unit basis, and the OR could thereby be improved, by taking advantage of economies of scale. Thus, when the CA was made, the parties knew that if the Target OR was to be achieved, rates, costs, total volumes and volumes allocated to each disposal site all had to be in an appropriate balance. [At paras. 42-3.]

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[26] The Target OR was 0.89 (see section 14.1). It would be reached if operating costs in a given Operating Year were equal to 89% of revenues – presumably leaving the balance (11%) as operating profits for Wastech. As the arbitrator noted, the ratio had been arrived at after a review of financial performance under predecessor agreements between Wastech and Metro. However, as observed by Madam Justice Fitzpatrick in her reasons for granting leave, it was common ground that the Agreement did not provide a *guarantee* that the OR would be met, in any given year or over the 20-year term of the Agreement. (See 2016 BCSC 68 at para. 13.) Rather the OR was a figure around which certain adjustments would be made in certain carefully-defined circumstances.

[27] Section 12.7 of the Agreement required Metro to provide Wastech with a detailed forecast (the "Annual Waste Allocation Plan") of the allocation of waste between Short- and Long- Haul destinations expected to be handled in the following year. The arbitrator found that one purpose of this requirement was to give Wastech an "opportunity to plan its future operations and manage its costs in the light of the forecasted total volume and Metro's allocation, all with a view to maximizing operating efficiencies." (At para. 44.)

[28] If the Target OR was exceeded – i.e., if Wastech's operating costs exceeded 89% of revenues – or if the actual OR was less than .89, *and the deviation in either case was 3% or less*, the parties were to share the difference equally by means of a "Carry-Over Variance Adjustment" under section 14.19. The arbitrator described it as follows:

> Section 14.19 of the CA provides for a retroactive payment by or to Wastech of 50% of the difference between the Target OR and the Actual OR. This is referred to in the CA as the "Carry-Over Variance Adjustment". The result of this adjustment is that the parties share equally the financial consequences of the deviation from the Target OR for the relevant year to the extent that the deviation is .03 or less. [At para. 48; emphasis added.]

[29] A further adjustment, this one to hauling rates, was provided at section 14.11 of the Agreement where the actual OR was less than .86 or more than .92. This was referred to as the "Outside Band Adjustment". As the arbitrator found, it was "only

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intended to be sufficient to return the OR to the 'outside' of the band of operating results that is represented by an OR of between .86 and .92". (At para. 49.) No adjustment was contemplated, then, to the extent that the actual OR *exceeded* .92. Indeed, as already mentioned, it was common ground that the Agreement did not provide a guarantee that the OR would be met in any year or years.

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[30] At paras. 57-63 of his reasons, the arbitrator reviewed the parties' evidence as to why the Agreement had not provided for the eventuality of a "*substantial*" re-allocation of waste volumes. He found that Mr. Rattray, who gave evidence for Metro, "genuinely did not consider that a substantial redirection of waste to [Vancouver Landfill] and away from [Cache Creek Landfill] was likely to occur" during the term of the Agreement. Based on all the evidence, the arbitrator found that when the Agreement was negotiated:

> 1. Both parties were aware of the possibility that waste flows to [Cache Creek Landfill] might reduce and that one possible reason for a volume reduction would be the direction of waste to [Vancouver Landfill] rather than [Cache Creek Landfill];
>
> 2. Both parties were aware that a possible consequence of a reduction in waste volumes delivered to [Cache Creek Landfill] would be that Wastech would not achieve the Target OR;
>
> 3. Both parties thought that it was highly unlikely that there actually would be a substantial reallocation of waste away from [Cache Creek Landfill] to [Vancouver Landfill];
>
> 4. As a consequence, and because of a mutual desire to simplify the [Agreement], <u>both parties agreed that no provision dealing with that eventually should be included in the [Agreement].</u> [At para. 63; emphasis added.]

The Re-allocation for 2011

[31] In February 2010, Metro gave Wastech notice that it was amending the base Trailer Capacity Guarantee such that the quantity guaranteed in 2010 (320,000 tonnes) would be reduced to 250,000 tonnes in 2011. Then, in September 2010, Metro gave Wastech its Annual Waste Allocation Plan for 2011. The arbitrator quoted the following passage from the notification letter:

> Metro Vancouver anticipates that Wastech will be required to dispose of approximately 600,000 to 700,000 tonnes of Municipal Solid Waste during the 2011 Operating Year.
>
> For the 2011 Operating Year, Metro Vancouver hereby directs Wastech to haul Metro Vancouver's Municipal Solid Waste as follows:
>
> (i) Sufficient tonnage to keep the Burnaby Waste to Energy Facility operating at maximum capacity;
>
> (ii) Approximately 200,000 tonnes to Vancouver Landfill; and
>
> (iii) All remaining tonnage to the Cache Creek Landfill.
>
> Metro Vancouver is notifying Wastech of the anticipated tonnages now so Wastech has sufficient time to adjust operations to reduce Total Eligible Operating Expenses so that the Operating Ratio remains as close to 0.89 as possible .... [At para. 47.]

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As a result, out of 609,340 tonnes of waste transported by Wastech in the 2011 Operating Year, only 273,018 tonnes would be hauled to the Cache Creek Landfill. Metro paid a Carry-Over Variance Adjustment of $2,888,183 pursuant to section 14.19 of the Agreement. The actual OR for 2011 was 1.05; taking the Variance Adjustment into account, it was .96. (At para. 47.) This meant that, subject to other terms of the Agreement, Wastech would recover an operating profit for 2011 of 4%.

[32] The arbitrator dealt with Metro's re-allocation decision at paras. 52-54 of his reasons. He found that Metro had made a "conscious decision" to redirect waste from the Cache Creek Landfill to the Vancouver Landfill. He cited a memorandum of Mr. Remillard, a Metro official, to the effect that the District had ordered the re-allocation in order to "maximize the remaining life of the Cache Creek Landfill" and because it had determined it was "better off financially to re-route 100,000 tonnes from Cache Creek Landfill to the Vancouver Landfill based on the assumption that Wastech would reduce costs at the [Cache Creek Landfill] to reduce the projected 4.4 million negative Carry-Over Variance that we share 50/50." Mr. Remillard had acknowledged in a memorandum in December 2010 that there was "no certainty" Wastech could reduce its costs significantly in light of the new Allocation Plan and that the Plan was likely to cause "significant operational issues with Wastech such as employee layoffs and reduced funding for the Village of Cache Creek due to lower royalty payments." (At para. 53.)

[33] The arbitrator made the following key findings about Metro's re-allocation decision and its effect on Wastech:

> Metro's allocation decision for 2011 caused volumes delivered to [Cache Creek Landfill] to drop precipitously (by 123,328 tonnes or 31%) relative to 2010 while [Vancouver Landfill] volumes were substantially increased (by 49,048 tonnes or 36%). On the whole of the evidence, I am satisfied that the substantial increase in the OR in 2011 was caused by Metro's decision to allocate a full 200,000 tonnes of a declining volume of total waste to [Vancouver Landfill] in priority to [Cache Creek Landfill]. I accept the evidence of Mr. Rattray that Wastech acted prudently in the light of Metro's 2011 waste allocations and took timely and appropriate measures to control costs in response to changing circumstances. I find that in all the circumstances, as a result of Metro's 2011 Waste Allocation Plan, it was simply not possible for Wastech to achieve the Target OR for the 2011 Operating Year. [At para. 54; emphasis added.]

The Parties' Positions

[34] In September 2014, Wastech initiated a claim that was brought to arbitration in accordance with section 18.3 of the Agreement. Wastech sought another $2,888,162 from Metro, which represented what Wastech would have earned in 2011 if rates payable under the Agreement had been adjusted to achieve the Target OR, less Wastech's actual earnings after taking into account the Carry-Over Variance Payment of $2,888,163 already received from Metro. (At para. 64.)

[35] As noted at para. 28 of the award, Wastech conceded that the Agreement had given Metro the authority to allocate waste among the disposal facilities. It argued, however, that in circumstances where the allocation "deprives Wastech of any opportunity to achieve the Target OR, there must be contractual consequences." It relied on two alternative legal bases for its claim – first that it was an *implied term* of the Agreement that in such circumstances Wastech would be entitled to a retroactive rate adjustment; and second, that by exercising its power to allocate waste as it had, Metro had breached an *implied duty to perform the Agreement in good faith*. (At para. 28.) Putting the second proposition another way, Wastech submitted that Metro could not, in good faith, exercise its power to allocate waste "in such a way as to deprive Wastech of the opportunity to earn the Target OR." (At para. 32.)

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[36] In response, Metro emphasized that when the Agreement was being negotiated, both parties had been aware that the actual OR achieved in any year would depend on a number of variables, including volumes of waste and the allocation of wastes between Short- and Long-Haul facilities. On this point, the arbitrator found that:

> ... Although operating costs would generally increase or decrease in absolute terms as waste volumes increased or decreased, operating costs could be reduced on a per-unit basis, and the OR could thereby be improved, by taking advantage of economies of scale. Thus, when the [Agreement] was made, the parties knew that if the Target OR was to be achieved, rates, costs, total volumes and volumes allocated to each disposal site all had to be in an appropriate balance. [At para. 43; emphasis added.]

[37] Metro also argued that the evidence did not support the notion that it had made a “radical re-direction” of waste away from Cache Creek; and that in any event, the express terms of the Agreement gave it the right to decide waste allocations and placed “no limit” on the exercise of that right. Further, Metro submitted:

> ... The risks associated with a reduction in total waste volumes or a reduction in volumes of waste allocated to [Cache Creek Landfill] are fully addressed by the provisions of the [Agreement], which set out in detail when rate adjustments are to be made. To the extent, if any, that evidence of pre-contractual matters is admissible, Metro submits that the omission of the term that Wastech wishes to have implied was not an oversight. It submits that the term Wastech seeks to imply is fatally imprecise and would, in any event, be inconsistent with the express terms of the [Agreement]. [At para. 36; emphasis added.]

Finally, Metro submitted there was no basis to imply a duty of good faith as asserted by Wastech and that in any event, its actions met the relevant good faith standard. (At para. 37.)

Implied Term

[38] The arbitrator addressed Wastech’s argument in favour of an implied term at paras. 65-77 of his reasons. Wastech relied in particular on the following principle from *Canadian Contractual Interpretation Law* (2nd ed., 2012):

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> ... based on the presumed intentions of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed. [At p. 149.]

The term Wastech sought to have implied in the Agreement was that:

> ... [Metro] cannot re-direct waste flow away from the [Cache Creek Landfill] to an extent that deprives Wastech of the *possibility* of achieving the Target OR (subject to reasonable performance of the services required of Wastech pursuant to the terms of the [Agreement]) without concurrently adjusting the Long Haul and Short Haul Rates or retroactively compensating Wastech for the consequential effect of that re-direction.

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[39] The arbitrator noted that the question of whether a term should be implied was "not immediately concerned" with the interpretation of the language of the Agreement, but that evidence of the factual matrix was helpful to, in the words of the Court in *Sattva*, "deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract." (At para. 57.) After considering the factual matrix described at para. 73 of his reasons, the arbitrator concluded:

> In the present case, the evidence shows that when the contract was made both parties were aware that it did not contain a provision dealing with the subject-matter of the term that Wastech now seeks to imply. They were both aware that the possibility of including some form of provision in the CA addressing that subject matter had been discussed, and that they had made a decision not to include it. In the light of that evidence, I do not see how an officious bystander, in the position of the two contracting parties, could possibly conclude that the parties intended to include such a provision in the CA. Based on the evidence, if the parties had been asked when agreeing to the CA whether such a term should be included, they would have said "no", just as they in fact did when the issue was actually raised. [At para. 74; emphasis added.]

He ruled, then, that there was no basis for implying the term sought by Wastech into the Agreement.

Breach of the Duty of Good Faith

[40] Under this rubric, Wastech argued that Canadian courts recognize a duty of good faith in certain types of contracts and, in particular, where one party to a

contract, through the exercise of a discretion accorded it in the contract, could nullify objectives of the contract or cause significant harm to the other party contrary to the parties' original expectations. (See *Mesa* at para. 23 and para. 51 of *Mannpar Enterprises v. H.M.T.Q.* 1999 BCCA 239.) In Canada, 'nullification' in this context seems to have its origins in *Gateway Realty Ltd. v. Arton Holdings Ltd. (No. 3)* (1991) 106 N.S.R. (2d) 180 (S.C.T.D.), *aff'd.* (1992) 112 N.S.R. (2d) 180 (App. Div.); see also McCamus at 864.) In Wastech's submission, Metro had breached an "imposed duty of good faith performance" when it exercised its discretion to redirect waste flow volumes away from Cache Creek in 2011 "to an extent that made it impossible for Wastech to achieve the Target OR". (At para. 78.) Wastech relied on evidence of the surrounding circumstances to show that Metro's conduct was so "fundamentally at odds" with Wastech's *legitimate contractual expectations* that it "must be characterized as a breach of a duty of good faith." (At para. 79; my emphasis.) The company cited *Schluessel v. Maier* 2001 BCSC 60, a decision of Mr. Justice Harvey, who in turn had referred to *Mannpar* and *Mesa*, *supra*. In Harvey J.'s analysis, these cases (all of which involved implying terms into contracts) illustrated the proposition that:

> > … a court will not willingly allow a party to act in a fashion to deny the benefits of a contract to the other contracting party….
> > ... [*per* Hall J.A. in *Mannpar*.]
>
> Therefore, as a matter of settled law in B.C., a party to a contract has a duty not to act in a manner that deprives another party to the contract of the bargained objective or benefit. [At para. 131; emphasis added.]

[41] Both parties cited *Bhasin,* from which the arbitrator quoted extensively as I have above. The arbitrator noted in particular the following passage:

> 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 interest will vary depending on the context of a 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. [At para. 65; emphasis added.]

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From this, Wastech argued that although Metro was not "barred" from allocating waste as it deemed fit, to the extent that its allocation denied Wastech the "opportunity to achieve the Target OR", Metro was obliged by the duty of good faith to compensate Wastech for the value of that lost opportunity. Not having provided compensation, Metro was said to be in breach of its good faith duty and liable to pay damages. (At para. 83.)

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[42] For its part, Metro did not seriously dispute that the Target OR was a "central concept" underpinning the Agreement. However, it submitted that:

> ... there is no justification to add a good faith obligation to the [Agreement] to address the consequences of its waste allocation decisions because the [Agreement] already exhaustively deals with what is to happen if the Target OR is not achieved. Metro submits that after intensive negotiations with the aid of expert advisors the parties implemented a compensation system that allocates and manages the risks of variances from the Target OR in a mutually acceptable manner. The [Agreement] does not contain a guaranteed minimum volume of waste to be allocated to [Cache Creek Landfill], as certain predecessor agreements did. Metro submits (and Wastech agrees) that there is no promise in the [Agreement] that the Target OR will be achieved. To the contrary, the [Agreement] expressly contemplates that it may not be achieved from time to time. Metro submits that to import into the [Agreement] a further compensation obligation or a new limitation on Metro's rights is, in effect, to re-write the [Agreement] to the benefit of Wastech and to the detriment of Metro. [At para. 84; emphasis added.]

The Arbitrator's Analysis of the Duty of Good Faith

[43] The arbitrator began his own analysis of Wastech's claim that Metro had breached a duty of good faith, with the proposition that as a complex, long-term contract involving mutual co-operation, the Agreement fell within one of the types of relationships in which existing doctrines of contract law required Metro to have "appropriate regard" for Wastech's "legitimate contractual interests" in the exercise of its (Metro's) discretionary power. (At para. 85.) Having said this, the arbitrator agreed with Metro that the existence of the adjustment clauses in the Agreement and the absence of any guarantee that the OR would be met, were "circumstances to be taken into account" in assessing whether Metro had met its good faith obligation. In the arbitrator's analysis, they supported the conclusion that *routine* changes in waste allocations should not be regarded as breaches of a good faith

obligation, even if they had a negative financial impact on Wastech. However, the 2011 re-allocation decision had resulted in a "*material*" reduction in the waste allocated to the Cache Creek facility and a material increase in waste allocated to the Vancouver Landfill. These changes had "significant financial implications beyond those addressed by the [Agreement's] adjustment mechanisms." (At para. 86.)

[44] The arbitrator accepted Metro's evidence that its re-allocation decision for 2011 had been guided by the objectives of "maximizing the Burnaby Incinerator's efficiency, preserving remaining site capacity at the [Cache Creek Landfill], and operating the system in the most cost-effective manner." He also accepted evidence that declining waste volumes in 2009 had negatively affected Metro's sole source of revenue – tipping fees paid by users at transfer stations – making it necessary for the District to use funds from its operating reserves to cover its operating costs. It was required to repay such funds within two years. Given these financial constraints, Metro had "focused" on the cost differences associated with different disposal options. If one viewed Metro's conduct *only from its perspective and without regard to the interests of Wastech,* the arbitrator said, Metro's conduct had been *"both honest and reasonable. Metro was not obliged to put Wastech's interests ahead of its own."* (At para. 88.)

[45] In the arbitrator's analysis, however, the issue raised by Wastech's claim was whether Metro had shown "appropriate regard" for Wastech's "interests" under the Agreement. (At para. 88.) Certainly Metro had expected that the diversion of 100,000 tonnes of waste to the Vancouver Landfill would cause "significant operational issues" for Wastech. In the event, the consequence of Metro's reallocation was that it was "not possible" for Wastech to achieve the OR (after the adjustments required by the express terms of the Agreement had been made and the resulting amounts paid to Wastech). The arbitrator stated the following key conclusions:

> I have considered very carefully the <u>question of whether the law requires a finding that Metro acted dishonestly before there can be any finding of breach of a duty of good faith and, if so, what constitutes "dishonesty" in this context.</u> In my view, although dishonest contractual performance in the form of half-truths, lies or deceit often leads to a finding of a breach of duty of good faith

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> in the performance of contracts, and is now even more likely to do so in the wake of *Bhasin*, neither the existing doctrines nor the organizing principle of good faith recognized in *Bhasin* requires that in all cases there must be evidence of dishonesty of that kind. Inherent in the concept of an obligation to perform contracts in good faith is the proposition that the mere fact that the impugned act is expressly authorized by, or not prohibited by, the contract is not determinative. The circumstances in which the contractual right is exercised and the impact of its exercise on the other contracting party may be such as to preclude or limit the exercise of the right. The focus of the organizing principle stated in *Bhasin* is on conduct that does not show "appropriate regard" for the "legitimate expectations" of the other party as to how the contract will be performed. It seems to me that the good faith doctrine characterizes the exercise of even an acknowledged, bargained-for contractual right as "dishonest" where it is wholly at odds with the legitimate contractual expectations of the other party. No additional form of dishonesty is required to be shown. [At para. 90; emphasis added.]

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(It is possible the arbitrator may have melded together the two branches of *Bhasin* here; but since Wastech relied only on the first branch, I do not propose to address the "new" duty of honest performance in these reasons.)

[46] The arbitrator found that the fact the parties had made a conscious decision not to include an express provision constraining Metro's allocation decisions or requiring compensation for their adverse effects, did not preclude the application of the good faith doctrine. In his words:

> ... Although in some cases the good faith obligation is described as an implied contractual term, *Bhasin* and the other jurisprudence defining the good faith doctrine do not require that the officious bystander test be applied. It is significant, in my view, that after observing that "the jurisprudence is not always very clear about the source of the good faith obligations found in these cases", when describing the organizing principle Cromwell, J. did not import the requirements of the officious bystander test for implying a term. [At para. 91.]

[47] In all the circumstances, the arbitrator ruled, Wastech had had a "legitimate contractual expectation" that Metro would not exercise its discretion with respect to the re-allocation of waste in such a way as would deprive Wastech of the opportunity, if Wastech performed its own obligations, to achieve the Target OR. Metro was obliged to have "appropriate regard" for Wastech's interest. Although "appropriate regard" was inherently a question of degree, the arbitrator said, it was not necessary for him to decide whether Wastech was required to show that Metro's

conduct had 'gutted' or 'eviscerated' the contract from Wastech's point of view. As *Bhasin* had made clear, legitimate expectations must be "determined on a case by case basis" and "viewed in the context of the [Agreement] and the commercial relationship as a whole." (At para. 93.) Again emphasizing the "material" nature of the re-allocation, the arbitrator wrote:

> The good faith obligation that I have found to exist applies because there was a substantial reduction in the waste allocated to [Cache Creek Landfill] attributable not just to a decline in total volumes of waste but also to a material increase in the waste directed to [Vancouver Landfill], that had the effect of depriving Wastech of the opportunity to achieve the Target OR, even though Wastech performed its own obligations. In those circumstances, to satisfy its good faith duty Metro must provide Wastech with compensation for its lost opportunity. [At para. 96; emphasis added.]

He measured this compensation by the difference between the revenue Wastech had actually received and the revenue it would have received had the "opportunity" not been "lost" – i.e., using the formula by which the Target OR was defined and adjusted in certain circumstances under the Agreement. Wastech was therefore awarded damages for breach of the duty of good faith in the amount of $2,888,162. (At para. 97.)

Appeal to Supreme Court of British Columbia

Leave to Appeal

[48] Metro sought leave to appeal to the Supreme Court of British Columbia on the following issues, which it characterized as questions of law:

> 1) Did the Arbitrator err in law in failing to apply proper principles in holding that the exercise of a bargained-for right could be "dishonest" and an act undertaken in bad faith simply because it was wholly at odds with the expectations of the counter-party, which expectations were not embodied in the contract?
>
> 2) Did the Arbitrator err in law by confusing the "organizing principle" stated in *Bhasin* with a free-standing obligation of

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contractual good faith, disregarding the applicable principle of good faith as found in the authorities?

Madam Justice Fitzpatrick granted leave for reasons indexed as 2016 BCSC 68. She found at para. 91 that the proposed issues had "arguable merit, whether from the standard of correctness or reasonableness" and that the other requirements of s. 31 of the *Arbitration Act* were met.

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[49] Wastech appealed Fitzpatrick J.'s order to this court, arguing in part that the two grounds of appeal as stated by Metro were not errors of law. (See para. 3 of this court's brief reasons, indexed as 2016 BCCA 393.) Mr. Justice Frankel for the Court rejected this argument, dismissing Wastech's appeal and allowing Metro's appeal of the arbitrator's award to proceed. Since s. 31(1) of the *Arbitration Act* permits an arbitral appeal only on a question of law, I agree with Mr. Nathanson that the division of this court must be taken to have found that the proposed grounds of appeal were questions of law and that the requirements of s. 31 of the *Act* were met. This conclusion is supported by the Supreme Court of Canada's comment in *Sattva* that the Supreme Court of British Columbia in that instance had been bound by this court's finding that leave had been properly granted, "including the determination that a question of law had been identified." (At para. 35.)

The Chambers Judge's Reasons

[50] Metro's appeal finally came before a judge in chambers in November 2017. He allowed it for reasons indexed at 2018 BCSC 605. Before starting his analysis, he noted a few cases, decided post-*Bhasin,* that have commented on the "organizing principle" of good faith in contract. The first was *Moulton Contracting Ltd. v. British Columbia* 2015 BCCA 89, *lve to app. dism'd.* [2015] S.C.C.A. No. 163, in which this court rejected the argument that the Province had acted "dishonestly, unreasonably, capriciously or arbitrarily" in failing to disclose to the respondent that a member of the Fort Nelson First Nation had threatened to disrupt logging under timber sale licenses purchased by the respondent from the Province. Madam Justice Levine for the Court stated that the respondent was reading the role of good faith as

explained in *Bhasin* ”too broadly in application to this case….No issues of honest contractual performance, as discussed in *Bhasin”* arose. (At para. 76.) In *Addison Chevrolet Buick GMC Limited v. General Motors of Canada Limited* 2015 ONSC 3404, *rev'd. on other grounds* at 2016 ONCA 324, the Court quoted from para. 33 of *Bhasin* and then commented:

> In suggesting this approach to the doctrine of good faith, Cromwell J. indicated that this "*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"* (*Bhasin, supra* at para. 41). It would be ironic indeed if a ruling intended to bring coherence and predictability by underscoring the common sense minimum standards of honesty in the commercial context should be misconstrued as a pretext for injecting uncertainty and risk of arbitrary outcomes into the world of commercial agreements whose very *raison d'être* is the pursuit of predictability and certainty.
>
> *Bhasin* is no authority for unbridled creativity in the creation from whole cloth of obligations in a contractual context which the parties have not provided for or have addressed in a fashion which one party regrets in hindsight. Good faith and honesty are the boundaries of the field on which the contractual relationship is negotiated and performed:
>
> > "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" (*Bhasin*, *supra* at para. 62) .
>
> [At para. 115; quoted by the chambers judge at para. 25; emphasis by underlining added.]

[51] Finally, the chambers judge noted *Empire Communities Ltd. v. Ontario* 2015 ONSC 4355, in which the Court endorsed a passage from *Data & Scientific Inc. v. Oracle Corp*. 2015 ONSC 4178 and continued:

> That is, the Supreme Court has rationalized, renamed and provided an overall framework for understanding several pre-existing aspects of duties of good faith that have been recognized by the law.… Nothing in *Bhasin* eliminated the pre-existing law of latent defects or the contractual interpretation principles enunciated just a few months earlier in *Sattva*.… Neither did it create a freestanding, ill-defined, and potentially arbitrary duty of good faith against which to measure all aspects of contractual performance. [At para. 26.]

Not surprisingly, Metro endorsed the foregoing "limitations on the reach of *Bhasin*".

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[52] For its part, Wastech submitted that the first ground of appeal divided into two questions, namely whether the arbitrator had erred in holding that it was not necessary to find dishonesty in order to prove there had been a breach of good faith in the exercise of Metro's discretion; and second, whether he had erred in law in finding that a "denial" of a party's contractual expectations not dealt with in the contract could be the basis for a breach of a duty of good faith. On the latter question, the chambers judge noted the arbitrator's finding that Wastech had had a legitimate contractual expectation that Metro would not direct waste flow volumes in a manner that would deprive Wastech of the opportunity to achieve the OR in 2011. (See paras. 90, 92 of the award.) As I understand it, the chambers judge was of the view that an inquiry into this question would "trespass on the fact finding jurisdiction of the Arbitrator" contrary to s. 31(1) of the *Arbitration Act*. (At para. 31.)

[53] The chambers judge regarded the second ground of appeal as resting on the proposition that since the arbitrator had ruled against implying a "rate-reset term", it was not open to him to find a duty of good faith (to do what the implied term would have required), and a breach thereof. (At para. 33.) Wastech's response was that the arbitrator's rejection of the implied term it had asserted, was "not inconsistent" with the good faith duty the arbitrator had found "on the terms and factual matrix" of the Agreement. In Wastech's submission, Recital C(6), quoted earlier in these reasons, clearly reflected an expectation that the annual allocation of waste by Metro would maximize the annual volume going to Cache Creek. The chambers judge rejected this argument, observing that if the arbitrator had found that the recital did reflect a common intention of the parties to maximize the waste delivered to Cache Creek, he (the arbitrator) would have implied a term to that effect. (At para. 40.) (I also note that it is erroneous to elevate recitals to contractual obligations: see *PUC Distribution Inc. v. Brascan Energy Marketing Inc.* 2008 ONCA 176 at para. 31, *lve. to app. ref'd* (2008) 390 N.R. 398. Recitals are generally referred to only for the purpose of clarifying ambiguities: see *Robb v. Walker* 2015 BCCA 117 at para. 27.)

[54] Wastech's next argument was that unless a contract states clearly that one party's discretion thereunder may be exercised without due regard for the other's

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legitimate expectations (obviously a very unlikely term), "objectively reasonable constraints ... must be imposed." The chambers judge stated that this argument was directly contradicted by the decision of the Alberta Court of Appeal in *Styles v. Alberta Investment Management Corp.* 2017 ABCA 1, *lve. to app. ref'd* [2017] S.C.C.A. No. 76. *Styles* was a wrongful dismissal case in which the plaintiff had been dismissed without notice and without cause from his employment. He argued, and the trial judge found, that in dismissing him, the employer had exercised a "discretion" which it was obliged to exercise "reasonably" and with "appropriate regard" for his interests – wording taken from *Bhasin*. The trial judge ruled that the employer had had no right to withhold certain bonuses from the plaintiff that were payable to employees on a vesting date *subsequent to* the date of his termination, and that the duty of good faith required that they also be paid to the plaintiff.

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[55] A majority of the Court of Appeal strongly disagreed with the trial judge's reasoning. Slatter and O'Ferrall JJ.A. began by referring to the duty of good faith adopted in *Bhasin* as not a "stand-alone concept but as explaining more specific rules that were applied in specific, established situations." (At para. 44.) Applying the organizing principle of good faith was said to involve a "difficult balancing exercise" and, the majority continued:

> Contracting parties are generally entitled to perform (and expect performance of) the contract in accordance with its terms. They are entitled to act in their own best interests: *Bhasin* at para. 70. <u>But at some point they cannot perform certain contracts in a way that seeks to "undermine [legitimate contractual] interests in bad faith": *Bhasin* at para. 65. The danger lies in imposing "legitimate contractual interests" that are contrary to the plain wording of the contract, or that involve the imposition of subjective expectations and interpretations on the contract.</u> As a result, this "organizing principle" should only be applied to situations where it has previously been invoked, although there is a limited ability to extend the law: *Bhasin* at paras. 71, 93. [At para. 45; emphasis added.]

Employment law was one of the areas in which Cromwell J. had found that the principle of good faith has been commonly recognized in Canadian law, although that duty did not extend to an employer's reason for *terminating* a contract of employment. On the other hand, the majority stated in *Styles*, *Bhasin* had recognized a common law duty to act honestly in the performance of contractual

obligations. In Cromwell J.'s words at para. 73 of *Bhasin*, that duty meant simply that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract". (See *Styles* at para. 47.)

[56] The Alberta Court of Appeal directly rejected the proposition that there is a more general principle of "reasonable exercise of discretion" in contractual performance. In the majority's analysis:

> This radical extension of the law is unsupported by authority, and contrary to the principles of the law of contract.
>
> The overall problem with the analysis in the trial reasons is that it quotes from several parts of the judgment in *Bhasin* without distinction. In some places the trial reasons rely on statements in *Bhasin* about the general "good faith" obligation, which was rejected by the Supreme Court as a universal principle, and identified as one that only manifests itself in certain discrete situations. Termination of employment is not one of those situations. Secondly, the trial reasons take the "honest performance" principle that was established in *Bhasin*, and then extend it not only well beyond the rejected "good faith" principle, but into a much broader and more problematic "common law duty of reasonable exercise of discretionary contractual power".
>
> Firstly, the *Bhasin* principle relates to the *performance* of the contract. It does not relate to the negotiation or terms of the contract. *Bhasin* does not invite the court to examine the *terms* of the contract and decide if they are "honest", "capricious", or negotiated in "good faith", much less whether they are "fair and reasonable".
>
> ...
>
> The asserted organizing principle of a "common law duty of reasonable exercise of discretionary contractual power" is not only unsupported by *Bhasin*, it is inconsistent with it. *Bhasin* is not to be used as a tool to rewrite contracts, and award damages to contracting parties that the court regards as being "fair", even though they are clearly unearned under the contract. The respondent contracted for Long Term Incentive Plan bonuses that would only vest if he stayed employed for at least four years, and nothing in *Bhasin* entitles him to anything more. The respondent did not earn the bonuses he claims, and he is not entitled to them.
>
> ...
>
> Expanding the principle of good faith performance of contracts found in *Bhasin* into a principle of "reasonable" performance creates a clear danger of "reverse engineering" in reviewing the performance of contracts. If the court cannot identify what it considers to be a reasonable basis for the exercise of contractual rights, then it is presumed that there must have been arbitrariness, capriciousness or "bad faith" involved: *Alberta v Alberta Union of Provincial Employees (Davis Grievance)* at paras. 42-4. The important distinction between exercises of discretion and dishonest performance eventually disappears.

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...

> The trial reasons [in *Styles*] recognize that *Bhasin* does not support this new "common law duty of reasonable exercise of discretionary contractual power", stating rather that it was a reasonable "manifestation of the general organizing [*Bhasin*] principle". The concept, however, <u>appears to assume that there is no room between capricious, arbitrary, and dishonest exercise of performance</u> <u>and "reasonableness". The very concept of "discretion" presupposes that there is a wide range of possible methods of performance permitted by the contract.</u> A contracting party is entitled to pick any one, and indeed is entitled to pick the least onerous one: *Bhasin* at para. 90; *Hamilton v Open Window Bakery Ltd*., 2004 SCC 9 at paras. 15-8, [2004] 1 SCR 303; *Agribrands Purina Canada Inc. v Kasamekas*, 2011 ONCA 460 at paras. 47-50, 106 OR (3d) 427. [At paras. 49-51, 54, 56, 58; emphasis by underlining added.]

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[57] The chambers judge did not state expressly whether he agreed with the Court of Appeal's clear rejection of a "common law duty of reasonable exercise of discretionary contractual power", but counsel seemed to proceed on the basis that he did so agree. (Wastech asserted in its factum in this court that the arbitrator had not found such a general, free-standing principle.)

[58] I believe it is fair to infer that the judge did agree with *Styles* at least insofar as he rejected a "general principle of reasonable exercise of discretion in contractual performance." (*Styles* at para. 49.) He then went on to examine Recital C(6), finding it not to be a contractual provision (at para. 46); and to note that one of the reasons for Metro's decision to re-allocate waste in 2011 had been to maximize the remaining life of the Cache Creek Landfill. He also emphasized that the parties had considered and rejected the idea of a term dealing with a substantial re-allocation of waste. Then, having rejected any general principle of "reasonable exercise" of a discretion in contractual performance, he said that any such duty would have to be based on the terms of the contract itself.

[59] Since the arbitrator had declined to imply a term to address the problem of an unexpected imbalance in the allocation of waste or of an unexpected decline in waste volumes (see para. 75 of his award), the chambers judge found that the arbitrator's approach to good faith had been 'negated.' In this instance, two sophisticated parties had decided to 'leave aside' a term that might have addressed

these problems. This was “not a situation in which the parties overlooked or failed to consider a provision; it was a situation in which they could not agree.” (At para. 57.) The arbitrator had reasoned that this fact did not “add anything” to the good faith analysis – a conclusion that left the arbitrator “with the problem of finding that Metro’s conduct was ‘dishonest’ only by reason that it was ‘at odds’ with the legitimate contractual expectations of Wastech.” This conclusion, however, could in the judge’s analysis only be reached by ignoring the contract:

> If the contract has the weight that should be accorded to it, particularly the effort that was made to properly balance the interest of the parties, it is difficult to see how the principle of good faith can be applied to it in the light of the actual circumstances in which the [Agreement] was developed. [At para. 61.]

[60] The judge recalled the comment at para. 70 of *Bhasin* to the effect that the principle of good faith must be applied in a manner consistent with the fundamental tenets of the common law of contract, including the freedom of contracting parties to pursue their self-interest and that 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”. Cromwell J. had also acknowledged the concern that “any general notions of good faith in contract law will undermine certainty in commercial contracts.” He had suggested that the correct balance was struck by ’tying’ the organizing principle to the existing law. (At para. 71.)

[61] In the circumstances of the case at bar, the chambers judge concluded that the arbitrator had attempted to “do what is fair, not as grounded in the [Agreement] but in a more general sense.” Noting that *Bhasin* was not authority for the proposition that contracts may be adjusted “to accommodate situations where one party regrets the contract in hindsight”, the judge allowed the appeal and set aside the arbitrator’s award.

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On Appeal to This Court

[62] The errors of law advanced by Wastech on appeal to this court are as follows:

> The chambers judge erred in concluding that the Arbitrator:
>
> A. Committed an express error of law by extending *Bhasin* to conclude there was a general duty of good faith in all contracts; and
>
> B. Committed a covert error of law by altering the stated legal principles when applying the law to his findings of fact. In regard to this error, the chambers judge erred because:
>
> (a) The Arbitrator's finding that there was a breach of the duty of good faith was a conclusion of mixed fact and law and thus not reviewable; and
>
> (b) The chambers judge decided the issue on a correctness standard and substituted his own findings of fact, and interpretation of the contract.

As I understand the first ground, it is an assertion that the chambers judge viewed the arbitrator's reasoning as based on a *new* "free-standing" rule of good faith in contract, when in fact, Wastech submits, the arbitrator merely applied "accepted principles" to the facts he found. It is not clear to me why this first ground is of more than academic interest. As will be seen below, Metro does not dispute that the Agreement, as a complex and "relational" contract, came within the "organizing principle" of good faith.

[63] It is unfortunate that the chambers judge did not expressly answer the two questions of law that were before him. It is clear he believed the arbitrator had erred in finding that Metro's conduct was "dishonest" (and thus in breach of the duty of good faith) by reason of its being "at odds" with Wastech's expectations. (See para. 60.) But as we have seen, the judge added at para. 61 that it was hard to see how good faith could be applied in light of the parties' efforts to "properly balance the interests of the parties", presumably in formulating the terms of the Agreement. Wastech argues that the chambers judge here was applying a legal test – the terms of which are unclear – to the facts of the case, thus making a finding of mixed law and fact that lies outside the scope of an appeal under the *Arbitration Act*.

[64] However, the main question posed when leave was granted was somewhat different and more nuanced – whether the arbitrator had failed to apply "proper principles" in holding that the exercise of a bargained-for right (i.e., the "right" or "discretion" to re-allocate waste annually) could be "dishonest" and thus be characterized as in "bad faith" because it was wholly at odds with Wastech's expectations, *which were not embodied in the contract*. This question did not require that the terms of the Agreement be construed – to the contrary, it expressly assumed that the counterparty's "expectations" were "not embodied" in it.

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[65] Perhaps it is because of the lack of clarity in the judge's responses to the two issues of law raised by the arbitral award and approved by this court, that both parties devoted most of their oral and written arguments in this court to the arbitrator's reasons and *Bhasin* itself. In the circumstances, I consider that we must address the two questions of law afresh. They were:

> 1) Did the Arbitrator err in law in failing to apply proper principles in holding that the exercise of a bargained-for right could be "dishonest" and an act undertaken in bad faith simply because it was wholly at odds with the expectations of the counter-party, which expectations were not embodied in the contract?
>
> 2) Did the Arbitrator err in law by confusing the "organizing principle" stated in *Bhasin* with a free-standing obligation of contractual good faith, disregarding the applicable principle of good faith as found in the authorities?

Since the questions overlap substantially, I will deal with them concurrently.

Analysis

[66] I begin my analysis by re-emphasizing that Wastech did not rely on the 'new' duty of honest performance formulated in *Bhasin*; and that Metro accepted that the law of contract prior to *Bhasin* (and obviously continuing thereafter) recognized that a party who has a discretion under a contract may not exercise it so as to "nullify the

benefits reasonably expected to be obtained from the contract by the other party." (*Mannpar* at para. 51.) As seen earlier, this principle was adopted in *Gateway Realty,* where Kelly J. stated:

> ... in most cases, bad faith can be said to occur when one party, without reasonable justification, acts in relation to the contracts in a manner where the result would be to substantially nullify the bargained objective or benefit contracted for by the other, or to cause significant harm to the other, contrary to the original purpose and expectation of the parties. [At 197; emphasis added.]

Kerans J.A. put it this way in *Mesa*:

> The rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith. As the trial judge said, a party cannot exercise a power granted in a contract in a way that "substantially nullifies the contractual objectives or causes a significant harm to the other contrary to the original purposes or expectations of the parties." [At para. 22; emphasis added.]

As we have also seen, Harvey J. wrote in *Schluessel*:

> It is however possible to endorse a related and somewhat narrower proposition – namely, that a party to [a] contract may not act in relation to the contract in such a way as to nullify the bargained objective or benefit moving to the other party under the contract. [At para. 130, citing *Mannpar, supra;* emphasis added.]

On occasion courts have used words such as "eviscerate" in place of "nullify", but they describe the same result: see *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003) 68 O.R. (3d) 457 (C.A.) at para. 53; *Barclay's Bank PLC v. Devonshire Trust* 2013 ONCA 494 at para. 134; *Northrock Resources v. ExxonMobil Canada Energy* 2017 SKCA 60 at para. 31; *Benfield Corporate Risk Canada Ltd. v. Beaufort International Insurance Inc.* 2013 ABCA 200 at para. 120.

[67] All the foregoing cases refer in one way or another to the legitimate *contractual* expectations or interests of the other party – a concept of central importance to this appeal. The Court in *Bhasin* stated:

> 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

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> 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. [At para. 65; emphasis added.]

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Putting aside for the moment the reference to 'seeking to undermine those interests in bad faith', the question of law is whether it was open to the arbitrator in law ("applying proper principles") to find "dishonest" and hence "bad faith" conduct on Metro's part by virtue of "expectations" that *were not founded in the contract*. As we have seen, the arbitrator had declined to find an implied term in the Agreement to the effect that Metro could not redirect or re-allocate waste "to an extent that deprives Wastech of the *possibility* of achieving the Target OR… without concurrently adjusting the Long-Haul and Short-Haul Rates or retroactively compensating Wastech for the consequential effect of that re-direction." He concluded that if the parties had been asked whether such a term should be included, they would have said "no" just as they did when the issue was actually raised in their negotiations. (At para. 74.) As Mr. Nathanson pointed out, the term the arbitrator refused to imply was exactly the same as the duty he imposed under the rubric of good faith.

[68] This being the case, what were the "legitimate contractual interests" or "expectations" of Wastech for which Metro failed to have "appropriate regard"? The arbitrator referred to contractual interests at many places in the key paras. 89-96 of his award, but as I read para. 96 (quoted above at para. 47), the obligation he "found to exist" arose solely because the reduction in waste allocated to Cache Creek was a "substantial" one that had the *effect* of depriving Wastech of the opportunity to achieve the OR – the "target" that was not the subject of a guarantee and was subject to adjustment only to the extent of the "Outside Band" provision. Since the arbitrator had rejected the implied term as something the parties had intentionally excluded, it seems to me that, with respect, he erred here in failing to apply the right test – namely whether Wastech had a *legitimate expectation arising out of the Agreement* that Metro would not exercise its discretion in the way it did. The answer to that question had to lie not in the financial effect of the re-allocation on Wastech,

but in the Agreement. Only then could an expectation to this effect be described as "contractual". (I note also that the Agreement contained an 'entire agreement' clause – a clause given some significance by Cromwell J. at para. 72 of *Bhasin* and at para. 47 of *Transamerica*; however, I do not wish to stray into the realm of contractual interpretation.)

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[69] I also note the arbitrator's comment at para. 91 that the fact the parties had considered and rejected a provision like the implied term, did not "add anything" to the good faith analysis. Again, with respect, I believe the arbitrator erred: as a matter of law, this fact substantially *took away* from the argument in support of a breach of the duty of good faith. I acknowledge that, as Mr. Cowper pointed out, in formulating the "organizing principle" of good faith the *Bhasin* court did not require that the 'officious bystander' test be applied; but it will also be recalled that Cromwell J. cited with approval the statement made by the Alberta Court of Appeal in *Mesa* that tied together the law regarding implied terms and the good faith duty. The Court's recognition of an organizing principle instead of various pockets of "more specific doctrines" required something broader than the officious bystander test.

[70] In my opinion, the foregoing errors of law are sufficient to lead to the conclusion that the first question posed for the Court should be answered in the affirmative and that Metro's appeal from the arbitral award was therefore properly allowed. However, I believe another aspect of the arbitrator's reasoning is also problematic – the fact that he found it unnecessary to decide whether, to come within the *Gateway/Mesa/Schluessel* principle, Wastech had to show the impugned conduct had "nullified" or "eviscerated" the Agreement "in the sense that it immediately deprived Wastech of all or substantially all of the benefit for which it bargained." (At para. 93.) If the Court in *Bhasin* did not intend to change the principle of good faith substantially, nor to establish a new "free-standing" duty, it seems to me unlikely that it intended to suggest the duty of good faith would as a matter of law be breached *whenever* a party exercising a contractual discretion fails to have "appropriate regard" for the other party's (contractual) interests. While I appreciate that read in isolation, para. 65 of *Bhasin* might be understood as supporting such a

broad suggestion, Cromwell J. went on in the same paragraph to observe that the organizing principle:

> … merely requires that a party not seek to undermine those [contractual] 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. [Emphasis added.]

In my view, the earlier reference should not be taken out of context to create a stand-alone civil wrong of "disregard of contractual interests". As noted at para. 49 of *Styles*, this would constitute a radical extension of the law – in the face of various comments to the effect that only "incremental" change was intended: see paras. 66, 68-70 of *Bhasin*.

[71] This brings me to what I see as another error of law that is implicit in both questions of law that were posed for the Court. I refer to the arbitrator's conclusion that:

> … the good faith doctrine characterizes the exercise of even an acknowledged, bargained-for contractual right as "dishonest" where it is wholly at odds with the legitimate contractual expectations of the other party. No additional form of dishonesty is required to be shown. [At para. 90; emphasis added.]

Again with due respect to the contrary view, I read *Bhasin* as concerned substantially with conduct that has at least a subjective element of improper motive or dishonesty. I note that in *Gateway*, for example, Kelly J. stated that "good faith conduct" is breached "when a party acts in 'bad faith' – a conduct that is contrary to community standards of honesty, reasonableness or fairness." (At 197.) In other areas of the law, both "bad faith" and "dishonesty" connote malice, untruthfulness, ulterior motive or, in the words of Mr. Justice Bastarache (as he then was) in *Crawford v. New Brunswick (Agricultural Development Board)* (1997) 192 N.B.R. (2d) 68 (C.A.), other "intentional conduct equivalent to fraud." Bad faith is also made out where the conduct in question is so reckless that "absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual

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abuse of power, having regard to the purposes for which it is meant to be exercised”: *Finney v. Barreau du Quėbec* 2004 SCC 36 at 39 *per* LeBel J. Thus in connection with a ministerial decision, the Court in *Hinse v. Canada (Attorney General)* 2015 SCC 35 said this:

> In sum, decisions of the Minister that are made in bad faith, including those demonstrating serious recklessness… on the Minister’s part, fall outside the Crown’s qualified immunity. Bad faith can be established by proving that the Minister acted deliberately with the specific intent to harm another person. It can also be established by proof of serious recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be deduced and bad faith presumed. [At para. 53; emphasis added.]

[72] In the employment context, reference may be made to the statement of McLachlin J., as she then was, in *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701, that employers should be “candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair *or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.*” (At para. 98; emphasis added.) In another context – the law of commercial fraud – McLachlin J. said this for the majority in *R. v. Zlatic* [1993] 2 S.C.R. 29:

> The fundamental question in determining the *actus reus* of fraud within the third head of the offense of fraud is whether the means to the alleged fraud can properly be stigmatized as dishonest:… In determining this, one applies the standard of the reasonable person. Would the reasonable person stigmatized what was done as dishonest? Dishonesty is, of course, difficult to define with precision. It does, however, connote an underhanded design which has the effect, or which engenders a risk, of depriving others of what is theirs. J.D. Ewart, in his *Criminal Fraud* (1986), defines dishonest conduct as that “which ordinary, decent people would feel was discreditable as being clearly at variance with straightforward or honourable dealings” (p. 99). Negligence does not suffice. Nor does taking advantage of an opportunity to someone else’s detriment, where that taking has not been occasioned by unscrupulous conduct, regardless of whether such conduct was wilful or reckless.…A use is “wrongful” in this context if it constitutes conduct which reasonable decent persons would consider dishonest and unscrupulous. [At 45; emphasis added.]

[73] In *Bhasin* itself, the Court described the “organizing principle” of good faith as meaning “simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily” (at para. 63) and again, as

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"merely" requiring that a party not "seek to undermine" the other's contractual interests "in bad faith." The arbitrator in the case at bar made no finding that Metro had 'sought to undermine' Wastech's interests or to do so in bad faith; and indeed he found as a fact that Metro's decision to re-allocate waste away from Cache Creek was both "honest and reasonable" from Metro's point of view. Subjectively, then, it appears he was satisfied Metro had acted honestly. As a matter of law, I doubt the Court in *Bhasin* intended that the principle of good faith would be extended so far as to attribute "dishonesty" (which, it will be remembered, carries a "stench") to a party in the circumstances of Metro in this case.

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[74] For the foregoing reasons, I conclude that the questions posed for the Court must be answered in the affirmative and that more particularly, the arbitrator erred in law in:

> (1) failing to address whether Wastech had a legitimate expectation, *founded in the Agreement,* that if Metro exercised its discretion as it did, it would compensate Wastech over and above the adjustments provided for in the Agreement;
>
> (2) failing to consider the effect of his rejection of an implied term in his analysis of the duty of good faith;
>
> (3) effectively concluding that the duty of good faith is breached whenever a contracting party fails to have "appropriate regard" for the other, in circumstances where the agreement has not been found to have been "nullified" or "eviscerated"; and
>
> (4) finding "dishonesty" and thus a breach of the duty of good faith on Metro's part without any subjective element of dishonesty, improper motive (under which I would include "seeking to undermine" the interests of the other party), or bad faith as understood in existing law.

These errors of law are clearly "extricable" and of importance to the parties and the legal system as a whole, involving as they do the scope and meaning of good faith in

contract, as newly explained in *Bhasin*. Given the amount of money and the question of ‘dishonesty’ involved, I also believe a miscarriage of justice would occur were we to decline to interfere with the arbitrator’s conclusions. Applying the standard of correctness, I conclude the chambers judge was correct to allow the appeal, although I would have done so for different reasons than his. Even if the standard of reasonableness were to be applicable I would reach the same conclusions.

[75] I would dismiss this appeal, with thanks to counsel for their able submissions.

“The Honourable Madam Justice Newbury”

I AGREE:

“The Honourable Madam Justice Stromberg-Stein”

I AGREE:

“The Honourable Madam Justice Fisher”

2019 BCCA 66 (CanLII)

Her Majesty The Queen *Appellant*

v.

Lavallee, Rackel & Heintz, Barristers and Solicitors, and Andrew Brent Polo *Respondents*

and

The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for Alberta, the Law Society of Alberta and the Federation of Law Societies of Canada *Interveners*

and between

White, Ottenheimer & Baker *Appellants/Respondents on cross-appeal*

v.

The Attorney General of Canada *Respondent/Appellant on cross-appeal*

and

The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for Alberta and the Federation of Law Societies of Canada *Interveners*

and between

Her Majesty The Queen *Appellant*

v.

Jeffrey Fink *Respondent*

and

The Attorney General of Canada, the Attorney General of Quebec, the Attorney

Sa Majesté la Reine *Appelante*

c.

Lavallee, Rackel & Heintz, avocats, et Andrew Brent Polo *Intimés*

et

Le procureur général de l'Ontario, le procureur général du Québec, le procureur général de l'Alberta, la Law Society of Alberta et la Fédération des ordres professionnels de juristes du Canada *Intervenants*

et entre

White, Ottenheimer & Baker *Appelants/Intimés au pourvoi incident*

c.

Le procureur général du Canada *Intimé/Appelant au pourvoi incident*

et

Le procureur général de l'Ontario, le procureur général du Québec, le procureur général de l'Alberta et la Fédération des ordres professionnels de juristes du Canada *Intervenants*

et entre

Sa Majesté la Reine *Appelante*

c.

Jeffrey Fink *Intimé*

et

Le procureur général du Canada, le procureur général du Québec, le procureur

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General for Alberta and the Canadian Bar Association *Interveners*

Indexed as: Lavallee, Rackel & Heintz *v.* Canada (Attorney General); White, Ottenheimer & Baker *v.* Canada (Attorney General); R. *v.* Fink

Neutral citation: 2002 SCC 61.

File Nos.: 27852, 28144, 28385.

2001: December 13; 2002: September 12.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Unreasonable search or seizure — Police seizing documents from law offices under warrants — Criminal Code procedure to protect solicitor-client privilege followed — Whether procedure infringes right against unreasonable search or seizure — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 8 — Criminal Code, R.S.C. 1985, c. C-46, s. 488.1.

Criminal law — Procedure — Solicitor-client privilege — Police seizing documents from law offices under warrants — Criminal Code procedure to protect solicitor-client privilege followed — Whether procedure infringes right against unreasonable search or seizure — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 8 — Criminal Code, R.S.C. 1985, c. C-46, s. 488.1.

These appeals bring into question whether s. 488.1 of the *Criminal Code*, which sets out a procedure for determining a claim of solicitor-client privilege in relation to documents seized from a law office under a warrant, infringes s. 8 of the *Canadian Charter of Rights and Freedoms* and, if so, whether the infringement is justified

général de l'Alberta et l'Association du Barreau canadien *Intervenants*

Répertorié : Lavallee, Rackel & Heintz *c.* Canada (Procureur général); White, Ottenheimer & Baker *c.* Canada (Procureur général); R. *c.* Fink

Référence neutre : 2002 CSC 61.

N[os] du greffe : 27852, 28144, 28385.

2001 : 13 décembre; 2002 : 12 septembre.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

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

EN APPEL DE LA COUR D'APPEL DE TERRE-NEUVE

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Fouilles, perquisitions ou saisies abusives — Documents de cabinets d'avocats saisis par la police en vertu d'un mandat — Application de la procédure du Code criminel visant à protéger le privilège des communications entre client et avocat — La procédure porte-t-elle atteinte à la garantie contre les fouilles, perquisitions ou saisies abusives? — Dans l'affirmative, cette atteinte est-elle justifiée? — Charte canadienne des droits et libertés, art. 1, 8 — Code criminel, L.R.C. 1985, ch. C-46, art. 488.1.

Droit criminel — Procédure — Secret professionnel — Documents de cabinets d'avocats saisis par la police en vertu d'un mandat — Application de la procédure du Code criminel visant à protéger le privilège des communications entre client et avocat — La procédure porte-t-elle atteinte à la garantie contre les fouilles, perquisitions ou saisies abusives? — Dans l'affirmative, cette atteinte est-elle justifiée? — Charte canadienne des droits et libertés, art. 1, 8 — Code criminel, L.R.C. 1985, ch. C-46, art. 488.1.

La question soumise à la Cour dans les présents pourvois est celle de savoir si l'art. 488.1 du *Code criminel*, qui établit une procédure permettant de décider si le secret professionnel de l'avocat s'applique aux documents saisis dans un bureau d'avocat en vertu d'un mandat, porte atteinte à l'art. 8 de la *Charte canadienne*

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under s. 1. This procedure mandates that the material be sealed at the time of the search, that the solicitor make application within strict time lines for a determination that the material is indeed protected by privilege, and that, with the permission of the court, the Crown may be permitted to examine the material in order to assist in a determination on the issue of the existence of privilege.

des droits et libertés et, dans l'affirmative, si cette atteinte est justifiée en vertu de l'article premier. Cette procédure exige que les documents soient scellés lors de la perquisition, que l'avocat demande dans des délais stricts qu'il soit statué sur la question de savoir si les documents sont effectivement protégés par le privilège et que, avec l'autorisation de la cour, le ministère public puisse examiner tous les documents afin d'aider celle-ci à trancher la question de l'existence du privilège.

The issue is brought before the Court by way of three separate appeals from the provinces of Alberta (*Lavallee, Rackel & Heintz v. Canada (Attorney General)*), Newfoundland and Labrador (*White, Ottenheimer & Baker v. Canada (Attorney General)*) and Ontario (*R. v. Fink*). In all three cases, materials were seized by the police from law offices pursuant to warrants, the procedures prescribed by s. 488.1 for the protection of materials possibly protected by solicitor-client privilege were followed and claims of solicitor-client privilege were made by the law firms on their clients' behalf. In *Lavallee*, a motion to quash the warrant on constitutional grounds was dismissed but the Court of Queen's Bench struck down s. 488.1 as unconstitutional and the Court of Appeal affirmed that decision. In *White*, the Supreme Court of Newfoundland dismissed an application for a declaration that s. 488.1 of the *Code* and s. 232 of the *Income Tax Act* were contrary to s. 8 of the *Charter*. The Court of Appeal allowed the appeal in part, resorting to the remedial techniques of severance and reading-in to salvage the impugned section of the *Code*. In *Fink*, an application for an order declaring s. 488.1 of the *Code* to be inconsistent with s. 8 of the *Charter* was dismissed by the Superior Court of Justice but that decision was reversed by the Court of Appeal.

La question est soumise à la Cour dans trois pourvois distincts provenant de l'Alberta (*Lavallee, Rackel & Heintz c. Canada (Procureur général)*), de Terre-Neuve-et-Labrador (*White, Ottenheimer & Baker c. Canada (Procureur général)*) et de l'Ontario (*R. c. Fink*). Dans ces trois affaires, la police a saisi des documents dans des cabinets d'avocats en vertu d'un mandat, les procédures prévues par l'art. 488.1 pour la protection de documents susceptibles d'être protégés par le privilège des communications entre client et avocat ont été suivies et les cabinets d'avocats ont invoqué le secret professionnel au nom de leurs clients. Dans *Lavallee*, la requête en annulation du mandat pour inconstitutionnalité est rejetée, mais la Cour du Banc de la Reine annule l'art. 488.1, le déclarant inconstitutionnel, et la Cour d'appel confirme cette décision. Dans *White*, la Cour suprême de Terre-Neuve rejette la demande d'un jugement déclaratoire selon lequel les art. 488.1 du *Code* et 232 de la *Loi de l'impôt sur le revenu* vont à l'encontre de l'art. 8 de la *Charte*. La Cour d'appel accueille l'appel en partie, recourant aux techniques réparatrices de la dissociation et de l'interprétation large pour justifier la disposition contestée du *Code*. Dans *Fink*, la Cour supérieure de justice rejette la demande d'une ordonnance déclarant l'art. 488.1 du *Code* incompatible avec l'art. 8 de la *Charte*, mais la Cour d'appel infirme cette décision.

Held (L'Heureux-Dubé, Gonthier and LeBel JJ. dissenting in part): The appeal in *Lavallee* should be dismissed. The appeal in *White* should be allowed and the cross-appeal dismissed. The appeal in *Fink* should be dismissed. Section 488.1 of the *Criminal Code* is unconstitutional.

Arrêt (les juges L'Heureux-Dubé, Gonthier et LeBel sont dissidents en partie) : Le pourvoi dans l'arrêt *Lavallee* est rejeté. Le pourvoi dans l'arrêt *White* est accueilli et le pourvoi incident est rejeté. Le pourvoi dans l'arrêt *Fink* est rejeté. L'article 488.1 du *Code criminel* est inconstitutionnel.

Per McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: Since s. 8 of the *Charter* only protects against unreasonable searches and seizures, the issue is whether the procedure set out by s. 488.1 results in a reasonable search and seizure of potentially privileged documents in the possession of a lawyer. Section 488.1 permits solicitor-client privilege to fall through the interstices of its inadequate procedure. This possible automatic loss of solicitor-client privilege through the normal operation of the law is not reasonable.

Le juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie et Arbour : Étant donné que l'art. 8 de la *Charte* ne protège que contre les fouilles, perquisitions et saisies abusives, il s'agit de déterminer si la procédure prévue à l'art. 488.1 donne lieu à une perquisition abusive et à la saisie abusive de documents en la possession d'un avocat, y compris les documents susceptibles d'être privilégiés. L'article 488.1 entraîne la disparition du privilège en raison des failles de la procédure prescrite. La perte automatique possible du privilège par l'application normale de la loi ne peut pas être raisonnable.

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Where the interest at stake is solicitor-client privilege, which is a principle of fundamental justice and a civil right of supreme importance in Canadian law, the usual exercise of balancing privacy interests and the exigencies of law enforcement is not particularly helpful because the privilege is a positive feature of law enforcement, not an impediment to it. Given that solicitor-client privilege must remain as close to absolute as possible to retain its relevance, the Court must adopt stringent norms to ensure its protection. The procedure set out in s. 488.1 must minimally impair solicitor-client privilege to pass *Charter* scrutiny.

Lorsque l'intérêt en jeu est le secret professionnel de l'avocat — principe de justice fondamentale et droit civil de la plus haute importance en droit canadien — l'habituel exercice d'établir un juste équilibre entre le droit à la vie privée et les exigences de l'application de la loi n'est pas particulièrement utile. En effet, le privilège est une caractéristique positive de l'application de la loi, et non pas un obstacle à celle-ci. Étant donné que le secret professionnel de l'avocat doit demeurer aussi absolu que possible pour conserver sa pertinence, la Cour est tenue d'adopter des normes rigoureuses pour assurer sa protection. La procédure prévue à l'art. 488.1 ne peut résister à l'examen de la *Charte* que si elle donne lieu à une atteinte minimale au secret professionnel de l'avocat.

Section 488.1 more than minimally impairs solicitor-client privilege and amounts to an unreasonable search and seizure contrary to s. 8 of the *Charter*. Its constitutional failings can result from: (1) the absence or inaction of the solicitor; (2) the naming of clients; (3) the fact that notice is not given to the client; (4) its strict time limits; (5) an absence of discretion on the part of the judge determining the existence of solicitor-client privilege; and (6) the possibility of the Attorney General's access prior to that judicial determination. The one principal, fatal feature shared by them is the potential breach of solicitor-client privilege without the client's knowledge, let alone consent. The fact that competent counsel will attempt to ascertain the whereabouts of their clients and will likely assert blanket privilege at the outset does not obviate the state's duty to ensure sufficient protection of the rights of the privilege holder. Privilege does not come into being by an assertion of a privilege claim; it exists independently. Section 488.1 provides that reasonable opportunity to ensure that the privileged information remains so must be given to the privilege keeper, but not to the privilege holder. It cannot be assumed that the lawyer is the *alter ego* of the client. Section 488.1(8), which provides that no examination may be carried out without affording a reasonable opportunity for a claim of solicitor-client privilege to be made, cannot raise this entire procedural scheme to a standard of constitutional reasonableness given this failure to address directly the client's entitlement to ensure the adequate protection of his or her rights.

L'article 488.1 porte atteinte de façon plus que minimale au secret professionnel de l'avocat et équivaut donc à une fouille, à une perquisition et à une saisie abusives, contrairement à l'art. 8 de la *Charte*. Ses lacunes constitutionnelles peuvent être attribuables aux facteurs suivants : (1) l'absence ou l'inaction de l'avocat; (2) l'obligation de désigner nommément les clients; (3) l'absence d'avis au client; (4) les délais stricts; (5) l'absence de pouvoir discrétionnaire de la part du juge pour décider s'il existe un privilège avocat-client; et (6) l'accès du procureur général avant qu'une décision judiciaire soit rendue. La caractéristique dominante fatale qu'elles ont toutes en commun est la violation potentielle du secret professionnel de l'avocat sans que le client n'en ait connaissance et encore moins qu'il y ait consenti. Même si l'avocat compétent essaiera de joindre son client et qu'il invoquera vraisemblablement le privilège général dès le départ, l'État a l'obligation de veiller à ce que les droits du détenteur du privilège demeurent suffisamment protégés. Le privilège ne prend pas effet seulement au moment où il est invoqué; il existe indépendamment de sa revendication. Selon l'article 488.1, le gardien du privilège, mais pas son détenteur, doit avoir une occasion raisonnable de préserver la confidentialité des renseignements privilégiés. On ne peut pas simplement tenir pour acquis que l'avocat est l'*alter ego* du client. Le paragraphe 488.1(8), qui dispose que nul ne peut examiner un document sans donner aux intéressés une occasion raisonnable de formuler une objection fondée sur le privilège des communications entre client et avocat, ne peut rendre l'ensemble de ce régime raisonnable du point de vue constitutionnel alors qu'il ne traite pas directement du droit que le client devrait avoir pour veiller à la protection adéquate de ses droits.

The absence of judicial discretion in the determination of the validity of an asserted claim of privilege is the second fatal flaw in the statutory scheme. A residual discretion cannot be read in s. 488.1(6), which confers an entitlement on the Crown to access the seized documents

La seconde lacune fatale du régime législatif est l'absence de pouvoir discrétionnaire du juge qui statue sur la validité de l'objection fondée sur le privilège. On ne peut pas déceler un pouvoir discrétionnaire résiduel du juge au par. 488.1(6), qui confère au ministère public un

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if an application has not been made, or has not been proceeded with, within the time limits imposed by subss. (2) and (3). This mandatory disclosure of potentially privileged information, in a case where the court has been alerted to the possibility of privilege by the fact that the documents were sealed at the point of search, cannot be said to impair the privilege minimally. Reasonableness dictates that courts must retain a discretion to decide whether materials seized in a lawyer's office should remain inaccessible to the State as privileged information if and when, in the circumstances, it is in the interest of justice to do so.

droit d'accès aux documents saisis si on n'a fait aucune demande, ou si on n'a pas donné suite à celle-ci, avec la célérité requise par les par. (2) et (3). On ne peut pas dire que cette communication obligatoire de renseignements potentiellement privilégiés porte atteinte le moins possible au privilège dans un cas où la cour a été mise au courant de la possibilité de l'existence de celui-ci par la mise sous scellés des documents au moment de la perquisition. La norme du caractère raisonnable dicte que les tribunaux doivent conserver le pouvoir discrétionnaire de décider si les documents saisis dans le bureau d'un avocat doivent demeurer inaccessibles à l'État en raison de leur caractère privilégié lorsque, dans les circonstances, il est dans l'intérêt de la justice qu'ils le demeurent.

The provision in s. 488.1(4)(*b*) which permits the Attorney General to inspect the seized documents where the applications judge is of the opinion that it would materially assist him or her in deciding whether the document is privileged is also an unjustifiable impairment of the privilege. Granting the Crown access to confidential solicitor-client communications would diminish the public's faith in the administration of justice and create a potential for abuse. This provision is unduly intrusive upon the privilege and of limited usefulness in determining its existence.

L'alinéa 488.1(4)*b*) porte atteinte de façon injustifiable au privilège, car il permet au procureur général d'examiner les documents saisis lorsque le juge des demandes est d'avis que cela l'aiderait à rendre sa décision sur leur caractère privilégié. En permettant au ministère public d'avoir accès aux communications confidentielles entre client et avocat, on risquerait de diminuer la confiance du public dans l'administration de la justice et de créer des abus. Cette disposition porte indûment atteinte au privilège et a une utilité limitée pour la détermination de son existence.

Section 488.1 cannot be infused with reasonableness, in a constitutional sense, on the basis of an assumption that the prosecution will behave honourably. Nor can it be saved by s. 1: while effective police investigations are a pressing and substantive concern, s. 488.1 does not establish proportional means to achieve that objective. The provision should be struck down. The process for seizing documents in the possession of a lawyer is a delicate matter which presents some procedural options that are best left to Parliament.

On ne peut pas conférer à l'art. 488.1 un caractère raisonnable du point de vue constitutionnel en se fondant sur la présomption que la poursuite se comportera de façon honorable. On ne peut pas non plus le justifier par l'article premier : bien que l'efficacité des enquêtes policières soit une préoccupation de fond urgente, l'art. 488.1 ne prévoit pas de moyens proportionnés pour atteindre cet objectif. Cet article doit être annulé. La saisie de documents en la possession d'un avocat est une question délicate comportant des choix de procédure qu'il incombe davantage au législateur de faire.

The following guidelines reflect present-day constitutional imperatives for the protection of solicitor-client privilege and apply to law office searches until new legislation is in place. (1) A search warrant should not issue for documents known to be protected by solicitor-client privilege. (2) As well, they should not issue if other reasonable alternatives to the law office search exist. (3) The issuing justice must be rigorously demanding with respect to solicitor-client privilege. (4) Unless otherwise authorized by the warrant, all documents in a lawyer's possession must be sealed before being examined or seized. (5) Every effort must be made to contact the lawyer and the client when the search warrant is executed and, where the lawyer or the client cannot be contacted, a representative of the Bar should oversee the sealing and seizure of documents. (6) The investigating officer

Les lignes directrices qui suivent reflètent les impératifs constitutionnels actuels en matière de protection du secret professionnel de l'avocat et s'appliquent aux perquisitions dans des bureaux d'avocats jusqu'à la mise en œuvre de nouvelles dispositions législatives. (1) Aucun mandat de perquisition ne peut être décerné relativement à des documents reconnus comme étant protégés par le secret professionnel de l'avocat. (2) Aucun mandat de perquisition dans un bureau d'avocats ne peut être décerné non plus s'il existe d'autres solutions de rechange raisonnables. (3) Le juge saisi de la demande de mandat doit être rigoureusement exigeant pour ce qui est des communications entre client et avocat. (4) Sauf autorisation contraire du mandat, tous les documents en la possession d'un avocat doivent être scellés avant d'être examinés ou saisis. (5) Il faut faire tous les efforts

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executing the warrant should report the efforts made to contact all potential privilege holders to the justice of the peace. These privilege holders should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided. (7) If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so. (8) The Attorney General may make submissions on the issue of privilege but should not be permitted to inspect the documents beforehand, and the prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged. (9) Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation. (10) Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

possibles pour communiquer avec l'avocat et le client au moment de l'exécution du mandat de perquisition et, lorsque l'avocat ou le client ne peut être joint, un représentant du Barreau devrait superviser la mise sous scellés et la saisie des documents. (6) L'enquêteur qui exécute le mandat doit rendre compte au juge de paix des efforts faits pour joindre tous les détenteurs potentiels du privilège, lesquels devraient ensuite avoir une occasion raisonnable de formuler une objection fondée sur le privilège et, si cette objection est contestée, de faire trancher la question par les tribunaux. (7) S'il est impossible d'aviser les détenteurs potentiels du privilège, l'avocat qui a la garde des documents saisis, ou un autre avocat nommé par le Barreau ou par la cour, doit examiner les documents pour déterminer si le privilège devrait être invoqué et doit avoir une occasion raisonnable de faire valoir ce privilège. (8) Le procureur général peut présenter des arguments sur la question du privilège, mais on ne devrait pas lui permettre d'examiner les documents à l'avance et l'autorité poursuivante peut examiner les documents uniquement lorsqu'un juge conclu qu'ils ne sont pas privilégiés. (9) Si les documents scellés sont jugés non privilégiés, ils peuvent être utilisés dans le cours normal de l'enquête. (10) Si les documents sont jugés privilégiés, ils doivent être retournés immédiatement au détenteur du privilège ou à une personne désignée par la cour.

Per L'Heureux-Dubé, Gonthier and LeBel JJ. (dissenting in part): Section 488.1 of the *Criminal Code* does not infringe either s. 7 or s. 8 of the *Charter*, with the exception of s. 488.1(4), which may lead to improper and premature disclosures of confidential information and therefore violates s. 8. It aims at protecting privilege, not destroying it, and builds on jurisprudential and legislative rules governing the issuance of search warrants. The procedure includes a number of safeguards which require a proper understanding of the role of counsel in the implementation of the provisions at issue. Lawyers have obligations flowing from their rights and privileges. As long as society and courts can assume that lawyers will behave in a competent and ethical manner, s. 488.1 grants adequate protection to professional privilege and to the interests of the clients of law firms.

Les juges L'Heureux-Dubé, Gonthier et LeBel (dissidents en partie) : L'article 488.1 du *Code criminel* ne contrevient ni à l'art. 7 ni à l'art. 8 de la *Charte*, à l'exception du par. 488.1(4), qui peut mener à des communications prématurées et injustifiées de renseignements confidentiels et qui porte donc atteinte à l'art. 8. Il vise à protéger le privilège et non à le supprimer. Il s'appuie sur les règles jurisprudentielles et législatives régissant la délivrance des mandats de perquisition. Le processus comporte des garanties qui exigent une bonne compréhension du rôle des avocats dans la mise en œuvre des dispositions en cause. Les avocats ont des obligations qui découlent de leurs droits et privilèges. Tant que la société et les tribunaux peuvent supposer que les avocats agiront avec compétence et selon leur code de déontologie, l'art. 488.1 accorde une protection adéquate au secret professionnel et aux droits des clients des cabinets d'avocats.

While the provision's 14-day time limit is short, this brevity does not render it unconstitutional. The short time limit does not appear to have been designed as a trap for overworked or careless lawyers, but as a procedural constraint designed to speed things up and move them to a quick disposition. Although s. 488.1 does not explicitly grant the power to extend the time limit, the trend of jurisprudential developments in respect of time limits and limitation periods has been to acknowledge the existence of a broad judicial power to grant relief or extend

Même si le délai de 14 jours est court, sa brièveté ne le rend pas inconstitutionnel. Il ne semble pas avoir été conçu comme un piège pour les avocats débordés de travail ou négligents, mais comme une contrainte procédurale visant à accélérer les choses et à les faire régler rapidement. Bien que l'art. 488.1 ne confère pas expressément le pouvoir de proroger le délai, la tendance de la jurisprudence à l'égard des délais ordinaires et des délais de prescription a été de reconnaître l'existence d'un vaste pouvoir des tribunaux d'accorder réparation

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time limits. A showing of inability or impossibility to act within the stated time has been found sufficient to grant an extension or other appropriate relief. Since the identity and whereabouts of a client are sometimes better known to lawyers, the failure to include a requirement of notice to the client does not amount to a flaw.

A requirement that the lawyer identify the client by name would breach the privilege. Naming, however, does not necessarily amount to identifying by name for the name used need not be the true or full name of an individual. The impugned provision seeks to avoid broad claims of privilege. At a subsequent stage of the proceedings, the question of the confidentiality of names and the measures necessary to protect it would fall to be decided by the court.

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By Arbour J.

Applied: *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, aff'g (1980), 16 C.R. (3d) 188, aff'g [1978] C.S. 792; **considered:** *Festing v. Canada (Attorney General)* (2001), 206 D.L.R. (4th) 98, aff'g in part (2000), 31 C.R. (5th) 203; *R. v. Colvin, Ex parte Merrick* (1970), 1 C.C.C. (2d) 8; *Re Presswood and International Chemalloy Corp.* (1975), 11 O.R. (2d) 164; *Re Shell Canada Ltd.*, [1975] F.C. 184; *Re Borden & Elliot and The Queen* (1975), 30 C.C.C. (2d) 337; *Re B.X. Development Inc. and The Queen* (1976), 31 C.C.C. (2d) 14; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; **referred to:** *R. v. Claus* (2000), 149 C.C.C. (3d) 336; *R. v. Piersanti & Co.*, [2001] G.S.T.C. 3; *Canada (Attorney General) v. Several Clients and Several Solicitors* (2000), 189 N.S.R. (2d) 313; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Thorson v. Jones* (1973), 38 D.L.R. (3d) 312; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Edwards*, [1996] 1 S.C.R. 128; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83; *R. v. Mills*, [1999] 3 S.C.R. 668; *Maranda v. Québec (Juge de la Cour du Québec)* (2001), 47 C.R. (5th) 162, 161 C.C.C. (3d) 64 (*sub nom. R. v. Charron*), leave to appeal granted, [2002] 2 S.C.R. vii; *R. v. Bain*, [1992] 1 S.C.R. 91; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1; *R. v. Heywood*, [1994] 3 S.C.R. 761.

ou de proroger les délais. La preuve de l'incapacité ou de l'impossibilité d'agir dans le délai mentionné a été considérée comme étant suffisante pour que soit accordée une prorogation ou une autre réparation appropriée. Étant donné que l'identité du client et le lieu où il se trouve sont parfois mieux connus des avocats, le fait de ne pas avoir prévu l'obligation de donner un avis au client n'équivaut pas à un vice.

L'obligation pour l'avocat d'identifier le client par son nom porterait atteinte au privilège. Toutefois, l'identification n'équivaut pas nécessairement à identifier par le nom, car le nom utilisé peut ne pas être le véritable nom d'une personne ou son nom en entier. La disposition contestée cherche à annuler les objections générales fondées sur le privilège. Plus tard dans la procédure, il incomberait à la Cour de statuer sur la question de la confidentialité des noms et celle des mesures nécessaires pour la protéger.

Jurisprudence

Citée par le juge Arbour

Arrêt appliqué : *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860, conf. (1980), 16 C.R. (3d) 188, conf. [1978] C.S. 792; **arrêts examinés :** *Festing c. Canada (Attorney General)* (2001), 206 D.L.R. (4th) 98, conf. en partie (2000), 31 C.R. (5th) 203; *R. c. Colvin, Ex parte Merrick* (1970), 1 C.C.C. (2d) 8; *Re Presswood and International Chemalloy Corp.* (1975), 11 O.R. (2d) 164; *Re Shell Canada Ltd.*, [1975] C.F. 184; *Re Borden & Elliot and The Queen* (1975), 30 C.C.C. (2d) 337; *Re B.X. Development Inc. and The Queen* (1976), 31 C.C.C. (2d) 14; *Solosky c. La Reine*, [1980] 1 R.C.S. 821; **arrêts mentionnés :** *R. c. Claus* (2000), 149 C.C.C. (3d) 336; *R. c. Piersanti & Co.*, [2001] G.S.T.C. 3; *Canada (Attorney General) c. Several Clients and Several Solicitors* (2000), 189 N.S.R. (2d) 313; *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353; *Smith c. Jones*, [1999] 1 R.C.S. 455; *R. c. McClure*, [2001] 1 R.C.S. 445, 2001 CSC 14; *R. c. Brown*, [2002] 2 R.C.S. 185, 2002 CSC 32; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Thorson c. Jones* (1973), 38 D.L.R. (3d) 312; *Schachter c. Canada*, [1992] 2 R.C.S. 679; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *R. c. Edwards*, [1996] 1 R.C.S. 128; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *R. c. Araujo*, [2000] 2 R.C.S. 992, 2000 CSC 65; *R. c. Golden*, [2001] 3 R.C.S. 679, 2001 CSC 83; *R. c. Mills*, [1999] 3 R.C.S. 668; *Maranda c. Québec (Juge de la Cour du Québec)* (2001), 47 C.R. (5th) 162, demande d'autorisation de pourvoi accordée, [2002] 2 R.C.S. vii; *R. c. Bain*, [1992] 1 R.C.S. 91; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1; *R. c. Heywood*, [1994] 3 R.C.S. 761.

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By LeBel J. (dissenting in part)

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APPEAL and CROSS-APPEAL (*White, Ottenheimer & Baker v. Canada (Attorney General)*) from a judgment of the Newfoundland Court of Appeal (2000), 187 D.L.R. (4th) 581, 190 Nfld. & P.E.I.R. 181, 576 A.P.R. 181, 146 C.C.C. (3d) 28, 35 C.R. (5th) 222, 76 C.R.R. (2d) 1, [2000] N.J. No. 196 (QL), 2000 NFCA 36, allowing in part the appellants' appeal from a decision of the Newfoundland Supreme Court, Trial Division. Appeal allowed, L'Heureux-Dubé, Gonthier and LeBel JJ. dissenting. Cross-appeal dismissed, L'Heureux-Dubé, Gonthier and LeBel JJ. dissenting in part.

APPEAL (*R. v. Fink*) from a judgment of the Ontario Court of Appeal (2000), 51 O.R. (3d) 577, 193 D.L.R. (4th) 51, 149 C.C.C. (3d) 321, 138 O.A.C. 142, 79 C.R.R. (2d) 121, [2000] O.J. No. 4549 (QL), setting aside a decision of the Superior Court of Justice (2000), 143 C.C.C. (3d) 566, 70 C.R.R. (2d) 181, [2000] O.J. No. 18 (QL). Appeal dismissed, L'Heureux-Dubé, Gonthier and LeBel JJ. dissenting in part.

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POURVOI (*Lavallee, Rackel & Heintz c. Canada (Procureur général)*) contre un arrêt de la Cour d'appel de l'Alberta (2000), 184 D.L.R. (4th) 25, 255 A.R. 86, 220 W.A.C. 86, 143 C.C.C. (3d) 187, 73 C.R.R. (2d) 58, [2000] 4 W.W.R. 331, [2000] A.J. nº 159 (QL), 2000 ABCA 54, qui a confirmé une décision de la Cour du Banc de la Reine (1998), 160 D.L.R. (4th) 508, 62 Alta. L.R. (3d) 306, 218 A.R. 229, 126 C.C.C. (3d) 129, 53 C.R.R. (2d) 8, [1999] 2 W.W.R. 241, [1998] A.J. nº 610 (QL), 1998 ABQB 436. Pourvoi rejeté, les juges L'Heureux-Dubé, Gonthier et LeBel sont dissidents en partie.

POURVOI et POURVOI INCIDENT (*White, Ottenheimer & Baker c. Canada (Procureur général)*) contre un arrêt de la Cour d'appel de Terre-Neuve (2000), 187 D.L.R. (4th) 581, 190 Nfld. & P.E.I.R. 181, 576 A.P.R. 181, 146 C.C.C. (3d) 28, 35 C.R. (5th) 222, 76 C.R.R. (2d) 1, [2000] N.J. nº 196 (QL), 2000 NFCA 36, qui a accueilli en partie l'appel interjeté par les appelants contre une décision de la Section de première instance de la Cour suprême de Terre-Neuve. Pourvoi accueilli, les juges L'Heureux-Dubé, Gonthier et LeBel sont dissidents. Pourvoi incident rejeté, les juges L'Heureux-Dubé, Gonthier et LeBel sont dissidents en partie.

POURVOI (*R. c. Fink*) contre un arrêt de la Cour d'appel de l'Ontario (2000), 51 O.R. (3d) 589, 193 D.L.R. (4th) 51, 149 C.C.C. (3d) 321, 138 O.A.C. 142, 79 C.R.R. (2d) 121, [2000] O.J. nº 4549 (QL), qui a infirmé une décision de la Cour supérieure de justice (2000), 143 C.C.C. (3d) 566, 70 C.R.R. (2d) 181, [2000] O.J. nº 18 (QL). Pourvoi rejeté, les juges L'Heureux-Dubé, Gonthier et LeBel sont dissidents en partie.

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Robert J. Frater, *Peter De Freitas* and *David Schermbrucker*, for the appellant Her Majesty the Queen, for the respondent/appellant on cross-appeal and the intervener the Attorney General of Canada.

David G. Butcher and *Michael J. Hewitt*, for the respondents Lavallee, Rackel & Heintz.

D. Mark Pike and *Geoffrey L. Spencer*, for the appellants/respondents on cross-appeal White, Ottenheimer & Baker.

Richard Macklin and *Aaron Harnett*, for the respondent Fink.

Michal Fairburn and *Philip Downes*, for the appellant Her Majesty the Queen and the intervener the Attorney General for Ontario.

Benoît Lauzon and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

Eric Tolppanen, for the intervener the Attorney General for Alberta.

Lindsay MacDonald, *Q.C.*, for the intervener the Law Society of Alberta.

Anne S. Derrick, *Q.C.*, *Joel Pink*, *Q.C.*, and *Shane Parker*, for the intervener the Federation of the Law Societies of Canada.

James L. Lebo, *Q.C.*, for the intervener the Canadian Bar Association.

The judgment of McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

1 ARBOUR J. — These appeals bring into question the constitutionality of s. 488.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, which sets out a procedure for determining a claim of solicitor-client privilege in relation to documents seized from a law office under a warrant. The issue is brought before this Court by way of three separate appeals from the provinces of Alberta (*Lavallee, Rackel & Heintz v. Canada (Attorney General)*), Newfoundland and Labrador (*White, Ottenheimer & Baker v. Canada (Attorney General)*) and Ontario (*R. v. Fink*).

Robert J. Frater, *Peter De Freitas* et *David Schermbrucker*, pour l'appelante Sa Majesté la Reine, pour l'intimé/appelant au pourvoi incident et pour l'intervenant le procureur général du Canada.

David G. Butcher et *Michael J. Hewitt*, pour les intimés Lavallee, Rackel & Heintz.

D. Mark Pike et *Geoffrey L. Spencer*, pour les appelants/intimés au pourvoi incident White, Ottenheimer & Baker.

Richard Macklin et *Aaron Harnett*, pour l'intimé Fink.

Michal Fairburn et *Philip Downes*, pour l'appelante Sa Majesté la Reine et l'intervenant le procureur général de l'Ontario.

Benoît Lauzon et *Gilles Laporte*, pour l'intervenant le procureur général du Québec.

Eric Tolppanen, pour l'intervenant le procureur général de l'Alberta.

Lindsay MacDonald, *c.r.*, pour l'intervenante la Law Society of Alberta.

Anne S. Derrick, *c.r.*, *Joel Pink*, *c.r.*, et *Shane Parker*, pour l'intervenante la Fédération des ordres professionnels de juristes du Canada.

James L. Lebo, *c.r.*, pour l'intervenante l'Association du Barreau canadien.

Version française du jugement du juge en chef McLachlin et des juges Iacobucci, Major, Bastarache, Binnie et Arbour rendu par

LE JUGE ARBOUR — Les présents pourvois mettent en cause la constitutionnalité de l'art. 488.1 du *Code criminel*, L.R.C. 1985, ch. C-46, qui établit une procédure permettant de décider si le secret professionnel de l'avocat (dans l'article en cause, « privilège des communications entre client et avocat ») s'applique aux documents saisis dans un bureau d'avocat en vertu d'un mandat. La question est soumise à la Cour dans trois pourvois distincts provenant de l'Alberta (*Lavallee, Rackel & Heintz c. Canada (Procureur général)*), de Terre-Neuve-et-Labrador (*White, Ottenheimer & Baker c. Canada (Procureur général)*) et de l'Ontario (*R. c. Fink*).

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Section 488.1 was also recently challenged and struck down in other matters currently not before this Court: *R. v. Claus* (2000), 149 C.C.C. (3d) 336 (Ont. C.A.); *R. v. Piersanti & Co.*, [2001] G.S.T.C. 3 (Ont. C.A.); *Canada (Attorney General) v. Several Clients and Several Solicitors* (2000), 189 N.S.R. (2d) 313 (S.C.); *Festing v. Canada (Attorney General)* (2001), 206 D.L.R. (4th) 98 (B.C.C.A.), leave to appeal to S.C.C. filed December 11, 2001 (Nos. 28936 and 28937).* In an order dated December 11, 2001, Levine J.A. of the British Columbia Court of Appeal stayed the order of that court in *Festing* dated November 5, 2001, for a period of two weeks following the decision of this Court in the present appeals: [2001] B.C.J. No. 2666 (QL), 2001 BCCA 732.

En outre, l'article 488.1 a récemment été contesté et annulé dans d'autres affaires dont la Cour n'est pas saisie actuellement : *R. c. Claus* (2000), 149 C.C.C. (3d) 336 (C.A. Ont.); *R. c. Piersanti & Co.*, [2001] G.S.T.C. 3 (C.A. Ont.); *Canada (Attorney General) c. Several Clients and Several Solicitors* (2000), 189 N.S.R. (2d) 313 (C.S.); *Festing c. Canada (Attorney General)* (2001), 206 D.L.R. (4th) 98 (C.A.C.-B.), demande d'autorisation d'appel à la C.S.C. déposée le 11 décembre 2001 (n°s 28936 et 28937)*. Par ordonnance du 11 décembre 2001, le juge Levine, de la Cour d'appel de la Colombie-Britannique, a suspendu pour deux semaines suivant la décision de notre Cour dans les présents pourvois l'ordonnance que la Cour d'appel avait rendue le 5 novembre 2001 dans *Festing* : [2001] B.C.J. n° 2666 (QL), 2001 BCCA 732.

3

For the reasons that follow, I am of the view that s. 488.1 is unconstitutional and must accordingly be struck down pursuant to s. 52 of the *Constitution Act, 1982*.

Pour les motifs qui suivent, je suis d'avis que l'art. 488.1 est inconstitutionnel et qu'il doit donc être annulé en vertu de l'art. 52 de la *Loi constitutionnelle de 1982*.

I - Facts: The Three Appeals

I - Les faits : les trois pourvois

4

The facts of these cases are not controversial, nor are they determinative. Accordingly, all three matters can be briefly summarized as follows.

Les faits de ces trois affaires ne sont ni controversés ni déterminants. On peut donc les résumer brièvement ainsi.

5

In *Lavallee*, the R.C.M.P. obtained a search warrant in the regular form and wording pursuant to s. 487 of the *Criminal Code* on January 16, 1996. The search was to be executed on the following day at the law firm of Lavallee, Rackel & Heintz, in the City of Edmonton, targeting correspondence, estate files, trust records and other documents in relation to Mr. Andy Brent Polo, an individual suspected of money laundering and of being in possession of proceeds of crime. When the R.C.M.P. arrived at the law firm to execute the warrant, a solicitor who was familiar with the documents in question claimed solicitor-client privilege. The searching officers accordingly followed the procedure set out in s. 488.1 of the *Criminal Code*: the documents were sealed in envelopes, summarily identified and taken

Dans *Lavallee*, la G.R.C. obtient le 16 janvier 1996 un mandat de perquisition selon la forme et le libellé prescrits par l'art. 487 du *Code criminel*. La perquisition, qui doit avoir lieu le lendemain au cabinet d'avocats Lavallee, Rackel & Heintz, à Edmonton, vise la correspondance, les dossiers de succession, les registres de fiducie et d'autres documents concernant M. Andy Brent Polo, soupçonné de blanchiment d'argent et de possession de produits de la criminalité. Lorsque les agents de la G.R.C. se présentent au cabinet d'avocats pour exécuter le mandat, un avocat connaissant bien les documents en question invoque le secret professionnel de l'avocat. Les agents chargés de la perquisition suivent donc la procédure établie à l'art. 488.1 du *Code criminel* : les documents sont scellés dans

* Cases remanded to British Columbia Court of Appeal on October 10, 2002.

* Affaires renvoyées à la Cour d'appel de la Colombie-Britannique le 10 octobre 2002.

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into police custody. The next day, January 18, 1996, counsel retained by the law firm moved in the Court of Queen's Bench to fix a date and place for a judicial determination of privilege in reference to the seized documents in accordance with s. 488.1(3). In April 1996, the law firm gave notice of a constitutional question, alleging the unconstitutionality of s. 488.1 of the *Criminal Code*. The law firm and Mr. Polo also moved to quash the warrant but the application was denied in part by Dea J.: (1997), 199 A.R. 21 (Q.B.). In 1998, Veit J. struck down s. 488.1 as unconstitutional: (1998), 126 C.C.C. (3d) 129 (Alta. Q.B.). The appeal from that order was dismissed unanimously by the Court of Appeal for Alberta: (2000), 143 C.C.C. (3d) 187.

des enveloppes, identifiés sommairement et confiés à la garde de la police. Le lendemain, le 18 janvier 1996, l'avocat représentant le cabinet présente devant la Cour du Banc de la Reine une requête sollicitant la fixation d'une date et d'un lieu où la cour déciderait s'il existe un privilège relatif aux documents saisis, conformément au par. 488.1(3). En avril 1996, le cabinet d'avocats donne avis d'une question constitutionnelle, alléguant l'inconstitutionnalité de l'art. 488.1 du *Code criminel*. Le cabinet et M. Polo présentent également une requête en annulation du mandat, mais le juge Dea la rejette en partie : (1997), 199 A.R. 21 (B.R.). En 1998, le juge Veit annule l'art. 488.1, le déclarant inconstitutionnel : (1998), 126 C.C.C. (3d) 129 (B.R. Alb.). La Cour d'appel de l'Alberta rejette à l'unanimité l'appel interjeté contre cette ordonnance : (2000), 143 C.C.C. (3d) 187.

6

In *White*, a search warrant was obtained to search the law offices of Raymond P. Whelan, including all storage facilities occupied by him at the law firm of White, Ottenheimer & Baker, in the City of St. John's, Newfoundland. The warrant authorized officers of Revenue Canada to search the premises for documents relating to Daley Brothers Ltd. and Mr. Terry Daley who were suspected of the offences described in s. 239(1)(*a*) and (*d*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). When the search was executed on June 30, 1998, a partner in the appellant law firm claimed solicitor-client privilege with respect to the targeted documents and, as a result, pursuant to s. 488.1 of the *Criminal Code* and s. 232 of the *Income Tax Act*, the documents were sealed and taken into police custody. On July 9, 1998, the law firm moved to set a date and time for the determination of privilege under both s. 488.1(3) of the *Criminal Code* and s. 232(4) of the *Income Tax Act*. On January 29, 1999, the appellants applied for a declaration that s. 488.1 of the *Criminal Code* and s. 232 of the *Income Tax Act* are contrary to s. 8 of the *Canadian Charter of Rights and Freedoms*. Halley J. of the Supreme Court of Newfoundland, Trial Division, dismissed the application. The Court of Appeal allowed the appeal in part, resorting to the remedial techniques of severance and reading-in to salvage the

Dans *White*, il y a délivrance d'un mandat de perquisition visant le cabinet de Raymond P. Whelan, y compris les installations d'entreposage qu'il occupe au cabinet d'avocats White, Ottenheimer & Baker, à St. John's (Terre-Neuve). Le mandat autorise les agents de Revenu Canada à perquisitionner dans les lieux pour chercher des documents concernant Daley Brothers Ltd. et M. Terry Daley, soupçonnés d'avoir commis les infractions visées aux al. 239(1)*a*) et *d*) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.). Lors de l'exécution du mandat le 30 juin 1998, un associé du cabinet appelant invoque le secret professionnel de l'avocat relativement aux documents visés et, de ce fait, ceux-ci sont scellés et confiés à la garde de la police conformément aux art. 488.1 du *Code criminel* et 232 de la *Loi de l'impôt sur le revenu*. Le 9 juillet 1998, le cabinet d'avocats présente une requête en fixation de date et de lieu d'une audience pour que soit décidé s'il existe un privilège en vertu des par. 488.1(3) du *Code criminel* et 232(4) de la *Loi de l'impôt sur le revenu*. Le 29 janvier 1999, les appelants sollicitent un jugement déclaratoire selon lequel les art. 488.1 du *Code criminel* et 232 de la *Loi de l'impôt sur le revenu* vont à l'encontre de l'art. 8 de la *Charte canadienne des droits et libertés*. Le juge Halley, de la Section de première instance de la Cour suprême de Terre-Neuve, rejette la demande. La Cour d'appel accueille l'appel en partie, recourant aux

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impugned section of the *Criminal Code*: (2000), 146 C.C.C. (3d) 28.

techniques réparatrices de la dissociation et de l'interprétation large pour justifier la disposition contestée du *Code criminel* : (2000), 146 C.C.C. (3d) 28.

In *Fink*, a search warrant was executed at the law firm of Turkstra, Mazza Associates on February 8, 1999, in the City of Toronto, targeting documents relating to the appellant Jeffrey Fink who was suspected of various counts of fraud over $5,000. As result of the claim of solicitor-client privilege made on behalf of the appellant by counsel, the search was carried out according to the procedure set out in s. 488.1 of the *Criminal Code* and the documents were taken into police custody. On November 11, 1999, the appellant applied to the Ontario Superior Court of Justice for an order declaring s. 488.1 to be inconsistent with s. 8 of the *Charter*. Dambrot J. dismissed the application: (2000), 143 C.C.C. (3d) 566. Goudge J.A., for a unanimous court, allowed the appeal and declared s. 488.1 to be unconstitutional and of no force and effect: (2000), 51 O.R. (3d) 577.

7

Dans *Fink*, il y a exécution d'un mandat de perquisition au cabinet d'avocats Turkstra, Mazza Associates le 8 février 1999, à Toronto, visant des documents concernant l'appelant Jeffrey Fink, soupçonné de culpabilité relativement à divers chefs d'accusation de fraude d'un montant supérieur à 5 000 $. L'avocat ayant invoqué au nom de l'appelant le secret professionnel, la perquisition est effectuée conformément à la procédure prévue à l'art. 488.1 du *Code criminel* et les documents sont confiés à la garde de la police. Le 11 novembre 1999, l'appelant sollicite auprès de la Cour supérieure de justice de l'Ontario une ordonnance déclarant l'art. 488.1 incompatible avec l'art. 8 de la *Charte*. Le juge Dambrot rejette la demande : (2000), 143 C.C.C. (3d) 566. Au nom de la Cour d'appel à l'unanimité, le juge Goudge accueille l'appel et déclare l'art. 488.1 inconstitutionnel et inopérant : (2000), 51 O.R. (3d) 589.

II - The Impugned Provisions

II - Les dispositions législatives contestées

8

Criminal Code, R.S.C. 1985, c. C-46

488.1 (1) In this section,

"custodian" means a person in whose custody a package is placed pursuant to subsection (2);

"document", for the purposes of this section, has the same meaning as in section 321;

"judge" means a judge of a superior court of criminal jurisdiction of the province where the seizure was made;

"lawyer" means, in the Province of Quebec, an advocate, lawyer or notary and, in any other province, a barrister or solicitor;

"officer" means a peace officer or public officer.

(2) Where an officer acting under the authority of this or any other Act of Parliament is about to examine, copy or seize a document in the possession of a lawyer who claims that a named client of his has a solicitor-client privilege in respect of that document, the officer

Code criminel, L.R.C. 1985, ch. C-46

488.1 (1) Les définitions qui suivent s'appliquent au présent article.

« avocat » Dans la province de Québec, un avocat ou un notaire, et dans les autres provinces, un *barrister* ou un *solicitor*.

« document » Pour l'application du présent article, s'entend au sens de l'article 321.

« fonctionnaire » Agent de la paix ou fonctionnaire public.

« gardien » Personne à qui la garde d'un paquet est confiée conformément au paragraphe (2).

« juge » Juge d'une cour supérieure de juridiction criminelle de la province où la saisie a été faite.

(2) Lorsqu'un fonctionnaire agissant sous le régime de la présente loi ou de toute autre loi fédérale est sur le point d'examiner, de copier ou de saisir un document en la possession d'un avocat qui prétend qu'un de ses clients, nommément désigné, jouit du privilège des

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shall, without examining or making copies of the document,

(*a*) seize the document and place it in a package and suitably seal and identify the package; and

(*b*) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is agreement in writing that a specified person act as custodian, in the custody of that person.

(3) Where a document has been seized and placed in custody under subsection (2), the Attorney General or the client or the lawyer on behalf of the client, may

(*a*) within fourteen days from the day the document was so placed in custody, apply, on two days notice of motion to all other persons entitled to make application, to a judge for an order

(i) appointing a place and a day, not later than twenty-one days after the date of the order, for the determination of the question whether the document should be disclosed, and

(ii) requiring the custodian to produce the document to the judge at that time and place;

(*b*) serve a copy of the order on all other persons entitled to make application and on the custodian within six days of the date on which it was made; and

(*c*) if he has proceeded as authorized by paragraph (*b*), apply, at the appointed time and place, for an order determining the question.

(4) On an application under paragraph (3)(*c*), the judge

(*a*) may, if the judge considers it necessary to determine the question whether the document should be disclosed, inspect the document;

(*b*) where the judge is of the opinion that it would materially assist him in deciding whether or not the document is privileged, may allow the Attorney General to inspect the document;

(*c*) shall allow the Attorney General and the person who objects to the disclosure of the document to make representations; and

(*d*) shall determine the question summarily and,

(i) if the judge is of the opinion that the document should not be disclosed, ensure that it is repackaged and resealed and order the custodian to deliver the document to the lawyer who

communications entre client et avocat en ce qui concerne ce document, le fonctionnaire doit, sans examiner le document ni le copier :

a) le saisir et en faire un paquet qu'il doit convenablement sceller et identifier;

b) confier le paquet à la garde du shérif du district ou du comté où la saisie a été effectuée ou, s'il existe une entente écrite désignant une personne qui agira en qualité de gardien, à la garde de cette dernière.

(3) Lorsqu'un document a été saisi et placé sous garde en vertu du paragraphe (2), le procureur général, le client ou l'avocat au nom de son client, peut :

a) dans un délai de quatorze jours à compter de la date où le document a été placé sous garde, demander à un juge, moyennant un avis de présentation de deux jours adressé à toute autre personne qui pourrait faire une demande, de rendre une ordonnance :

(i) fixant une date, au plus tard vingt et un jours après la date de l'ordonnance, et un endroit, où sera décidée la question de savoir si le document doit être communiqué,

(ii) en outre, exigeant du gardien qu'il présente le document au juge au moment et au lieu fixés;

b) faire signifier une copie de l'ordonnance à toute personne qui pourrait faire une demande et au gardien dans les six jours de la date où elle est rendue;

c) s'il a procédé ainsi que l'alinéa *b*) l'autorise, demander, au moment et au lieu fixés, une ordonnance qui tranche la question.

(4) Suite à une demande prévue à l'alinéa (3)*c*), le juge :

a) peut examiner le document, s'il l'estime nécessaire, pour établir si le document doit être communiqué;

b) peut, s'il est d'avis que cela l'aidera à rendre sa décision sur le caractère privilégié du document, permettre au procureur général d'examiner le document;

c) doit permettre au procureur général et à toute personne qui s'oppose à la communication du document de lui présenter leurs observations;

d) doit trancher la question de façon sommaire et :

(i) s'il est d'avis que le document ne doit pas être communiqué, s'assurer que celui-ci est remballé et scellé à nouveau et ordonner au gardien de le remettre à l'avocat qui a allégué le privilège des

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claimed the solicitor-client privilege or to the client, or

(ii) if the judge is of the opinion that the document should be disclosed, order the custodian to deliver the document to the officer who seized the document or some other person designated by the Attorney General, subject to such restrictions or conditions as the judge deems appropriate,

and shall, at the same time, deliver concise reasons for the determination in which the nature of the document is described without divulging the details thereof.

(5) Where the judge determines pursuant to paragraph (4)(*d*) that a solicitor-client privilege exists in respect of a document, whether or not the judge has, pursuant to paragraph (4)(*b*), allowed the Attorney General to inspect the document, the document remains privileged and inadmissible as evidence unless the client consents to its admission in evidence or the privilege is otherwise lost.

(6) Where a document has been seized and placed in custody under subsection (2) and a judge, on the application of the Attorney General, is satisfied that no application has been made under paragraph (3)(*a*) or that following such an application no further application has been made under paragraph (3)(*c*), the judge shall order the custodian to deliver the document to the officer who seized the document or to some other person designated by the Attorney General.

(7) Where the judge to whom an application has been made under paragraph (3)(*c*) cannot act or continue to act under this section for any reason, subsequent applications under that paragraph may be made to another judge.

(8) No officer shall examine, make copies of or seize any document without affording a reasonable opportunity for a claim of solicitor-client privilege to be made under subsection (2).

(9) At any time while a document is in the custody of a custodian under this section, a judge may, on an *ex parte* application of a person claiming a solicitor-client privilege under this section, authorize that person to examine the document or make a copy of it in the presence of the custodian or the judge, but any such authorization shall contain provisions to ensure that the document is repackaged and the package is resealed without alteration or damage.

(10) An application under paragraph (3)(*c*) shall be heard in private.

communications entre client et avocat ou à son client,

(ii) s'il est d'avis que le document doit être communiqué, ordonner au gardien de remettre celui-ci au fonctionnaire qui a fait la saisie ou à quelque autre personne désignée par le procureur général, sous réserve des restrictions et conditions qu'il estime appropriées.

Le juge motive brièvement sa décision en décrivant la nature du document sans toutefois en révéler les détails.

(5) Lorsque le juge décide, conformément à l'alinéa (4)*d*), qu'un privilège des communications entre client et avocat existe en ce qui concerne un document, ce document demeure privilégié et inadmissible en preuve, que le juge ait permis ou non au procureur général de l'examiner, conformément à l'alinéa (4)*b*), à moins que le client n'y consente ou que le privilège ne soit autrement perdu.

(6) Lorsqu'un document a été saisi et placé sous garde, en vertu du paragraphe (2) et qu'un juge, sur la demande du procureur général, est convaincu qu'aucune demande prévue à l'alinéa (3)*a*) n'a été faite, ou, si elle l'a été, qu'elle n'a pas été suivie d'une autre demande prévue à l'alinéa (3)*c*), il doit ordonner au gardien de remettre le document au fonctionnaire qui a fait la saisie ou à quelque autre personne désignée par le procureur général.

(7) Lorsque, pour quelque motif, le juge à qui une demande a été faite selon l'alinéa (3)*c*) ne peut agir ni continuer d'agir en vertu du présent article, des demandes subséquentes faites en vertu de cet alinéa peuvent être faites à un autre juge.

(8) Aucun fonctionnaire ne doit examiner ni saisir un document ou en faire des copies sans donner aux intéressés une occasion raisonnable de formuler une objection fondée sur le privilège des communications entre client et avocat en vertu du paragraphe (2).

(9) En tout temps, lorsqu'un document est entre les mains d'un gardien selon le présent article, un juge peut, sur une demande *ex parte* de la personne qui s'oppose à la divulgation du document alléguant le privilège des communications entre client et avocat, autoriser cette dernière à examiner le document ou à en faire une copie en présence du gardien ou du juge; cependant une telle autorisation doit contenir les dispositions nécessaires pour que le document soit remballé et le paquet scellé à nouveau sans modification ni dommage.

(10) La demande visée à l'alinéa (3)*c*) est entendue à huis clos.

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(11) This section does not apply in circumstances where a claim of solicitor-client privilege may be made under the *Income Tax Act*.

III - The Issues

9 These appeals give rise to the following constitutional questions:

1. Does s. 488.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?
2. If so, is the infringement reasonable and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?
3. Does s. 488.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 8 of the *Canadian Charter of Rights and Freedoms*?
4. If so, is the infringement reasonable and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

IV - Analysis

A. *Law Office Searches*

10 Before the 1970s, law office searches were seldom employed in the course of criminal investigations. But since that time, there has been an observable trend in Canada and the United States towards more aggressive investigatory methods which include the issuing of warrants to search law offices for evidence of crime. See generally L. H. Bloom, Jr., "The Law Office Search: An Emerging Problem and Some Suggested Solutions" (1980), 69 *Geo. L.J.* 1, wherein the author partially attributes "the sudden and recent emergence of the law office search" (p. 7) in the United States to the Watergate scandal, which he claims lowered the public esteem of lawyers in general. See also J. E. Davis, "Law Office Searches: The Assault on Confidentiality and the Adversary System" (1996), 33 *Am. Crim. L. Rev*. 1251.

11 In Canada, the enactment of s. 488.1 of the *Criminal Code* (originally s. 444.1) in 1985 was in fact the legislative response to a line of cases culminating in this Court's decision *Descôteaux*

(11) Le présent article ne s'applique pas lorsque le privilège des communications entre client et avocat peut être invoqué en vertu de la *Loi de l'impôt sur le revenu*.

III - Les questions en litige

Les présents pourvois soulèvent les questions constitutionnelles suivantes :

1. L'article 488.1 du *Code criminel*, L.R.C. 1985, ch. C-46, porte-t-il atteinte à l'art. 7 de la *Charte canadienne des droits et libertés*?
2. Dans l'affirmative, cette atteinte est-elle raisonnable et justifiée dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte*?
3. L'article 488.1 du *Code criminel*, L.R.C. 1985, ch. C-46, porte-t-il atteinte à l'art. 8 de la *Charte canadienne des droits et libertés*?
4. Dans l'affirmative, cette atteinte est-elle raisonnable et justifiée dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte*?

IV - Analyse

A. *Les perquisitions dans les bureaux d'avocats*

Avant les années 70, il y avait rarement des perquisitions dans les bureaux d'avocats au cours d'enquêtes criminelles. Mais, depuis, on a assisté au Canada et aux États-Unis à la tendance consistant à employer des méthodes d'enquête plus agressives, dont la délivrance de mandats autorisant la perquisition dans des bureaux d'avocats pour chercher des éléments de preuve de crimes. Voir de façon générale L. H. Bloom, Jr., « The Law Office Search : An Emerging Problem and Some Suggested Solutions » (1980), 69 *Geo. L.J.* 1, ouvrage dans lequel l'auteur attribue en partie [TRADUCTION] « l'émergence soudaine et récente de la perquisition dans des bureaux d'avocats » (p. 7) aux États-Unis au scandale du Watergate, qui, selon lui, a diminué l'estime du public à l'endroit des avocats en général. Voir également J. E. Davis, « Law Office Searches : The Assault on Confidentiality and the Adversary System » (1996), 33 *Am. Crim. L. Rev*. 1251.

Au Canada, par l'adoption de l'art. 488.1 du *Code criminel* (initialement l'art. 444.1) en 1985, le législateur réagissait en fait à la jurisprudence ayant abouti à l'arrêt *Descôteaux c. Mierzwinski*, [1982]

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v. Mierzwinski, [1982] 1 S.C.R. 860, that set out guidelines for the issuing of search warrants for law offices. From the outset, Canadian courts expressed serious concerns about the dangers of law office searches in light of solicitor-client privilege, and urged Parliament to create protective measures akin to those found in the *Income Tax Act*. Section 488.1 was designed to address these concerns and, in the words of the Minister of Justice, "establish a sealing procedure with respect to seized documents that will ensure protection of solicitor-client privilege" (House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, Issue No. 5, January 22, 1985, at p. 5:9). As it will be explained further in these reasons, s. 488.1 of the *Criminal Code* falls short of providing the protection it promised and, indeed, unconstitutionally jeopardizes solicitor-client privilege. Before turning to the shortcomings of s. 488.1, it is perhaps worthwhile to review the jurisprudence that lead to its enactment in order to better understand the concerns that s. 488.1 was meant to address.

1 R.C.S. 860, où la Cour a établi des lignes directrices pour la délivrance de mandats de perquisition visant les bureaux d'avocats. Dès le départ, les tribunaux canadiens, en raison du secret professionnel de l'avocat, ont exprimé de sérieuses craintes au sujet des dangers des perquisitions dans des bureaux d'avocats et ont incité le législateur à établir des mesures de protection semblables à celles figurant dans la *Loi de l'impôt sur le revenu*. L'article 488.1 a été conçu pour dissiper ces craintes et, comme l'a dit le ministre de la Justice, pour « instaure[r] une procédure permettant de faire sceller des documents saisis afin d'assurer la protection du caractère confidentiel des communications entre avocats et clients » (Chambre des communes, Comité permanent de la Justice et des questions juridiques, *Procès-verbaux et témoignages*, fascicule n° 5, le 22 janvier 1985, p. 5:9). Comme je l'expliquerai davantage plus loin dans les présents motifs, l'art. 488.1 du *Code criminel* est loin de fournir la protection promise et, en fait, met en péril de façon inconstitutionnelle le secret professionnel de l'avocat. Avant d'aborder les lacunes de l'art. 488.1, il est peut-être utile d'examiner la jurisprudence qui a mené à son adoption afin de mieux comprendre les craintes qu'il visait à dissiper.

B. *The Pre-Descôteaux Decisions*

12

In *R. v. Colvin, Ex parte Merrick* (1970), 1 C.C.C. (2d) 8 (Ont. H.C.), an application was brought to quash a warrant issued by a justice of the peace authorizing police officers to enter a law firm and to search for various articles, namely, letters, correspondence, contracts and agreements which, it was alleged, would disclose evidence that the accused had committed an offence. Though he quashed the warrant on the basis that the issuing justice of the peace should not have been satisfied that the documents would afford any evidence, Osler J. also discussed the incidence of law office searches on solicitor-client privilege. He said at p. 13:

> Finally, the question of solicitor-client privilege is, in this connection, a troublesome one. On the one hand, no authority should be given *carte blanche* to search through the files in a solicitor's office in hopes of discovering material prepared for the purpose of advising the client in

B. *Les décisions antérieures à l'arrêt Descôteaux*

Dans *R. c. Colvin*, *Ex parte Merrick* (1970), 1 C.C.C. (2d) 8 (H.C. Ont.), on a sollicité l'annulation du mandat par lequel le juge de paix avait autorisé les policiers à pénétrer dans un bureau d'avocats pour y chercher divers documents, à savoir des lettres, des contrats et des ententes qui, selon les allégations, recelaient des éléments de preuve indiquant que l'accusé avait commis une infraction. Bien qu'il ait annulé le mandat au motif que le juge de paix n'aurait pas dû conclure que les documents fourniraient des éléments de preuve, le juge Osler a aussi analysé l'effet des perquisitions dans des bureaux d'avocats sur le secret professionnel de l'avocat, disant à la p. 13 :

> [TRADUCTION] Enfin, la question du secret professionnel de l'avocat est épineuse à cet égard. D'une part, aucune autorité ne devrait avoir carte blanche pour fouiller dans les dossiers d'un cabinet d'avocat dans l'espoir d'y découvrir des documents préparés en vue de

the normal and legitimate course of professional practice. The privilege, however, is exclusively that of the client and does not extend to correspondence, memoranda or documents prepared for the purpose of assisting a client to commit a crime nor to material in no way related to the giving of proper advice but stored with the solicitor purely for the purpose of avoiding seizure in the hands of the client.

At that time, solicitor-client privilege was only a rule of evidence and had not yet evolved into a substantive principle. Accordingly, Osler J. went on to state at p. 13:

. . . it must be remembered that the rule is a rule of evidence, not a rule of property. I would not be prepared, therefore, to quash a warrant respecting material which there were reasonable grounds to believe might afford evidence with respect to the commission of an offence simply because the possibility existed that such material might be covered by the solicitor-client privilege. The only way, as I see it, in which the privilege can be asserted is by way of objection to the introduction of any allegedly privileged material in evidence at the appropriate time.

13 In *Re Presswood and International Chemalloy Corp*. (1975), 11 O.R. (2d) 164 (H.C.), Osler J. had the opportunity to revise his previous dictum in light of a Federal Court of Appeal decision rendered earlier that year. Indeed, in *Re Shell Canada Ltd.*, [1975] F.C. 184, the Director of Investigation and Research applied before a five-judge panel of the Federal Court of Appeal to set aside a decision of the court below limiting his statutory search powers. Pursuant to s. 10(1) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (now the *Competition Act*, R.S.C. 1985, c. C-34) the Director had the power to enter any premises and copy any document which he believed was evidence relating to a matter under investigation. The court was of the view that the powers conferred on the Director did not abrogate the principle of solicitor-client privilege, which the court recognized as a fundamental principle of our legal system. Concurring, Thurlow J.A. emphasized that the principle of solicitor-client privilege may be asserted any time client confidentiality is threatened by legal authorities. He stated at p. 195:

conseiller le client dans l'exercice normal et légitime de la profession. Il s'agit toutefois d'un privilège exclusif au client qui ne s'étend pas aux lettres, notes ou documents préparés dans le but d'aider un client à commettre un crime, ni aux documents qui n'ont aucun rapport avec le fait de donner un conseil judicieux mais qui sont confiés à l'avocat uniquement dans le but d'éviter une saisie entre les mains du client.

À cette époque, le secret professionnel de l'avocat était uniquement une règle de preuve et n'était pas encore devenu une règle de fond. En conséquence, le juge Osler a ajouté à la p. 13 :

[TRADUCTION] . . . il faut se rappeler qu'il s'agit d'une règle de preuve et non d'une règle de propriété. Par conséquent, je ne serais pas disposé à annuler un mandat visant des documents dont on a des motifs raisonnables de croire qu'ils pourraient fournir une preuve concernant la perpétration d'une infraction, du seul fait qu'il est possible que ces documents soient protégés par le secret professionnel qui lie un avocat à son client. Selon moi, l'unique façon de faire valoir ce privilège est de s'opposer en temps opportun au dépôt en preuve de tout document qui bénéficierait du privilège.

Dans l'affaire *Re Presswood and International Chemalloy Corp*. (1975), 11 O.R. (2d) 164 (H.C.), le juge Osler avait la possibilité de réviser sa remarque incidente antérieure à la lumière d'un arrêt de la Cour d'appel fédérale rendu plus tôt cette année-là. En effet, dans *Re Shell Canada Ltd.*, [1975] C.F. 184, le directeur des enquêtes et recherches avait demandé à une formation de cinq juges de la Cour d'appel fédérale d'annuler la décision par laquelle une cour d'instance inférieure avait restreint les pouvoirs d'enquête que lui conférait la loi. En vertu du par. 10(1) de la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, ch. C-23 (maintenant la *Loi sur la concurrence*, L.R.C. 1985, ch. C-34), le Directeur avait le pouvoir de pénétrer en tous lieux et de copier les documents qui, à son avis, constituaient des éléments de preuve relatifs à une affaire faisant l'objet d'une enquête. La cour était d'avis que les pouvoirs conférés au Directeur n'écartaient pas le principe du secret professionnel de l'avocat, qu'elle a reconnu comme un principe fondamental de notre système judiciaire. Dans ses motifs concordants, le juge Thurlow a souligné, à la p. 195, que le principe du secret professionnel de l'avocat pouvait être invoqué chaque fois que les autorités menacent la confidentialité des communications entre client et avocat :

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. . . the confidential character of such communications, whether oral or in writing, comes into existence at the time when the communications are made. As the right to protection for the confidence, commonly referred to as legal professional privilege, is not dependent on there being litigation in progress or even in contemplation at the time the communications take place, it seems to me that the right to have the communications protected must also arise at that time and be capable of being asserted on any later occasion when the confidence may be in jeopardy at the hands of anyone purporting to exercise the authority of the law.

Relying on the authority of *Shell Canada*, *supra*, Osler J. held in *Presswood*, *supra*, that the discovery provisions of the *Business Corporations Act*, R.S.O. 1970, c. 53, did not override the common law solicitor-client privilege.

14

Re Borden & Elliot and The Queen (1975), 30 C.C.C. (2d) 337 (Ont. C.A.) is, in my view, the leading pre-*Descôteaux* judicial consideration of the relationship between solicitor-client privilege and search warrants under the *Criminal Code*. This was an appeal from an order of Southey J. quashing a search warrant issued under s. 443 of the *Criminal Code* to search the offices of Borden & Elliot, the solicitors of a man suspected of fraud. Southey J. (whose reasons are reported immediately prior to Arnup J.A.'s oral reasons) contemplated whether search warrants could be attacked for lack of jurisdiction on the part of the issuing justice when the targeted documents are privileged. Relying on the authority of *Shell Canada*, *supra*, Southey J. concluded that solicitor-client privilege could be asserted to challenge the issuance of search warrants, holding at p. 343:

If the privilege could not be invoked to prevent the seizure and examination of documents under a search warrant, the Crown would be free in any case to seize and examine the files and brief of defence counsel in a criminal prosecution. It would be small comfort indeed to the accused and to his counsel to discover that his only protection in such a case was to prevent the introduction into evidence of the documents that had been seized and examined. Such a result, in my view, would be absurd.

. . . le caractère confidentiel de ces communications, qu'elles soient orales ou écrites, prend naissance au moment de l'échange des communications. Puisque le droit à la protection du secret, communément appelé secret professionnel, n'est pas subordonné à l'existence d'un procès en cours ou même prévu au moment où les communications sont faites, il me semble que le droit à la protection des communications doit également exister à cette époque et pouvoir être invoqué en toute autre occasion, lorsque le secret peut être menacé par quiconque prétend exercer l'autorité de la Loi.

Se fondant sur l'arrêt *Shell Canada*, précité, le juge Osler a conclu dans l'affaire *Presswood*, précitée, que les dispositions sur l'interrogatoire préalable de la *Business Corporations Act*, R.S.O. 1970, ch. 53, n'écartaient pas le privilège de common law que constitue le secret professionnel de l'avocat.

À mon avis, l'arrêt *Re Borden & Elliot and The Queen* (1975), 30 C.C.C. (2d) 337 (C.A. Ont.), constitue l'arrêt clé antérieur à *Descôteaux* qui traite de la relation entre le secret professionnel de l'avocat et les mandats de perquisition décernés en vertu du *Code criminel*. Il s'agit d'un appel formé contre une ordonnance par laquelle le juge Southey a annulé un mandat de perquisition décerné en vertu de l'art. 443 du *Code criminel* et autorisant la perquisition dans les bureaux de Borden & Elliot, les avocats d'un homme soupçonné de fraude. Le juge Southey (dont les motifs sont publiés juste avant les motifs oraux du juge Arnup) s'est demandé si on pouvait contester un mandat de perquisition pour absence de compétence du juge l'ayant délivré lorsque les documents visés sont privilégiés. Se fondant sur l'arrêt *Shell Canada*, précité, le juge Southey a conclu qu'on pouvait invoquer le secret professionnel pour contester la délivrance d'un mandat de perquisition, disant à la p. 343 :

[TRADUCTION] Si l'on ne pouvait invoquer le privilège pour empêcher la saisie et l'examen de documents en vertu d'un mandat de perquisition, la poursuite aurait toujours le loisir de saisir et d'examiner les dossiers et le mémoire de l'avocat de la défense dans une poursuite criminelle. Ce serait vraiment une mince consolation pour l'accusé et son avocat de savoir que la seule protection dont il jouirait en l'instance serait que les pièces saisies et examinées ne peuvent être produites en preuve. Selon moi, un tel résultat serait absurde.

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Southey J. also found the information on which the warrant was based to be vague and ambiguous. The Court of Appeal for Ontario upheld the order on this last basis, carefully disassociating itself with the views expressed by Southey J. However, Arnup J.A., for the court, acknowledged the "difficult questions of solicitor-and-client privilege" as it relates to search warrants, indicating that the *Criminal Code* provided no guidance in terms of the limitations that might be ordered in issuing the warrant in order to protect possible claims of solicitor-client privilege. Moreover, the court observed that the *Criminal Code* was silent as to the procedures to be followed by lawyers who asserted solicitor-client privilege on behalf of their clients; at that time, their remedies were limited to bringing a motion to quash the search warrant. "The need for considering possible legislation is abundantly apparent", opined Arnup J.A., at p. 348.

Le juge Southey a également considéré comme vagues et ambigus les renseignements sur lesquels le mandat était fondé. La Cour d'appel de l'Ontario a confirmé l'ordonnance pour ce dernier motif, prenant bien soin de se dissocier des opinions du juge Southey. Toutefois, au nom de la cour, le juge Arnup a reconnu [TRADUCTION] « les difficiles questions du secret professionnel de l'avocat » en ce qui a trait aux mandats de perquisition, indiquant que le *Code criminel* ne fournissait aucune indication sur les restrictions dont on pourrait assortir le mandat pour protéger les revendications possibles fondées sur le secret professionnel de l'avocat. De plus, la cour a fait remarquer que le *Code criminel* ne prévoyait aucune procédure à suivre pour les avocats invoquant le secret professionnel au nom de leurs clients; à cette époque, les recours de ces derniers se limitaient à la présentation d'une requête en annulation du mandat de perquisition. [TRADUCTION] « Il est très clair qu'il faut envisager la possibilité d'adopter de nouvelles dispositions législatives », a affirmé le juge Arnup à la p. 348.

15 A few months later, in *Re B.X. Development Inc. and The Queen* (1976), 31 C.C.C. (2d) 14 (B.C.C.A.), Bull J.A. held on the authority of *Shell Canada*, *supra*, and *Borden & Elliot*, *supra*, that search warrants issued pursuant to s. 443 of the *Criminal Code* could be quashed where the targeted documents are plainly subject to solicitor-client privilege. As properly observed by the authors S. C. Hutchison, J. C. Morton and M. P. Bury, in *Search and Seizure Law in Canada* (loose-leaf), at p. 10-17: "In making this statement, Mr. Justice Bull, became the first Canadian Court of Appeal judge to suggest that the solicitor-client privilege might override the warrant provisions of the Criminal Code."

Quelques mois plus tard, dans *Re B.X. Development Inc. and The Queen* (1976), 31 C.C.C. (2d) 14 (C.A.C.-B.), le juge Bull s'est fondé sur *Shell Canada* et *Borden & Elliot*, précités, pour conclure que les mandats de perquisition délivrés en vertu de l'art. 443 du *Code criminel* pouvaient être annulés lorsque les documents visés bénéficiaient clairement de la protection du secret professionnel de l'avocat. Comme l'ont fait remarquer à juste titre les auteurs S. C. Hutchison, J. C. Morton et M. P. Bury, dans *Search and Seizure Law in Canada* (feuilles mobiles), p. 10-17 : [TRADUCTION] « En faisant cette déclaration, le juge Bull est devenu le premier juge d'une cour d'appel canadienne à laisser entendre que le secret professionnel de l'avocat est susceptible de l'emporter sur les dispositions du Code criminel sur les mandats de perquisition ».

16 Dickson J. (as he then was) commented on this expansion of solicitor-client privilege in his reasons for judgment in *Solosky v. The Queen*, [1980] 1 S.C.R. 821. In that case, the appellant Solosky, imprisoned at Millhaven Institution, invoked solicitor-client privilege to prevent the Director of the penitentiary from censoring his correspondence with

Le juge Dickson (plus tard Juge en chef) commente cette expansion du privilège entre avocat et client dans ses motifs dans l'affaire *Solosky c. La Reine*, [1980] 1 R.C.S. 821. Dans cette affaire, l'appelant Solosky, détenu à l'institution de Millhaven, a invoqué le privilège entre avocat et client pour empêcher le directeur du pénitencier de censurer

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his lawyer, a power conferred to the Director under the *Penitentiary Act*, R.S.C. 1970, c. P-6. In dismissing the appeal, Dickson J. stated that while solicitor-client privilege had undergone a significant expansion in recent years, it had still not become a rule of property and could not operate to prevent the censorship order. Indeed, an inmate's mail is opened, not with a view of obtaining evidence for a subsequent proceeding, but by reason of the exigencies of institutional security. In short, solicitor-client privilege did not apply to the appellant's case. Nevertheless, Dickson J. clearly stated that solicitor-client privilege had become a "fundamental civil and legal right" (*Solosky*, *supra*, at p. 839); see also *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at p. 383; *Smith v. Jones*, [1999] 1 S.C.R. 455; *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14, wherein Major J., for the Court, described solicitor-client privilege as a principle of fundamental justice within the meaning of s. 7 of the *Charter* (at pp. 453-60), and *R. v. Brown*, [2002] 2 S.C.R. 185, 2002 SCC 32. The *Solosky* decision remains an important restatement by this Court of the historical development of the privilege. See particularly pp. 834-38. For a general discussion of the jurisprudential expansion of solicitor-client privilege discussed above see also K. L. Chasse, "The Solicitor-Client Privilege and Search Warrants" (1977), 36 C.R.N.S. 349; R. A. Kasting, "Recent Developments in the Canadian Law of Solicitor-Client Privilege" (1978), 24 *McGill L.J.* 115.

sa correspondance avec son avocat, pouvoir qui est conféré au directeur par la *Loi sur les pénitenciers*, S.R.C. 1970, ch. P-6. En rejetant le pourvoi, le juge Dickson a affirmé que même si le privilège entre avocat et client avait connu une expansion importante au cours des dernières années, il n'était pas devenu une règle de propriété et ne pouvait pas s'appliquer de manière à empêcher d'ordonner la censure. En effet, on ouvre le courrier du détenu, non pas en vue d'obtenir des éléments de preuve devant servir dans une instance ultérieure, mais en raison des exigences de sécurité institutionnelle. Bref, le privilège entre avocat et client ne s'appliquait pas dans le cas de l'appelant. Le juge Dickson a néanmoins affirmé clairement que ce privilège était devenu un « droit civil fondamental » (*Solosky*, précité, p. 839); voir également *Geffen c. Succession Goodman*, [1991] 2 R.C.S. 353, p. 383; *Smith c. Jones*, [1999] 1 R.C.S. 455; *R. c. McClure*, [2001] 1 R.C.S. 445, 2001 CSC 14, où le juge Major, au nom de la Cour, a affirmé que le secret professionnel de l'avocat était un principe de justice fondamentale au sens de l'art. 7 de la *Charte* (p. 453-460), et *R. c. Brown*, [2002] 2 R.C.S. 185, 2002 CSC 32. L'arrêt *Solosky* demeure une importante formulation par la Cour de l'historique du privilège. Voir en particulier les p. 834-838. Pour une analyse générale de l'expansion jurisprudentielle susmentionnée du secret professionnel de l'avocat, voir également K. L. Chasse, « The Solicitor-Client Privilege and Search Warrants » (1977), 36 C.R.N.S. 349; R. A. Kasting, « Recent Developments in the Canadian Law of Solicitor-Client Privilege » (1978), 24 *R.D. McGill* 115.

C. *Descôteaux v. Mierzwinski*

C. *L'arrêt Descôteaux c. Mierzwinski*

17

This case involved the search of a legal aid bureau for evidence that an applicant for legal aid had illegally reported a lower income in order to be eligible for such services. The search was conducted in the presence of the syndic of the Bar and the police officers agreed to receive the documents in sealed envelopes pending the judicial determination of solicitor-client privilege. The legal aid bureau and Mr. Descôteaux brought a motion before the Superior Court in Montreal to quash the warrant on the grounds that the documents were protected

Dans cette affaire, on a perquisitionné dans un bureau d'aide juridique pour chercher des éléments de preuve établissant qu'un demandeur d'aide juridique avait illégalement déclaré un revenu inférieur à son revenu réel pour avoir droit à l'aide juridique. La perquisition a eu lieu en présence du syndic du Barreau et les policiers ont accepté de recevoir les documents saisis sous enveloppes scellées et de les garder jusqu'à ce qu'un juge décide s'il existe un privilège avocat-client à leur égard. Le bureau d'aide juridique et M. Descôteaux ont présenté

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by solicitor-client privilege. The Superior Court dismissed the motion and held that the documents were not privileged since they had been prepared before the solicitor-client relationship came into existence, [1978] C.S. 792. The Quebec Court of Appeal dismissed the appeal, adopting the conclusions of the Superior Court and stating further that solicitor-client privilege could not apply if the communication was made in furtherance of a criminal act or to facilitate the commission of a crime: (1980), 16 C.R. (3d) 188.

18 Writing for the Court, Lamer J. (as he then was) dismissed the appeal. After briefly tracing the historical development of solicitor-client privilege as a rule of evidence, Lamer J. confirmed that solicitor-client privilege had evolved into a substantive principle, referring to this Court's decision in *Solosky*, *supra*. He stated at p. 875:

> It is quite apparent that the Court in that case [*Solosky*] applied a standard that has nothing to do with the rule of evidence, the privilege, since there was never any question of testimony before a tribunal or court. The Court in fact, in my view, applied a substantive rule, without actually formulating it, and, consequently, recognized implicitly that the right to confidentiality, which had long ago given rise to a rule of evidence, had also since given rise to a substantive rule.

Lamer J. went on to formulate the elements of the substantive rule concisely in the following terms (at p. 875), elements which, in my view, largely govern the outcome of the appeals presently before the Court:

> It would, I think, be useful for us to formulate this substantive rule, as the judges formerly did with the rule of evidence; it could, in my view, be stated as follows:
>
> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential,

à la Cour supérieure de Montréal une requête en annulation du mandat au motif que les documents étaient protégés par le privilège avocat-client. La Cour supérieure a rejeté la requête et a conclu que les documents n'étaient pas visés par le privilège puisqu'ils avaient été préparés avant la naissance de la relation avocat-client, [1978] C.S. 792. La Cour d'appel du Québec a rejeté l'appel, adoptant les conclusions de la Cour supérieure et ajoutant que le privilège avocat-client ne pouvait pas s'appliquer si la communication avait été faite en vue de la perpétration d'un acte criminel ou pour la faciliter : (1980), 16 C.R. (3d) 188.

Au nom de la Cour, le juge Lamer (plus tard Juge en chef) a rejeté le pourvoi. Après avoir exposé brièvement l'historique du privilège avocat-client en tant que règle de preuve, le juge Lamer a confirmé que ce privilège était devenu un principe de fond, se référant à la décision que la Cour a rendue dans *Solosky*, précité. Il affirme à la p. 875 :

> De toute évidence la Cour, dans cette cause [*Solosky*], appliquait une norme qui n'a rien à voir avec la règle de preuve, le privilège, puisqu'en rien n'y était-il question de témoignages devant un tribunal quelconque. En fait la Cour, à mon avis, appliquait, sans par ailleurs la formuler, une règle de fond et, par voie de conséquence, reconnaissait implicitement que le droit à la confidentialité, qui avait depuis déjà longtemps donné naissance à une règle de preuve, avait aussi depuis donné naissance à une règle de fond.

Le juge Lamer a ensuite formulé de façon concise et dans les termes suivants (à la p. 875) les éléments de la règle de fond, lesquels, d'après moi, déterminent en grande partie l'issue des pourvois dont la Cour est actuellement saisie :

> Il est, je crois, opportun que nous formulions cette règle de fond, tout comme l'ont fait autrefois les juges pour la règle de preuve; elle pourrait, à mon avis, être énoncée comme suit :
>
> 1. La confidentialité des communications entre client et avocat peut être soulevée en toutes circonstances où ces communications seraient susceptibles d'être dévoilées sans le consentement du client;
>
> 2. À moins que la loi n'en dispose autrement, lorsque et dans la mesure où l'exercice légitime d'un droit porterait atteinte au droit d'un autre à la confidentialité de ses communications avec son avocat, le

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the resulting conflict should be resolved in favour of protecting the confidentiality.

3. When the law gives someone the authority to do something which, in the circumstances of the case, might interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.

4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

See also *Jones*, *supra*, at para. 49.

19 After discussing issues regarding the moment at which the solicitor-client relationship crystallizes (at pp. 876-82), Lamer J. considered the effect of solicitor-client privilege on searches authorized under s. 443 of the *Criminal Code* (now s. 487). First, he held that the evidential rule of solicitor-client privilege could be invoked to prevent the issuance of a search warrant where the targeted documents are privileged and therefore inadmissible in evidence. Citing with approval Southey J.'s jurisprudential analysis in *Borden & Elliot*, *supra*, Lamer J. added: "that the justice of the peace should raise the question himself and, where necessary, find that he has no jurisdiction to authorize the search" (p. 887).

20 Second, Lamer J. considered the interplay between the state's search power and the substantive rule of solicitor-client privilege. He stated, at pp. 889 and 891:

> Searches are an exception to the oldest and most fundamental principles of the common law, and as such the power to search should be strictly controlled. . . . [T]here are places for which authorization to search should generally be granted only with reticence and, where necessary, with more conditions attached than for other places. One does not enter a church in the same way as a lion's den, or a warehouse in the same way as a lawyer's office.

. . .

conflit qui en résulte doit être résolu en faveur de la protection de la confidentialité;

3. Lorsque la loi confère à quelqu'un le pouvoir de faire quelque chose qui, eu égard aux circonstances propres à l'espèce, pourrait avoir pour effet de porter atteinte à cette confidentialité, la décision de le faire et le choix des modalités d'exercice de ce pouvoir doivent être déterminés en regard d'un souci de n'y porter atteinte que dans la mesure absolument nécessaire à la réalisation des fins recherchées par la loi habilitante;

4. La loi qui en disposerait autrement dans les cas du deuxième paragraphe ainsi que la loi habilitante du paragraphe trois doivent être interprétées restrictivement.

Voir également l'arrêt *Jones*, précité, par. 49.

Après avoir traité des questions relatives au moment de la cristallisation de la relation avocat-client (p. 876-882), le juge Lamer a examiné l'effet du secret professionnel de l'avocat sur les perquisitions autorisées en vertu de l'art. 443 du *Code criminel* (maintenant l'art. 487). Premièrement, il a conclu qu'on pouvait invoquer la règle de preuve que constitue le secret professionnel de l'avocat pour empêcher la délivrance d'un mandat de perquisition lorsque les documents ciblés sont protégés et, par conséquent, inadmissibles en preuve. Citant avec approbation l'analyse de la jurisprudence à laquelle s'est livré le juge Southey dans *Borden & Elliot*, précité, le juge Lamer a ajouté : « il incombe au juge de paix de soulever la question *proprio motu* et, le cas échéant, de se reconnaître sans compétence pour autoriser la perquisition » (p. 887).

Deuxièmement, le juge Lamer a examiné l'interaction entre le pouvoir de perquisitionner de l'État et la règle de fond que constitue le secret professionnel de l'avocat. Il a affirmé, aux p. 889 et 891 :

> La perquisition est une exception aux principes les plus anciens et les plus fondamentaux de la *common law* et le pouvoir de perquisition doit être contrôlé strictement. [. . .] [I]l y a des endroits dont on ne devrait de façon générale permettre la fouille qu'avec réticence et, le cas échéant, avec plus de manières que pour d'autres endroits. On n'entre pas à l'église comme on le fait chez le loup; ni à l'entrepôt comme chez l'avocat.

. . .

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Generally speaking, where the search is to be made of a lawyer's office, in order to search for things provided for under para. (*a*), (*b*) or (*c*) of s. 443(1), the justice of the peace should be particularly demanding. Where it is a question of evidence (443(1)(*b*)), although satisfied that there is such evidence on the premises, he should only allow a lawyer's office to be searched if in addition he is satisfied that there is no reasonable alternative to a search. It will sometimes be desirable, as soon as the informant initiates proceedings, for the justice of the peace to see that the district Crown attorney is notified, if he is not aware of such proceedings, as well as the Bar authorities. With their assistance he should normally be more easily able to decide with the police on search procedures acceptable to everyone that respect the law firm's clients' right to confidentiality without depriving the police of their right to search for evidence of the alleged crime. [Emphasis added; emphasis in original deleted.]

De façon générale, lorsqu'il s'agit de perquisitionner chez un avocat, que ce soit pour y chercher des choses prévues aux al. *a*), *b*) ou *c*) de l'art. 443(1), le juge de paix devrait se montrer particulièrement exigeant. Lorsqu'il s'agit de preuves (443(1)*b*)), quoique satisfait de la présence sur les lieux de ces preuves, il ne doit permettre la fouille d'un bureau d'avocat que si, en plus, il est convaincu qu'il n'y a pas d'autre alternative raisonnable à la perquisition. Il sera parfois souhaitable que, dès les premières démarches du dénonciateur, le juge de paix voie à ce que le procureur de la Couronne du district soit avisé, si ces démarches sont faites à son insu, ainsi que les autorités du Barreau. Assisté de ceux-ci, il devrait normalement pouvoir plus facilement arrêter de concert avec les forces de l'ordre des modalités de perquisition acceptables à tous et qui respecteraient le droit à la confidentialité des clients du bureau de l'avocat sans frustrer la police de son droit de rechercher les preuves du crime allégué. [Je souligne; soulignement dans l'original omis.]

I think it important to emphasize, as did Lamer J. at p. 891, that even if the necessary conditions precedent are met, "the justice of the peace must set out procedures for the execution of the warrant that reconcile protection of the interests this right [solicitor-client privilege] is seeking to promote with protection of those the search power is seeking to promote, and limit the breach of this fundamental right to what is strictly inevitable" (emphasis in original). In other words, solicitor-client privilege must only be impaired if necessary and, even then, minimally.

J'estime qu'il est important de souligner, comme l'a fait le juge Lamer à la p. 891, que même si les conditions nécessaires préalables sont respectées, « le juge de paix doit assortir l'exécution du mandat de modalités qui concilient la protection des intérêts que cherche à promouvoir ce droit [le privilège des communications entre avocat et client] avec celle des intérêts que cherche à promouvoir le pouvoir de perquisitionner, et limiter à ce qui est strictement inévitable l'atteinte au droit fondamental » (souligné dans l'original). En d'autres termes, on ne doit porter atteinte au secret professionnel de l'avocat que si cela est nécessaire et, même dans un tel cas, on doit le faire de la façon la moins attentatoire possible.

21

Lamer J. gave incidental approval to the procedure set out in s. 232 of the *Income Tax Act*, suggesting that the issuing justice should take guidance from these provisions (p. 892). Section 444.1 (now s. 488.1) of the *Criminal Code* was explicitly modelled after s. 232 of the *Income Tax Act* and, in proceedings before the Standing Committee on Justice and Legal Affairs, was said to conform with the spirit of this Court's decision in *Descôteaux*, *supra*. Obviously, the fact that s. 488.1 of the *Criminal Code* mirrors s. 232 of the *Income Tax Act* does not insulate it from *Charter* scrutiny, despite the comments of this Court on the desirability of *Income Tax Act*-style safeguards. This is especially so given that

Le juge Lamer a accessoirement approuvé la procédure prévue à l'art. 232 de la *Loi de l'impôt sur le revenu*, indiquant que le juge saisi de la demande de mandat devait s'inspirer de cette disposition (p. 892). L'article 444.1 (maintenant l'art. 488.1) du *Code criminel* a été expressément calqué sur l'art. 232 de la *Loi de l'impôt sur le revenu* et, dans les audiences tenues devant le Comité permanent de la justice et des questions juridiques, on a dit que cette disposition était conforme à l'esprit de la décision que la Cour a rendue dans *Descôteaux*, précité. Manifestement, le fait que l'art. 488.1 du *Code criminel* soit semblable à l'art. 232 de la *Loi de l'impôt sur le revenu* ne met pas cette disposition à l'abri

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s. 232 of the *Income Tax Act* was enacted in 1956, long before the constitutional entrenchment of the protection against unreasonable search and seizure and other fundamental rights and freedoms. Moreover, it is important to recall that *Descôteaux* was not decided on the basis of the *Charter* (the *Charter* was two months old when judgment was rendered), but rather on the strength of common law principles. Accordingly, for the purpose of these appeals, the constitutionality of s. 488.1 must be determined in light of present-day constitutional norms, which include the status of solicitor-client privilege as a principle of fundamental justice within the meaning of s. 7 of the *Charter* (*McClure*, *supra*) and the constitutional protection against unreasonable searches and seizures as guaranteed by s. 8 of the *Charter*.

d'un examen fondé sur la *Charte*, malgré les observations de la Cour sur le caractère souhaitable de mesures de protection de la nature de celles prévues par la *Loi de l'impôt sur le revenu*. Cela est particulièrement vrai étant donné que l'art. 232 de la *Loi de l'impôt sur le revenu* a été adopté en 1956, bien avant la constitutionnalisation de la protection contre les fouilles, les perquisitions et les saisies abusives ainsi que d'autres droits et libertés fondamentaux. De plus, il est important de se rappeler que l'arrêt *Descôteaux* n'était pas fondé sur la *Charte* (celle-ci a été adoptée deux mois avant que la Cour rende cet arrêt), mais plutôt sur la force des principes de common law. En conséquence, pour les fins des présents pourvois, il faut statuer sur la constitutionnalité de l'art. 488.1 d'après les normes constitutionnelles actuelles, lesquelles comprennent le statut du secret professionnel de l'avocat comme principe de justice fondamentale au sens de l'art. 7 de la *Charte* (*McClure*, précité) et la protection constitutionnelle contre les fouilles, les perquisitions et les saisies abusives prévue à l'art. 8 de la *Charte*.

D. *Introduction to Section 488.1*

22 It seems clear from this background that s. 488.1 of the *Code* was enacted in an effort to address the specificity of the searches of lawyers' business premises and, in particular, to ensure that privileged communications made to a lawyer were properly exempted from the reach of that investigative technique. At the same time, to the extent that s. 488.1 only applies "[w]here an officer acting under the authority of [the *Criminal Code*] or any other Act of Parliament is about to examine, copy, or seize a document in the possession of a lawyer" (emphasis added), it is clear that the provision was never intended to supersede the common law principles pertaining to the issuance of a warrant in the law office context, as discussed by Lamer J. in *Descôteaux*, *supra*. That is, s. 488.1 does not attempt to deal with the process for authorizing the search of law offices but merely with the manner in which they are carried out. The question before us is whether this attempt reached the constitutional mark. Not all communications between a solicitor and a client are covered by privilege (*Solosky*, *supra*, at p. 829). In the context of civil litigation,

D. *Introduction à l'art. 488.1*

Il ressort de cet historique qu'on a adopté l'art. 488.1 du *Code* pour essayer de tenir compte du caractère particulier de la perquisition dans les lieux d'affaires des avocats et, notamment, de veiller à ce que les communications privilégiées faites à un avocat ne soient pas assujetties à cette méthode d'enquête. Or, dans la mesure où l'art. 488.1 s'applique seulement « [l]orsqu'un fonctionnaire agissant sous le régime [du *Code criminel*] ou de toute autre loi fédérale est sur le point d'examiner, de copier ou de saisir un document en la possession d'un avocat » (je souligne), il est clair que la disposition n'a jamais eu pour objet de remplacer les principes de common law concernant la délivrance de mandats dans le cas des bureaux d'avocats, comme l'a mentionné le juge Lamer dans *Descôteaux*, précité. L'article 488.1 ne tente pas de réglementer l'autorisation de la perquisition dans les bureaux d'avocats, mais simplement la façon dont s'effectue la perquisition. La question dont nous sommes saisis est de savoir si cette tentative résiste à l'examen de la constitutionnalité. Ce ne sont pas toutes les communications entre avocat et client qui sont protégées (*Solosky*, précité, p. 829).

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for example, affidavits of documents are produced, identifying documents that would otherwise be discoverable, but that are claimed as privileged and thus exempt from disclosure.

Dans les litiges civils, par exemple, on produit des affidavits mentionnant les documents susceptibles d'être découverts autrement, mais au sujet desquels on revendique le privilège et qui sont donc à soustrait à la divulgation.

23 In the context of a criminal investigation, the privilege acquires an additional dimension. The individual privilege holder is facing the state as a "singular antagonist" and for that reason requires an arsenal of constitutionally guaranteed rights (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 994). It is particularly when a person is the target of a criminal investigation that the need for the full protection of the privilege is activated. It is then not an abstract proposition but a live issue of ensuring that the privilege delivers on the promise of confidentiality that it holds.

Dans le cadre d'une enquête criminelle, le privilège prend une autre dimension. Le détenteur du privilège fait face à l'État, qui est son « adversaire singulier », de sorte qu'il a besoin d'une multitude de droits garantis par la Constitution (*Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 994). C'est surtout lorsqu'une personne est visée par une enquête criminelle que le besoin de la protection entière du privilège se fait sentir. Il ne s'agit donc pas d'un principe théorique, mais de la question réelle de veiller à ce que le privilège procure la confidentialité qu'il promet.

24 It is critical to emphasize here that all information protected by the solicitor-client privilege is out of reach for the state. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client and the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore, any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice.

Il est essentiel de souligner ici que l'État ne peut avoir accès aux renseignements protégés par le secret professionnel de l'avocat. On ne peut pas découvrir par la force ces renseignements ni en forcer la divulgation, et ils sont inadmissibles en cour. Il s'agit du privilège du client, et l'avocat agit comme gardien, tenu par l'éthique de protéger les renseignements privilégiés appartenant à son client. Par conséquent, il y a une règle de justice fondamentale voulant que tout renseignement privilégié obtenu par l'État sans le consentement de son détenteur est un renseignement auquel l'État n'a pas droit.

25 It is in that context that we must ask whether Parliament has taken all required steps to ensure that there is no deliberate or accidental access to information that is, as a matter of constitutional law, out of reach in a criminal investigation.

C'est dans ce contexte que nous devons nous demander si le législateur a pris toutes les mesures nécessaires pour garantir qu'on n'obtienne pas volontairement ou involontairement des renseignements qui, du point de vue du droit constitutionnel, ne peuvent servir dans le cadre d'une enquête criminelle.

E. *The Constitutional Failings of Section 488.1 Identified in the Proceedings Below*

E. *Les lacunes constitutionnelles de l'art. 488.1 mentionnées dans les instances inférieures*

26 As stated above, the appellate courts of Alberta, British Columbia, Newfoundland, Nova Scotia and Ontario all held that the procedure set out in s. 488.1 unconstitutionally offended to the rights enshrined in s. 8 of the *Charter*. In coming to that conclusion, these courts identified several problems within the

Comme je l'ai indiqué précédemment, les cours d'appel de l'Alberta, de la Colombie-Britannique, de Terre-Neuve, de la Nouvelle-Écosse et de l'Ontario ont toutes conclu que la procédure prévue à l'art. 488.1 portait atteinte de manière inconstitutionnelle aux droits consacrés par l'art. 8 de la *Charte*. En

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provisions of s. 488.1 which, either directly or indirectly, compromise the integrity of solicitor-client privilege.

(1) Absence or Inaction of Solicitor

27 The courts below all found that privilege may be lost through the absence or the inaction of the solicitor. Pursuant to s. 488.1(2), the sealing procedure is only engaged if "a lawyer . . . claims that a named client of his has a solicitor-client privilege" (emphasis added) in respect of the documents. If the solicitor is not present at the time and place of the search, the officers conducting the search must give the lawyer a reasonable opportunity to make the claim of privilege, as directed by s. 488.1(8). If no claim is made, they may seize the documents and freely examine their contents, thus causing the privilege to be lost. Similarly, the privilege may also be lost if the solicitor is present but fails to claim the privilege for whatever reason (incompetence, sickness or out of sheer nervousness arising out of having his or her office searched). See *Lavallee*, *supra*, at paras. 28 and 37; *White*, *supra*, at para. 21; *Fink*, *supra*, at para. 34; and, *Festing*, *supra*, at para. 17.

(2) The Naming of Clients

28 Courts have also identified another offensive aspect of s. 488.1(2) in the requirement that the lawyer name the client whose privilege is being threatened in order to engage the sealing procedure with respect to that client's documents. The name of the client may very well be protected by solicitor-client privilege, although this is not always the case. See *Thorson v. Jones* (1973), 38 D.L.R. (3d) 312 (B.C.S.C.); R. D. Manes and M. P. Silver, *Solicitor-Client Privilege in Canadian Law* (1993), at p. 141. Where the name of the client is indeed privileged information, s. 488.1(2) compels the lawyer to choose between two different privileged items: the name of the client or the confidential documents targeted by the search. In these situations, s. 488.1(2) requires that one privilege be sacrificed so that the other may be salvaged. See *Lavallee*, *supra*, at para. 50; *White*, *supra*, at para. 21; *Fink*, *supra*, at para.

tirant cette conclusion, ces cours ont relevé plusieurs problèmes dans l'art. 488.1 qui, directement ou indirectement, compromettent l'intégrité du secret professionnel de l'avocat.

(1) L'absence ou l'inaction de l'avocat

Les cours d'instance inférieure ont toutes conclu que l'absence ou l'inaction de l'avocat pouvait entraîner la perte du privilège. Selon le par. 488.1(2), la mise sous scellés ne s'applique que si « un avocat [. . .] prétend qu'un de ses clients, nommément désigné, jouit du privilège des communications entre client et avocat » (je souligne) en ce qui concerne les documents. Si l'avocat n'est pas présent au moment et au lieu de la perquisition, les agents l'effectuant doivent lui donner une occasion raisonnable de formuler une objection fondée sur le privilège, conformément au par. 488.1(8). En l'absence d'objection, ils peuvent saisir les documents et en examiner le contenu, ce qui entraîne la perte du privilège. De même, il peut également y avoir perte du privilège si l'avocat est présent mais qu'il n'invoque pas le privilège pour quelque raison que ce soit (incompétence, maladie ou pure nervosité résultant de la perquisition dans son bureau). Voir les arrêts précités suivants : *Lavallee*, par. 28 et 37; *White*, par. 21; *Fink*, par. 34; et *Festing*, par. 17.

(2) Le nom des clients

Les tribunaux ont également relevé un autre aspect attentatoire du par. 488.1(2), soit l'exigence que l'avocat nomme le client dont le privilège est menacé pour que soit enclenchée la mise sous scellés des documents de ce client. Le nom de celui-ci peut fort bien être protégé par le secret professionnel de l'avocat, bien que cela ne soit pas toujours le cas. Voir la décision *Thorson c. Jones* (1973), 38 D.L.R. (3d) 312 (C.S.C.-B.), et R. D. Manes et M. P. Silver, *Solicitor-Client Privilege in Canadian Law* (1993), p. 141. Lorsque le nom du client constitue effectivement un renseignement privilégié, le par. 488.1(2) oblige l'avocat à choisir entre deux éléments privilégiés : le nom du client et les documents confidentiels visés par la perquisition. Dans de tels cas, le par. 488.1(2) exige qu'un privilège soit sacrifié pour que l'autre puisse être préservé. Voir les arrêts précités suivants : *Lavallee*, par. 50; *White*, par. 21;

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39; *Festing*, *supra*, at para. 17, and *Several Clients*, *supra*, at para. 38.

(3) No Notice Given to Client

29 The courts below also criticized the fact that s. 488.1 fails to ensure that all interested clients are notified when their documents are about to be turned over to the investigators. Indeed, the procedure does not provide for the mandatory notification of privilege holders. This absence of notice is particularly striking when, as described above, the solicitor is absent or fails to act, thus irremediably depriving the client of the opportunity to assert his or her solicitor-client privilege. The absence of notice is the first step in a series of consequences which can be fatal to maintaining the confidentiality of privileged documents. See *Lavallee*, *supra*, at paras. 28-39; *White*, *supra*, at para. 21; *Fink*, *supra*, at para. 42; *Festing*, *supra*, at para. 17, and *Several Clients*, *supra*, at para. 38.

(4) Strict Time Limits

30 If the privilege is not asserted at the time of the search, for whatever reason, the seized documents may be examined by the investigating officers and prosecutors. Even if solicitor-client privilege is asserted at the time of the search, it may still be lost if the client or solicitor fails to move for "a place and a day . . . for the determination of the question whether the document should be disclosed" within 14 days of the search and seizure, as provided by s. 488.1(3)(*a*)(i) of the *Criminal Code*. In *Lavallee*, Côté J.A. further observed at para. 41: "The looming '14-day time' limit under s. 488.1(3) is really only 10 to 11 days, because the subsection says that 2 days' notice must be given. In view of the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 27(2), that will eat up at least 3 days. Since the lawyer needs authority to move in court, and since only the client owns the privilege and can move, the 10 or 14 days might well be missed." This time limit was held to be unreasonably strict and unworkable by the courts below. This procedural rigidity is exacerbated by the fact that no time extension can be granted without the consent of the Crown. See also *White*, *supra*, at para. 21; *Fink*, *supra*, at para. 34; *Festing*,

Fink, par. 39; *Festing*, par. 17, et *Several Clients*, par. 38.

(3) L'absence d'avis au client

Les cours d'instance inférieure ont également critiqué le fait que l'art. 488.1 ne garantit pas que tous les clients intéressés sont avisés lorsque leurs documents vont être remis aux enquêteurs. En effet, la procédure ne prévoit pas l'obligation d'aviser les détenteurs du privilège. Cette absence d'avis est particulièrement dramatique lorsque, comme je l'ai mentionné précédemment, l'avocat est absent ou n'intervient pas, ce qui prive irrémédiablement le client de la possibilité de faire valoir son privilège. L'absence d'avis constitue la première étape d'une série de conséquences susceptibles de mener à la perte de la confidentialité des documents privilégiés. Voir les arrêts précités suivants : *Lavallee*, par. 28-39; *White*, par. 21; *Fink*, par. 42; *Festing*, par. 17, et *Several Clients*, par. 38.

(4) Les délais stricts

Si on ne fait pas valoir le privilège au moment de la perquisition, pour quelque raison que ce soit, les enquêteurs et les poursuivants peuvent examiner les documents saisis. Même si le privilège des communications entre client et avocat est invoqué au moment de la perquisition, il peut encore être perdu si le client ou l'avocat omet de présenter une requête demandant que soient « fix[és] une date [. . .] et un endroit, où sera décidée la question de savoir si le document doit être communiqué » dans un délai de 14 jours de la fouille, de la perquisition et de la saisie, comme le prévoit le sous-al. 488.1(3)*a*)(i) du *Code criminel*. Dans *Lavallee*, le juge Côté a en outre fait remarquer au par. 41 que : [TRADUCTION] « Le délai apparent "de 14 jours" fixé au par. 488.1(3) est en réalité de seulement 10 ou 11 jours parce que cette disposition prévoit un avis de présentation de deux jours. Compte tenu du par. 27(2) de la *Loi d'interprétation*, L.R.C. 1985, ch. I-21, cet avis aura pour effet d'éliminer au moins trois jours. Comme l'avocat doit avoir une autorisation pour présenter une requête à la cour et que seul le client détient le privilège et peut présenter une telle requête, il se pourrait bien que le délai de 10 ou 14 jours ne soit pas respecté. » Les cours

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supra, at para. 17, and *Several Clients*, *supra*, at para. 38.

d'instance inférieure ont conclu que ce délai était déraisonnablement strict et impossible à respecter. Cette rigidité procédurale est exacerbée par le fait que le délai ne peut être prorogé sans le consentement du ministère public. Voir également les arrêts précités suivants : *White*, par. 21; *Fink*, par. 34; *Festing*, par. 17, et *Several Clients*, par. 38.

(5) Absence of Discretion

(5) L'absence de pouvoir discrétionnaire

31

Even in cases where the privilege has been asserted at the first opportunity, if the strict procedures outlined above are not followed, the *Code* provides that the court has no remedial discretion to relieve the privilege holder from his or her default and maintain the confidentiality of the information claimed to be privileged. This means that if an application is not made within 14 days of the search for a judicial determination of the validity of the claim of privilege, and if the consent of the Attorney General cannot be obtained for an extension of time, the judge has no discretion under the *Code* and must order that the documents seized and held under seal be turned over to the prosecution. Pursuant to s. 488.1(6), "the judge shall order" (emphasis added) that the documents be delivered to the prosecuting authorities. See *White*, *supra*, at para. 21; *Fink*, *supra*, at para. 35. The courts in *Festing*, *supra*, and *Several Clients*, *supra*, also found this aspect to be particularly offensive.

Même dans les cas où on fait valoir le privilège à la première occasion, le *Code* prévoit que, si les procédures strictes exposées précédemment ne sont pas suivies, la cour n'a pas le pouvoir discrétionnaire curatif de relever le détenteur du privilège de son défaut afin de préserver la confidentialité des renseignements qu'on prétend être privilégiés. Cela signifie que si, dans un délai de 14 jours de la perquisition, on ne demande pas au tribunal de statuer sur la validité de l'objection fondée sur le privilège et si on ne peut pas obtenir le consentement du procureur général à ce que le délai soit prorogé, le juge n'a aucun pouvoir discrétionnaire en vertu du *Code* et il doit ordonner que les documents saisis et conservés sous scellés soient remis à la poursuite. En vertu du par. 488.1(6), le « juge [. . .] doit ordonner » (je souligne) que les documents soient remis aux autorités chargées des poursuites. Voir les arrêts précités suivants : *White*, par. 21, et *Fink*, par. 35. Les cours ont également conclu, dans *Festing* et *Several Clients*, précités, que cet élément était particulièrement attentatoire.

(6) Access of the Attorney General Prior to Judicial Determination

(6) L'accès du procureur général avant qu'une décision judiciaire soit rendue

32

Finally, some appellate courts took issue with the fact that, pursuant to s. 488.1(4)(*b*), the Attorney General may be allowed to inspect the documents where the judge is of the opinion that it would materially assist the court in determining the question of privilege. Several courts held that this subsection effectively nullifies solicitor-client privilege before it is even determined that such privilege exists. The courts were of the view that the Crown does not need to inspect the documents in order to make meaningful submissions with regards to the seized documents and that the issue of privilege could be determined without allowing the Attorney General

Enfin, certaines cours d'appel ont réprouvé le fait qu'en vertu de l'al. 488.1(4)*b*), le juge peut, s'il est d'avis que cela aidera la cour à rendre sa décision sur la question du privilège, permettre au procureur général d'examiner les documents. Plusieurs tribunaux ont conclu que cette disposition avait pour effet de supprimer le privilège avant même qu'une décision ne soit rendue quant à son existence. Les tribunaux étaient d'avis que le ministère public n'avait pas besoin d'examiner les documents saisis pour présenter des observations utiles à leur égard et qu'on pouvait statuer sur la question du privilège sans permettre au procureur général d'avoir accès

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to access the seized documents. In the first instance of *Festing*, Romilly J. opined at para. 82: "I fail to see how disclosure to the prosecuting authority for the purposes of determining privilege is a practical necessity. I appreciate that eventually someone will have to see the documents in order to decide privilege. But surely that someone does not have to be the prosecuting authority" ((2000), 31 C.R. (5th) 203). See also *Fink*, *supra*, at para. 34; *Festing* (C.A.), *supra*, at para. 19; *Several Clients*, *supra*, at para. 41.

aux documents saisis. En première instance, dans *Festing*, le juge Romilly a exprimé l'opinion suivante au par. 82 : [TRADUCTION] « je ne vois pas en quoi il est nécessaire en pratique de communiquer les documents à l'autorité poursuivante pour qu'une décision soit rendue sur le caractère privilégié. Je suis conscient du fait qu'éventuellement quelqu'un devra voir les documents pour trancher la question. Mais il n'est certainement pas nécessaire que cette personne soit l'autorité poursuivante » ((2000), 31 C.R. (5th) 203). Voir également les arrêts précités suivants : *Fink*, par. 34; *Festing* (C.A.), par. 19, et *Several Clients*, par. 41.

33 The legislative deficiencies described above were held to impair solicitor-client privilege beyond any tolerable constitutional limit by the appellate courts of British Columbia (*Festing*, *supra*), Nova Scotia (*Several Clients*, *supra*) and Ontario (*Fink*, *supra*; *Claus*, *supra*; and *Piersanti*, *supra*) who accordingly all struck down s. 488.1 of the *Criminal Code*. While it endorsed the grounds identified in *Lavallee* in finding that s. 488.1 was unconstitutional, the Court of Appeal for Newfoundland (*White*, *supra*) ultimately decided that the section could be saved in accordance with the guidelines given by this Court in *Schachter v. Canada*, [1992] 2 S.C.R. 679, and by resorting to legislative severance and reading-in. More will be said on the issue of remedy further in these reasons.

Les déficiences législatives susmentionnées portent atteinte au secret professionnel de l'avocat à un point excédant toute limite constitutionnelle tolérable, d'après les cours d'appel de la Colombie-Britannique (*Festing*, précité), de la Nouvelle-Écosse (*Several Clients*, précité) et de l'Ontario (*Fink*, *Claus* et *Piersanti*, précités). Elles ont donc toutes annulé l'art. 488.1 du *Code criminel*. Bien qu'elle ait approuvé les motifs exposés dans *Lavallee*, selon lesquels l'art. 488.1 est inconstitutionnel, la Cour d'appel de Terre-Neuve (*White*, précité) a finalement décidé que cette disposition pouvait se justifier, en application des lignes directrices de la Cour dans *Schachter c. Canada*, [1992] 2 R.C.S. 679, et des techniques de la dissociation et de l'interprétation large. J'en dirai davantage sur la question de la réparation plus loin dans les présents motifs.

F. *Section 488.1 Violates Section 8 of the Charter*

34 The proper approach to the constitutional issues here is under s. 8 of the *Charter*, and there is no need to undertake an independent s. 7 analysis. This was properly explained in *Fink* by Goudge J.A., at para. 15:

> While a seizure undertaken by the state in the course of a criminal investigation can be said to implicate s. 7 and while solicitor-client privilege is encompassed within the principles of fundamental justice, I think s. 8 provides a sufficient framework for analysis. If the procedure mandated by s. 488.1 results in a reasonable search and seizure of the documents in the possession of a lawyer, it surely accords with the principles of fundamental justice and vice versa.

F. *L'article 488.1 viole l'art. 8 de la Charte*

En l'espèce, il convient d'analyser les questions constitutionnelles selon l'art. 8 de la *Charte* et il n'y a pas lieu d'entreprendre une analyse distincte fondée sur l'art. 7. C'est ce que le juge Goudge a bien expliqué dans *Fink*, par. 15 :

> [TRADUCTION] Bien qu'une saisie effectuée par l'État au cours d'une enquête criminelle puisse se rapporter à l'art. 7 et bien que le privilège des communications entre client et avocat fasse partie des principes de justice fondamentale, je crois que l'art. 8 prévoit un cadre d'analyse suffisant. Si la procédure prescrite par l'art. 488.1 donne lieu à une fouille, une perquisition ou une saisie raisonnable à l'égard des documents en la possession d'un avocat, elle est certainement conforme aux principes de justice fondamentale et vice versa.

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If the procedure set out in s. 488.1 results in an unreasonable search and seizure contrary to s. 8 of the *Charter*, it follows that s. 488.1 cannot be said to comply with the principles of fundamental justice embodied in s. 7. See also *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486. In *R. v. Edwards*, [1996] 1 S.C.R. 128, at para. 33, Cory J. stated that "[t]here are two distinct questions which must be answered in any s. 8 challenge. The first is whether the accused had a reasonable expectation of privacy. The second is whether the search was an unreasonable intrusion on that right to privacy." A client has a reasonable expectation of privacy in all documents in the possession of his or her lawyer, which constitute information that the lawyer is ethically required to keep confidential, and an expectation of privacy of the highest order when such documents are protected by the solicitor-client privilege. This is not at issue in this case. I will therefore proceed immediately to the second step of the s. 8 analysis, namely the reasonableness of the statutory intrusion on the privacy interests of solicitor's clients.

Si la procédure prévue à l'art. 488.1 donne lieu à une perquisition et à une saisie abusives, contrairement à l'art. 8 de la *Charte*, on ne peut donc pas dire que cette disposition respecte les principes de justice fondamentale consacrés à l'art. 7. Voir également *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486. Dans *R. c. Edwards*, [1996] 1 R.C.S. 128, par. 33, le juge Cory a déclaré que « [d]ans toute attaque fondée sur l'art. 8, il faut répondre à deux questions distinctes. La première est de savoir si l'accusé pouvait raisonnablement s'attendre au respect de sa vie privée. La seconde est de savoir si la perquisition constituait une atteinte abusive à ce droit à la vie privée ». Le client a une attente raisonnable au respect du caractère privé de tous les documents en la possession de son avocat, lesquels constituent des renseignements dont l'avocat est tenu, sur le plan de l'éthique, de préserver la confidentialité, et son attente est du plus haut niveau lorsque ces documents sont protégés par le privilège du secret professionnel de l'avocat. Ces principes ne sont pas contestés en l'espèce. J'aborde donc immédiatement le deuxième volet de l'analyse relative à l'art. 8, à savoir le caractère raisonnable de l'atteinte par la loi aux droits à la vie privée du client.

36

At this stage, the issue is whether the procedure set out by s. 488.1 results in a reasonable search and seizure of documents, including potentially privileged documents, in the possession of a lawyer. Indeed, s. 8 only protects against unreasonable searches and seizures: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. In commenting on the fact that a reasonable search and seizure is permitted under s. 8 of the *Charter*, Dickson J. stated, at pp. 159-60:

> This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

À ce stade-ci, il s'agit de déterminer si la procédure prévue à l'art. 488.1 donne lieu à la perquisition et à la saisie raisonnables de documents en la possession d'un avocat, y compris les documents susceptibles d'être privilégiés. En effet, l'art. 8 protège uniquement contre les fouilles, les perquisitions et les saisies abusives : *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145. En commentant le fait que l'art. 8 de la *Charte* autorise les fouilles, les perquisitions et les saisies raisonnables, le juge Dickson a affirmé aux p. 159-160 :

> Cette limitation du droit garanti par l'art. 8, qu'elle soit exprimée sous la forme négative, c'est-à-dire comme une protection contre les fouilles, les perquisitions et les saisies « abusives », ou sous la forme positive comme le droit de s'attendre « raisonnablement » à la protection de la vie privée, indique qu'il faut apprécier si, dans une situation donnée, le droit du public de ne pas être importuné par le gouvernement doit céder le pas au droit du gouvernement de s'immiscer dans la vie privée des particuliers afin de réaliser ses fins et, notamment, d'assurer l'application de la loi.

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Since *Hunter*, this Court has striven to strike an appropriate balance between privacy interests on the one hand and the exigencies of law enforcement on the other. See *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65; *R. v. Golden*, [2001] 3 S.C.R. 679, 2001 SCC 83. Sometimes, however, the traditional balancing of interests involved in a s. 8 analysis is inappropriate. As it was stated in *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 86, "the appropriateness of the balance is assessed according to the nature of the interests at stake in a particular context, and the place of these interests within our legal and political traditions". Where the interest at stake is solicitor-client privilege — a principle of fundamental justice and civil right of supreme importance in Canadian law — the usual balancing exercise referred to above is not particularly helpful. This is so because the privilege favours not only the privacy interests of a potential accused, but also the interests of a fair, just and efficient law enforcement process. In other words, the privilege, properly understood, is a positive feature of law enforcement, not an impediment to it. This was emphasized by this Court in *McClure*, *supra*, where Major J., writing for the Court, stated, at paras. 32 and 34-35:

> That solicitor-client privilege is of fundamental importance was repeated in *Jones*, *supra*, *per* Cory J., at para. 45:
>
> The solicitor-client privilege has long been regarded as fundamentally important to our judicial system. Well over a century ago in *Anderson v. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), at p. 649, the importance of the rule was recognized:
>
> > The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, . . . to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence . . . that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for

Depuis *Hunter*, la Cour s'est efforcée d'établir un juste équilibre entre le droit à la vie privée et les exigences de l'application de la loi. Voir *R. c. Araujo*, [2000] 2 R.C.S. 992, 2000 CSC 665, et *R. c. Golden*, [2001] 3 R.C.S. 679, 2001 CSC 83. Il arrive cependant parfois que l'évaluation traditionnelle des intérêts en jeu dans une analyse relative à l'art. 8 soit inappropriée. Comme il est déclaré dans *R. c. Mills*, [1999] 3 R.C.S. 668, par. 86, « [l]e caractère approprié de l'évaluation dépend [. . .] de la nature des intérêts en jeu dans un contexte particulier et de la place qu'ils occupent dans nos traditions juridiques et politiques ». Lorsque l'intérêt en jeu est le secret professionnel de l'avocat — principe de justice fondamentale et droit civil de la plus haute importance en droit canadien — l'exercice d'évaluation habituel susmentionné n'est pas particulièrement utile. En effet, le privilège favorise non seulement le droit à la vie privée d'une personne susceptible d'être accusée, mais aussi le droit à ce que le processus d'application de la loi soit équitable et efficace. En d'autres termes, bien compris, le privilège est une caractéristique positive de l'application de la loi, et non pas un obstacle à celle-ci. C'est ce que la Cour a souligné dans *McClure*, précité, où le juge Major, au nom de la Cour, a déclaré ceci aux par. 32 et 34-35 :

> Le juge Cory réitère l'importance fondamentale du secret professionnel de l'avocat dans l'arrêt *Jones*, précité, par. 45 :
>
> Le secret professionnel de l'avocat est considéré depuis longtemps comme étant d'une importance fondamentale pour notre système judiciaire. Cette règle a été reconnue il y a plus de cent ans, dans *Anderson c. Bank of British Columbia* (1876), 2 Ch. D. 644 (C.A.), à la p. 649 :
>
> > [TRADUCTION] L'objet et la teneur de la règle sont les suivants : comme, en raison de la complexité et des difficultés inhérentes à notre droit, les procès ne peuvent être correctement menés que par des professionnels, il est absolument nécessaire qu'un homme fasse appel à des avocats professionnels pour faire valoir ses droits ou se défendre contre une demande injustifiée [. . .] qu'il puisse, pour employer une expression populaire, tout avouer au professionnel qu'il consulte pour faire valoir sa demande ou pour se défendre [. . .], qu'il puisse placer toute sa confiance dans ce représentant professionnel et que les choses communiquées demeurent secrètes, sauf consentement de sa part (car il s'agit de son privilège et non de

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it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

. . .

Despite its importance, solicitor-client privilege is not absolute. It is subject to exceptions in certain circumstances. *Jones*, *supra*, examined whether the privilege should be displaced in the interest of protecting the safety of the public, *per* Cory J. at para. 51:

> Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by the solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege. In certain circumstances, however, other societal values must prevail.

However, solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added.]

Indeed, solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance. Accordingly, this Court is compelled in my view to adopt stringent norms to ensure its protection. Such protection is ensured by labeling as unreasonable any legislative provision that interferes with solicitor-client privilege more than is absolutely necessary. In short, in the specific context of law office searches for documents that are potentially protected by solicitor-client privilege, the procedure set out in s. 488.1 will pass *Charter* scrutiny if it results in a "minimal impairment" of solicitor-client privilege.

37

Minimal impairment has long been the standard by which this Court has measured the reasonableness of state encroachments on solicitor-client privilege. Recently, in *Brown*, *supra*, in defining the scope of the "innocence at stake" exception to solicitor-client privilege, this Court insisted that the

celui du mandataire qui reçoit l'information confidentielle), afin qu'il soit bien préparé à mener son procès.

. . .

Malgré son importance, le secret professionnel de l'avocat n'est pas absolu. Il est assujetti à des exceptions dans certains cas. Dans l'arrêt *Jones*, précité, par. 51, le juge Cory a examiné si le privilège devait être supplanté afin d'assurer la sécurité du public :

> De la même façon qu'aucun droit n'est absolu, aucun privilège ne l'est, y compris celui du secret professionnel de l'avocat qui souffre des exceptions bien définies. La décision d'exclure des éléments de preuve qui seraient à la fois pertinents et d'une grande valeur probante parce qu'ils font l'objet du secret professionnel de l'avocat constitue une décision de principe qui est fondée sur l'importance que revêt ce privilège pour notre système judiciaire en général. Dans certains cas, toutefois, d'autres valeurs sociales doivent avoir préséance.

Toutefois, le secret professionnel de l'avocat doit être aussi absolu que possible pour assurer la confiance du public et demeurer pertinent. Par conséquent, il ne cède le pas que dans certaines circonstances bien définies et ne nécessite pas une évaluation des intérêts dans chaque cas. [Je souligne.]

En effet, le secret professionnel de l'avocat doit demeurer aussi absolu que possible pour conserver sa pertinence. Par conséquent, je suis d'avis que la Cour est tenue d'adopter des normes rigoureuses pour assurer sa protection, ce qu'elle fait en qualifiant d'abusive toute disposition législative qui porte atteinte au secret professionnel plus que ce qui est absolument nécessaire. En résumé, dans le cadre particulier des perquisitions dans des bureaux d'avocats visant des documents susceptibles d'être protégés par le secret professionnel de l'avocat, la procédure prévue à l'art. 488.1 résistera à l'examen de la *Charte* si elle donne lieu à une « atteinte minimale » au secret professionnel de l'avocat.

L'atteinte minimale constitue depuis longtemps la norme dont se sert la Cour pour mesurer le caractère raisonnable des atteintes au secret professionnel de l'avocat par l'État. Récemment, dans *Brown*, précité, en définissant la portée de l'exception de « la démonstration de l'innocence de l'accusé »

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judge order the "production of only those communications that are necessary to allow an accused, whose innocence is otherwise at stake, to raise a reasonable doubt as to his guilt" (para. 77). In *Jones*, *supra*, this Court held at para. 77 that even where public safety is at stake, there must be a clear and imminent risk of serious bodily harm or death to an identifiable person or group before solicitor-client privilege can be compromised. Moreover, where it is determined that these criteria are met, the majority in *Jones* held that "[t]he disclosure of the privileged communication should generally be limited as much as possible" (para. 86). Major J., dissenting on another point, agreed at para. 28 that "solicitor-client privilege is a fundamental common law right of Canadians. . . . Anytime such a fundamental right is eroded the principle of minimal impairment must be observed". As I noted earlier in these reasons at para. 20, the minimal impairment standard was also applied in *Descôteaux*, *supra*, where Lamer J. instructed justices of the peace to be "particularly demanding" when issuing warrants to search law offices, so to "limit the breach of this fundamental right [solicitor-client privilege] to what is strictly inevitable" (p. 891).

applicable au secret professionnel de l'avocat, la Cour a insisté pour que le juge ordonne « uniquement la production des communications nécessaires pour permettre à l'accusé, dont l'innocence est en jeu, de susciter un doute raisonnable quant à sa culpabilité » (par. 77). Dans *Jones*, précité, la Cour a conclu au par. 77 que, même lorsque la sécurité publique est en jeu, une personne ou un groupe de personnes identifiables doivent être clairement exposées au danger imminent d'être gravement blessées ou d'être tuées pour qu'on puisse compromettre le secret professionnel de l'avocat. Les juges majoritaires ont de plus conclu que « [l]a divulgation des communications protégées par le privilège doit en général être aussi limitée que possible » (par. 86). Dissident sur un autre point, le juge Major a convenu au par. 28 que le « privilège du secret professionnel de l'avocat est un droit fondamental des Canadiens en common law. [. . .] Chaque fois qu'il est porté atteinte à ce droit fondamental, le principe de l'atteinte minimale doit être respecté ». Comme je l'ai souligné auparavant dans les présents motifs au par. 20, la norme de l'atteinte minimale a aussi été appliquée dans *Descôteaux*, précité, où le juge Lamer a donné instruction aux juges de paix d'être « particulièrement exigeant[s] » lorsqu'ils décernent des mandats de perquisition visant des bureaux d'avocats, de manière à « limiter à ce qui est strictement inévitable l'atteinte au droit fondamental [le secret professionnel de l'avocat] » (p. 891).

38 Does s. 488.1 more than minimally impair solicitor-client privilege? It is my conclusion that it does.

L'article 488.1 porte-t-il atteinte de façon plus que minimale au secret professionnel de l'avocat? Je conclus que tel est le cas.

39 While I think it unnecessary to revisit the numerous statements of this Court on the nature and primacy of solicitor-client privilege in Canadian law, it bears repeating that the privilege belongs to the client and can only be asserted or waived by the client or through his or her informed consent (*Solosky*, *supra*; *Descôteaux*, *supra*; *Geffen*, *supra*; *Jones*, *supra*; *McClure*, *supra*; *Benson*, *supra*). In my view, the failings of s. 488.1 identified in numerous judicial decisions and described above all share one principal, fatal feature, namely, the potential breach of solicitor-client privilege without the client's knowledge, let alone consent. The

Même si je considère qu'il est inutile de réexaminer les nombreuses déclarations de la Cour quant à la nature et à la primauté du secret professionnel de l'avocat en droit canadien, il est utile de répéter que le privilège appartient au client et que seul celui-ci peut l'invoquer ou y renoncer, directement ou par consentement éclairé (arrêts *Solosky*, *Descôteaux*, *Geffen*, *Jones*, *McClure* et *Benson*, précités). D'après moi, les lacunes de l'art. 488.1, mentionnées dans de nombreuses décisions judiciaires et décrites précédemment, ont toutes en commun une caractéristique dominante fatale, à savoir la violation potentielle du secret professionnel de l'avocat

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fact that competent counsel will attempt to ascertain the whereabouts of their clients and will likely assert blanket privilege at the outset does not obviate the state's duty to ensure sufficient protection of the rights of the privilege holder. Privilege does not come into being by an assertion of a privilege claim; it exists independently. By the operation of s. 488.1, however, this constitutionally protected right can be violated by the mere failure of counsel to act, without instruction from or indeed communication with the client. Thus, s. 488.1 allows the solicitor-client confidentiality to be destroyed without the client's express and informed authorization, and even without the client's having an opportunity to be heard.

sans que le client n'en ait connaissance et encore moins qu'il y ait consenti. Même si l'avocat compétent essaiera de joindre son client et qu'il invoquera vraisemblablement le privilège général dès le départ, l'État a l'obligation de veiller à ce que les droits du détenteur du privilège demeurent suffisamment protégés. Le privilège ne prend pas effet seulement au moment où il est invoqué; il existe indépendamment de sa revendication. Toutefois, selon l'art. 488.1, ce droit constitutionnel peut être violé du simple fait que l'avocat n'a pas agi, sans instructions en ce sens de la part de son client ou sans même qu'il y ait de communication avec lui. Ainsi, l'article 488.1 permet la perte de la confidentialité des communications entre avocat et client sans l'autorisation explicite et éclairée du client et sans même que celui-ci ait la possibilité d'être entendu.

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In that respect I note that s. 488.1(8), which requires the investigative officers to give reasonable opportunity for a claim of solicitor-client privilege to be made before examining, making copies or seizing any documents, is limited to a claim "to be made under subsection (2)". The claim under subs. (2) is of course the claim that the lawyer is required to make, at the time of the search, in order to trigger the further procedural protections provided for in s. 488.1. Therefore, under this statutory scheme, reasonable opportunity has to be provided to the privilege keeper, but not to the privilege holder, to ensure that the privileged information remains so. This positive obligation on counsel shifts the burden of guaranteeing the respect for *Charter* rights from the state to the lawyer. I stress here that I am making no adverse assumption about the competence, professionalism and integrity of lawyers. However, in the context of searches of law offices, it cannot simply be assumed that the lawyer is the *alter ego* of the client. The solicitor-client relationship may have been terminated long before the search. This of course does not displace the duty of loyalty owed by the solicitor to the client. But law office searches may place lawyers in a conflict of interest with their clients, or may place them in conflict regarding their ongoing duties to several present and former clients. I cannot see how s. 488.1(8), limited as it is, can raise this entire procedural scheme to a standard of constitutional reasonableness when it fails to address

Je souligne à cet égard que le par. 488.1(8), qui exige des enquêteurs qu'ils donnent aux intéressés une occasion raisonnable de formuler une objection fondée sur le privilège des communications entre client et avocat avant d'examiner ou de saisir des documents ou d'en faire des copies, prévoit seulement une objection « en vertu du paragraphe (2) ». Il s'agit évidemment de l'objection que l'avocat est tenu de formuler au moment de la perquisition pour faire entrer en jeu les protections procédurales additionnelles de l'art. 488.1. Par conséquent, en vertu de ce régime législatif, il faut fournir au gardien du privilège, mais pas à son détenteur, une occasion raisonnable de formuler une objection fondée sur le secret professionnel de l'avocat pour préserver la confidentialité des renseignements privilégiés. Cette obligation positive qui incombe à l'avocat déplace de l'État à l'avocat le fardeau de garantir que les droits protégés par la *Charte* sont respectés. Je tiens à souligner ici que je ne fais aucune supposition négative quant à la compétence, au professionnalisme et à l'intégrité des avocats. Cependant, dans le cadre des perquisitions dans des bureaux d'avocats, on ne peut pas simplement tenir pour acquis que l'avocat est l'*alter ego* du client. La relation entre l'avocat et le client peut avoir pris fin bien avant la perquisition, ce qui, naturellement, n'écarte pas l'obligation de loyauté de l'avocat envers le client. Mais les perquisitions dans des bureaux d'avocats peuvent mettre les avocats en conflit d'intérêts avec leurs clients ou

directly the entitlement that the privilege holder, the client, should have to ensure the adequate protection of his or her rights. Indeed, because of the complete lack of notification provisions within the s. 488.1 scheme, the client may not even be aware that his or her privilege is threatened.

mettre en opposition leurs obligations permanentes à l'égard de plusieurs clients actuels et de plusieurs anciens clients. Je ne peux pas voir comment, limité comme il l'est, le par. 488.1(8) peut rendre l'ensemble de ce régime raisonnable du point de vue constitutionnel alors qu'il ne traite pas directement du droit que le détenteur du privilège, le client, devrait avoir pour veiller à la protection adéquate de ses droits. En effet, vu l'absence totale de disposition prévoyant l'obligation de donner avis sous le régime de l'art. 488.1, il se peut que le client ne sache même pas que son privilège est menacé.

41 In cases where it would not be feasible to notify the potential privilege holders that they need to assert their privilege in order to bar an intrusion by the state into these protected materials, at the very least independent legal intervention, for instance in the form of notification and involvement of the Law Society, would go a long way to afford the protection that is so lacking under the present regime. Indeed, this is done routinely as a matter of practice in Quebec, and occasionally elsewhere. For a detailed description of the practice in Quebec, see *Maranda v. Québec (Juge de la Cour du Québec)* (2001), 47 C.R. (5th) 162, 161 C.C.C. (3d) 64 (Que. C.A.), at paras. 34 to 38, application for leave to appeal granted May 16, 2002, [2002] 2 S.C.R. vii.

Dans les cas où il ne serait pas possible d'aviser les détenteurs de privilège potentiels qu'ils doivent faire valoir leur privilège pour empêcher l'État d'avoir accès à ces documents protégés, une intervention légale indépendante, par exemple sous forme d'avis et de participation du Barreau, contribuerait certainement beaucoup à l'octroi de la protection qui fait si cruellement défaut dans le régime actuel. En effet, cette intervention est de pratique courante au Québec, et parfois ailleurs. Pour une description détaillée de la pratique québécoise, voir *Maranda c. Québec (Juge de la Cour du Québec)* (2001), 47 C.R. (5th) 112 (C.A. Qué.), par. 34-38, demande d'autorisation de pourvoi accordée le 16 mai 2002, [2002] 2 R.C.S. vii.

42 I stress here again that the enactment of s. 488.1 represents an attempt to respect the solicitor-client privilege. However, in order to respect the constitutional imperatives, the enactment must strive to ensure that the chances of the state's accessing, through a search warrant, privileged information to which the state has no right of access, are reduced to their reasonable minimum. In my view, since the right of the state to access this information is, in law, conditional on the consent of the privilege holder, all efforts to notify that person, or an appropriate surrogate such as the Law Society, must be put in place in order for the section to conform to s. 8 of the *Charter*.

Je souligne de nouveau ici que l'adoption de l'art. 488.1 vise à respecter le privilège des communications entre client et avocat. Toutefois, pour respecter les impératifs constitutionnels, la disposition doit faire en sorte, dans toute la mesure du possible, que soient réduites à leur minimum raisonnable les chances que l'État ait accès, au moyen d'un mandat de perquisition, à des renseignements privilégiés auxquels il n'a pas droit. À mon avis, comme le droit de l'État d'obtenir ces renseignements est, en droit, conditionnel au consentement du détenteur du privilège, il faut que toutes les mesures nécessaires à la notification de cette personne ou d'un substitut convenable comme le Barreau soient mises en place pour que la disposition soit conforme à l'art. 8 de la *Charte*.

43 Another fatal flaw in the current statutory scheme is, in my view, the absence of judicial discretion

Une autre lacune fatale du régime législatif actuel est, d'après moi, l'absence de pouvoir discrétionnaire

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in the determination of the validity of an asserted claim of privilege. I am not unduly concerned with the apparently strict time limits imposed by the *Code* for this issue to be dealt with, as I believe that a proper interpretation of these provisions would permit a court to relieve a party from its default to comply with the statutory time line, for instance on consent, in the interest of justice. However, I cannot see how one can read a residual judicial discretion in s. 488.1(6) which confers an entitlement on the Crown to access the seized documents if an application has not been made, or has not been proceeded with, with the dispatch required by subss. (2) and (3). The language is clear, "the judge shall" order the documents released to the prosecution. Short of replacing the word "shall" with the word "may" by way of constitutional remedy, a point to which I will return below, I cannot see how, as a matter of sound statutory interpretation, one can interpret this provision as containing an element of judicial discretion. Again, measured against the constitutional standard of reasonableness in s. 8 of the *Charter*, this mandatory disclosure of potentially privileged information, in a case where the court has been alerted to the possibility of privilege by the fact that the documents were sealed at the point of search, cannot be said to minimally impair the privilege. It amounts to an unjustifiable vindication of form over substance, and it creates a real possibility that the state may obtain privileged information that a court could very well have recognized as such. In my view, reasonableness dictates that courts must retain a discretion to decide whether materials seized in a lawyer's office should remain inaccessible to the state as privileged information if and when, in the circumstances, it is in the interest of justice to do so.

du juge qui statue sur la validité de l'objection fondée sur le privilège. Je ne m'inquiète pas indûment des délais apparemment stricts prescrits par le *Code* pour l'examen de cette question car j'estime que, bien interprétées, ces dispositions permettent au tribunal de relever une partie de son défaut de se conformer au délai légal, par exemple suivant un consentement, dans l'intérêt de la justice. Je ne vois cependant pas comment on peut déceler un pouvoir discrétionnaire résiduel du juge au par. 488.1(6), qui confère au ministère public un droit d'accès aux documents saisis si on n'a fait aucune demande, ou si on n'a pas donné suite à celle-ci, avec la célérité requise par les par. (2) et (3). Le libellé de cette disposition est clair : le « juge [. . .] doit » ordonner la remise des documents à la poursuite. À moins que le mot « doit » soit remplacé par le mot « peut » par voie de réparation constitutionnelle, point sur lequel je reviendrai plus loin, je ne vois pas comment, aux fins d'une saine interprétation des lois, on peut interpréter cette disposition comme comportant un certain pouvoir discrétionnaire judiciaire. Encore une fois, selon la norme constitutionnelle du caractère raisonnable que renferme l'art. 8 de la *Charte*, on ne peut pas dire que cette communication obligatoire de renseignements potentiellement privilégiés porte atteinte le moins possible au privilège dans un cas où la cour a été mise au courant de la possibilité de l'existence de celui-ci par la mise sous scellés des documents au moment de la perquisition. Cette communication obligatoire revient à faire prédominer de façon injustifiable la forme sur le fond et crée la possibilité réelle que l'État obtienne des renseignements qu'un tribunal peut fort bien reconnaître comme étant privilégiés. À mon avis, la norme du caractère raisonnable dicte que les tribunaux conservent le pouvoir discrétionnaire de décider si les documents saisis dans le bureau d'un avocat doivent demeurer inaccessibles à l'État en raison de leur caractère privilégié lorsque, dans les circonstances, il est dans l'intérêt de la justice qu'ils le demeurent.

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I also find an unjustifiable impairment of the privilege in the provision in s. 488.1(4)(*b*), which permits the Attorney General to inspect the seized documents where the applications judge is of the opinion that it would materially assist him or her in deciding whether the document is privileged.

J'estime également que l'al. 488.1(4)*b*) porte atteinte de façon injustifiable au privilège, car il permet au procureur général d'examiner les documents saisis lorsque le juge des demandes est d'avis que cela l'aiderait à rendre sa décision sur leur caractère privilégié. La Commission de réforme du droit

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This particular aspect of s. 488.1 was disapproved of by the Law Reform Commission of Canada who felt that "granting the Crown access to confidential communications passing between a solicitor and his client would diminish the public's faith in the administration of justice and create a potential for abuse" (p. 60). See Law Reform Commission of Canada, Report 24, *Search and Seizure* (1984), Recommendation Seven, at p. 58. I agree. As Goudge J.A. stated at para. 40 of his reasons in *Fink*, *supra*: "The effect of this provision is the complete loss of the protection afforded by the very privilege that may subsequently be determined to apply." It should be noted however that while the substantive aspect of the privilege is irremediably lost by operation of s. 488.1(4)(*b*), its evidentiary component remains untouched and continues to protect the privileged documents from being entered into evidence. See *Borden & Elliot*, *supra*, at p. 343. However, in my opinion and as Southey J. recognized in that case, "[i]t would be small comfort indeed" for the privilege holder that the law prevents the introduction of his or her confidential documents into evidence when their contents have already been disclosed to the prosecuting authority. Ultimately, any benefit that might accrue to the administration of justice from the Crown's being in a better position to assist the court in determining the existence of the privilege is, in my view, greatly outweighed by the risk of disclosing privileged information to the state in the conduct of a criminal investigation. I also cannot understand the logic of the argument that the Crown should be trusted not to use information obtained under that provision if it subsequently proved to have been the proper subject of a privilege. If, as would be the case under this provision, the conduct of the Crown examining the documents would have been entirely lawful, it is difficult to understand why the Crown should then refrain from making use of such knowledge lawfully acquired. In the end, this provision is unduly intrusive upon the privilege and of limited usefulness in determining its existence.

du Canada a désapprouvé cet élément particulier de l'art. 488.1. À cet égard, elle affirme : « en permettant au ministère public d'avoir accès [aux] communications [confidentielles], on risquerait de diminuer la confiance du public dans l'administration de la justice. De plus, certains redoutent les abus possibles » (p. 68). Voir Commission de réforme du droit du Canada, Rapport 24, *Les fouilles, les perquisitions et les saisies* (1984), Recommandation sept, p. 66. Je suis d'accord. Comme le juge Goudge l'a affirmé au par. 40 de ses motifs dans *Fink*, précité, [TRADUCTION] « Une telle disposition a pour effet d'éliminer complètement la protection conférée par le privilège même qui pourrait par la suite s'appliquer au document ». Il convient de noter, toutefois, que même si l'aspect substantiel du privilège est irrémédiablement perdu par application de l'al. 488.1(4)*b*), la règle de preuve demeure inchangée et continue à protéger les documents privilégiés en empêchant qu'ils soient présentés en preuve. Voir *Borden & Elliot*, précité, p. 343. Mais, à mon avis, et comme l'a reconnu le juge Southey dans cette affaire, [TRADUCTION] « [c]e serait vraiment une mince consolation » pour le détenteur du privilège que de savoir que la loi empêche la présentation en preuve de ses documents confidentiels alors que leur contenu a déjà été dévoilé à l'autorité poursuivante. Enfin, à mon avis, le danger que des renseignements privilégiés soient communiqués à l'État au cours d'une enquête criminelle l'emporte largement sur tout avantage pour l'administration de la justice qui pourrait découler du fait que le ministère public serait en meilleure position pour aider la cour à statuer sur l'existence du privilège. En outre, je ne peux pas comprendre la logique de l'argument selon lequel on peut être sûr que le ministère public n'utilisera pas les renseignements obtenus en vertu de cette disposition s'il est démontré par la suite que ceux-ci sont effectivement privilégiés. Si, comme cela aurait été le cas en vertu de cette disposition, l'examen des documents par le ministère public avait été entièrement légal, il est difficile de comprendre pourquoi ce dernier aurait dû ensuite se garder d'utiliser ces connaissances légalement acquises. En fin de compte, cette disposition porte indûment atteinte au privilège et a une utilité limitée pour la détermination de son existence.

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In short, in my opinion, s. 488.1 fails to ensure that clients are given a reasonable opportunity to exercise their constitutional prerogative to assert or waive their privilege. Far from upholding solicitor-client confidentiality, s. 488.1 permits the privilege to fall through the interstices of its inadequate procedure. The possible automatic loss of protection against unreasonable search and seizure through the normal operation of the law cannot be reasonable. Nor can the provision be infused with reasonableness in a constitutional sense on the basis of an assumption that the prosecution will behave honourably and, for instance, initiate a review under s. 488.1(3), if neither the client nor the lawyer has done so, or refrain from exercising the right to inspect the sealed documents, even though authorized to do so by the reviewing judge, as contemplated by s. 488.1(4)(*b*). As Cory J. observed in *R. v. Bain*, [1992] 1 S.C.R. 91, at pp. 103-4: "Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control." Even more so, I would add that the constitutionality of a statutory provision cannot rest on an expectation that the Crown will refrain from doing what it is permitted to do.

En résumé, j'estime que l'art. 488.1 ne garantit pas aux clients une occasion raisonnable d'exercer leur prérogative constitutionnelle de faire valoir leur privilège ou d'y renoncer. Loin de protéger la confidentialité des communications entre client et avocat, l'art. 488.1 entraîne la disparition du privilège en raison des failles de la procédure prescrite. La perte automatique possible de la protection contre les fouilles, les perquisitions ou les saisies abusives par l'application normale de la loi ne peut pas être raisonnable. On ne peut pas non plus conférer à la disposition un caractère raisonnable du point de vue constitutionnel en se fondant sur la présomption que la poursuite se comportera de façon honorable et, par exemple, qu'elle demandera la révision visée par le par. 488.1(3) si le client et l'avocat ne l'ont pas fait ou qu'elle s'abstiendra d'exercer le droit d'examiner les documents scellés même si le juge chargé de la révision l'y autorise conformément à l'al. 488.1(4)*b*). Comme le juge Cory l'a fait remarquer dans *R. c. Bain*, [1992] 1 R.C.S. 91, p. 103-104 : « Malheureusement, il semblerait que, chaque fois que le ministère public se voit accorder par la loi un pouvoir qui peut être utilisé de façon abusive, il le sera en effet à l'occasion. La protection des droits fondamentaux ne devrait pas être fondée sur la confiance à l'égard du comportement exemplaire permanent du ministère public, chose qu'il n'est pas possible de surveiller ni de maîtriser. » J'irais même jusqu'à ajouter que la constitutionnalité d'une disposition législative ne peut pas reposer sur l'attente que le ministère public s'abstienne de faire ce qu'il lui est permis de faire.

46

For these reasons, I find that s. 488.1 more than minimally impairs solicitor-client privilege and thus amounts to an unreasonable search and seizure contrary to s. 8 of the *Charter*. The appellants did not make any submissions on the issue of whether s. 488.1 could be saved under s. 1 of the *Charter* in the event it was found to be unconstitutional, as I have found it to be. Although this Court has left open the possibility that violations of ss. 7 and 8 could be saved under s. 1 in exceptional circumstances, this is clearly not such a case. See *Re B.C. Motor Vehicle Act*, *supra*; *Hunter*, *supra*; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 78. See also

Pour ces motifs, je conclus que l'art. 488.1 porte atteinte de façon plus que minimale au secret professionnel de l'avocat et qu'il équivaut donc à une fouille, à une perquisition et à une saisie abusives, contrairement à l'art. 8 de la *Charte*. Les appelants n'ont présenté aucune observation sur la question de savoir si l'art. 488.1 pouvait être justifié par l'article premier de la *Charte* dans l'hypothèse où on le jugerait inconstitutionnel, comme je l'ai fait. Bien que la Cour ait prévu la possibilité que des violations des art. 7 et 8 puissent être justifiées par l'article premier dans des cas exceptionnels, il ne s'agit clairement pas d'un tel cas en l'espèce. Voir les arrêts suivants : *Renvoi : Motor Vehicle Act de la C.-B.*, précité;

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D. Stuart, *Charter Justice in Canadian Criminal Law* (3rd ed. 2001), at pp. 24-25 and 245. In particular, if, as here, the violation of s. 8 is found to consist of an unjustifiable impairment of the privacy interest protected by that section, everything else aside, it is difficult to conceive that the infringement could survive the minimal impairment part of the *Oakes* test. See *R. v. Heywood*, [1994] 3 S.C.R. 761, at pp. 802-3. I therefore conclude that s. 488.1 could not be saved by s. 1: while effective police investigations are indisputably a pressing and substantive concern, s. 488.1 cannot be said to establish proportional means to achieve that objective inasmuch as it more than minimally impairs solicitor-client privilege.

Hunter, précité, et *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1, par. 78. Voir également D. Stuart, *Charter Justice in Canadian Criminal Law* (3e éd. 2001), p. 24-25 et 245. En particulier, si, comme en l'espèce, la violation de l'art. 8 est jugée constituer une atteinte injustifiable au droit à la vie privée protégé par cette disposition, toute autre chose à part, il est difficile de concevoir que cette violation puisse résister au volet de l'atteinte minimale du critère de l'arrêt *Oakes*. Voir *R. c. Heywood*, [1994] 3 R.C.S. 761, p. 802-803. Je conclus donc que l'art. 488.1 ne peut pas être justifié par l'article premier : bien que l'efficacité des enquêtes policières soit incontestablement une préoccupation de fond urgente, on ne peut pas dire que l'art. 488.1 prévoit des moyens proportionnés pour atteindre cet objectif dans la mesure où il porte atteinte au secret professionnel de l'avocat d'une façon plus que minimale.

V - Remedy

47 In *White*, *supra*, the Court of Appeal for Newfoundland held that the constitutional failings in s. 488.1 could be cured by a remedial interpretation of that section, resorting to such techniques as severance and reading-in. By contrast, the appellate courts in *Lavallee*, *supra*, and *Fink*, *supra*, thought it best to declare s. 488.1 unconstitutional and not engage in any judicial re-crafting of the impugned provision on the basis that, given the complexities involved, "[i]t is better that Parliament have a chance to sort all this out." (*Lavallee*, *supra*, at para. 105)

48 Some of the procedural shortcomings of s. 488.1 could be addressed by such techniques as severance or reading in. For instance, s. 488.1(4)(*b*) could be severed from the rest of the section, thus removing the offensive provision permitting the Attorney General to inspect documents that may be privileged. Section 488.1(3)(*a*) could be read to include after the words "within fourteen days" and "not later than twenty-one days" the expression: "or such time as the court deems appropriate". However, these are not at the heart of the constitutional infirmity of the provision. The need to ensure that privilege holders are given a genuine opportunity to enforce the

V - La réparation

Dans *White*, précité, la Cour d'appel de Terre-Neuve a conclu qu'on pouvait remédier aux lacunes constitutionnelles de l'art. 488.1 par une interprétation réparatrice de cette disposition, en recourant à des techniques comme la dissociation et l'interprétation large. Par contre, dans *Lavallee* et *Fink*, précités, les cours d'appel ont jugé préférable de déclarer l'art. 488.1 inconstitutionnel et de ne pas reformuler la disposition contestée au motif que, étant donné les subtilités en cause, [TRADUCTION] « [i]l est préférable que le législateur ait la possibilité de démêler tout cela ». (*Lavallee*, précité, par. 105)

On peut remédier à certaines des lacunes procédurales de l'art. 488.1 par des méthodes comme la dissociation et l'interprétation large. Par exemple, on pourrait dissocier l'al. 488.1(4)*b*) du reste de l'article, éliminant ainsi la disposition attentatoire qui permet au procureur général d'examiner des documents susceptibles d'être privilégiés. On pourrait interpréter l'al. 488.1(3)*a*) comme comprenant, après les termes « dans un délai de quatorze jours » et « au plus tard vingt et un jours », l'expression « ou dans tout autre délai que la cour juge approprié ». Toutefois, ces termes ne se situent pas au cœur du vice constitutionnel de la disposition. Une

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protection of their confidential communications to their lawyers, at the time when they need the protection of the law the most, cannot easily be met by a judicial redrafting of the provision. Neither can the need to ensure that the courts are given enough flexibility and discretion to remain the protectors of constitutional rights and the guardians of the law. In my view, the process for seizing documents in the possession of a lawyer is indeed a delicate matter, which presents some procedural options that are best left to Parliament. It also requires that legislation be carefully drafted. This Court is not asked to rewrite s. 488.1, nor am I inclined to do so. Rather, I think the proper course of action is to declare s. 488.1 unconstitutional and strike it down pursuant to s. 52 of the *Constitution Act, 1982.* As Côté J.A. properly observed in *Lavallee*, *supra*, at para. 105: "There is doubtless more than one constitutional way to legislate to alleviate the legitimate concerns of the police, of lawyers, and of their clients, over privilege claims during searches. Parliament should be allowed to choose that way which it thinks most apt." However, Parliament's prerogative to legislate anew in this area of criminal law enforcement would be better exercised, in my view, with the benefit of further consultation with those charged or affected by its interpretation and application.

reformulation judiciaire de la disposition ne peut pas aisément combler le besoin d'assurer que les détenteurs du privilège aient une occasion réelle de veiller à la protection de la confidentialité de leurs communications avec leurs avocats au moment où ils ont le plus besoin de la protection de la loi. Cette reformulation ne peut pas non plus aisément combler le besoin d'assurer que les tribunaux jouissent de la souplesse et du pouvoir discrétionnaire nécessaires pour garantir qu'ils demeurent les protecteurs des droits constitutionnels et les gardiens de la loi. D'après moi, la saisie de documents en la possession d'un avocat est effectivement une question délicate comportant des choix de procédure qu'il incombe davantage au législateur de faire. Ce processus exige également que les dispositions législatives soient rédigées avec soin. On n'a pas demandé à la Cour de rédiger de nouveau l'art. 488.1, et je ne suis pas encline à le faire non plus. J'estime plutôt qu'il convient de déclarer l'art. 488.1 inconstitutionnel et de l'annuler aux termes de l'art. 52 de la *Loi constitutionnelle de 1982*. Comme le juge Côté l'a fait remarquer à bon droit dans *Lavallee*, précité, par. 105, [TRADUCTION] « [i]l y a certes plus d'une façon constitutionnelle de légiférer de manière à dissiper les craintes légitimes de la police ainsi que des avocats et de leurs clients relativement aux objections fondées sur le privilège formulées lors de perquisitions. Le législateur doit pouvoir choisir la procédure qu'il estime la plus convenable ». Toutefois, le législateur exercerait mieux, à mon avis, sa prérogative d'adopter de nouvelles dispositions dans ce domaine d'application du droit criminel s'il consultait davantage les personnes chargées de leur interprétation et de leur application ainsi que celles touchées par celles-ci.

49

In the interim, I will articulate the general principles that govern the legality of searches of law offices as a matter of common law until Parliament, if it sees fit, re-enacts legislation on the issue. These general principles should also guide the legislative options that Parliament may want to address in that respect. Much like those formulated in *Descôteaux*, *supra*, the following guidelines are meant to reflect the present-day constitutional imperatives for the protection of solicitor-client privilege, and to govern both the search authorization process and the

Entre-temps, je formule les principes généraux régissant la légalité, en common law, des perquisitions dans des bureaux d'avocats jusqu'à ce que le législateur juge bon d'adopter de nouvelles dispositions législatives sur la question. Ces principes généraux doivent aussi guider les choix législatifs que le législateur peut vouloir examiner à cet égard. Comme celles qui ont été formulées dans *Descôteaux*, précité, les lignes directrices qui suivent visent à refléter les impératifs constitutionnels actuels en matière de protection du secret

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general manner in which the search must be carried out; in this connection, however, they are not intended to select any particular procedural method of meeting these standards. Finally, it bears repeating that, should Parliament once again decide to enact a procedural regime that is restricted in its application to the actual carrying out of law office searches, justices of the peace will accordingly remain charged with the obligation to protect solicitor-client privilege through application of the following principles that are related to the issuance of search warrants:

1. No search warrant can be issued with regards to documents that are known to be protected by solicitor-client privilege.

2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.

3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.

4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.

5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.

6. The investigative officer executing the warrant should report to the justice of the peace the

professionnel de l'avocat et à régir à la fois l'autorisation des perquisitions et la manière générale dont elles doivent être effectuées; à cet égard, cependant, elles ne visent pas à privilégier une méthode procédurale particulière en vue de respecter ces normes. Enfin, je tiens à répéter que, si le législateur décide de nouveau d'adopter un régime procédural dont l'application se limite à la perquisition dans des bureaux d'avocats, les juges de paix auront, par voie de conséquence, l'obligation de protéger le secret professionnel de l'avocat en appliquant les principes suivants concernant la délivrance des mandats de perquisition :

1. Aucun mandat de perquisition ne peut être décerné relativement à des documents reconnus comme étant protégés par le secret professionnel de l'avocat.

2. Avant de perquisitionner dans un bureau d'avocats, les autorités chargées de l'enquête doivent convaincre le juge saisi de la demande de mandat qu'il n'existe aucune solution de rechange raisonnable.

3. Lorsqu'il permet la perquisition dans un bureau d'avocats, le juge saisi de la demande de mandat doit être rigoureusement exigeant, de manière à conférer la plus grande protection possible à la confidentialité des communications entre client et avocat.

4. Sauf lorsque le mandat autorise expressément l'analyse, la copie et la saisie immédiates d'un document précis, tous les documents en la possession d'un avocat doivent être scellés avant d'être examinés ou de lui être enlevés.

5. Il faut faire tous les efforts possibles pour communiquer avec l'avocat et le client au moment de l'exécution du mandat de perquisition. Lorsque l'avocat ou le client ne peut être joint, on devrait permettre à un représentant du Barreau de superviser la mise sous scellés et la saisie des documents.

6. L'enquêteur qui exécute le mandat doit rendre compte au juge de paix des efforts faits pour

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efforts made to contact all potential privilege holders, who should then be given a reasonable opportunity to assert a claim of privilege and, if that claim is contested, to have the issue judicially decided.

7. If notification of potential privilege holders is not possible, the lawyer who had custody of the documents seized, or another lawyer appointed either by the Law Society or by the court, should examine the documents to determine whether a claim of privilege should be asserted, and should be given a reasonable opportunity to do so.

8. The Attorney General may make submissions on the issue of privilege, but should not be permitted to inspect the documents beforehand. The prosecuting authority can only inspect the documents if and when it is determined by a judge that the documents are not privileged.

9. Where sealed documents are found not to be privileged, they may be used in the normal course of the investigation.

10. Where documents are found to be privileged, they are to be returned immediately to the holder of the privilege, or to a person designated by the court.

Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. While the public has an interest in effective criminal investigation, it has no less an interest in maintaining the integrity of the solicitor-client relationship. Confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system. Unjustified, or even accidental infringements of the privilege erode the public's confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences.

joindre tous les détenteurs potentiels du privilège, lesquels devraient ensuite avoir une occasion raisonnable de formuler une objection fondée sur le privilège et, si cette objection est contestée, de faire trancher la question par les tribunaux.

7. S'il est impossible d'aviser les détenteurs potentiels du privilège, l'avocat qui a la garde des documents saisis, ou un autre avocat nommé par le Barreau ou par la cour, doit examiner les documents pour déterminer si le privilège devrait être invoqué et doit avoir une occasion raisonnable de faire valoir ce privilège.

8. Le procureur général peut présenter des arguments sur la question du privilège, mais on ne devrait pas lui permettre d'examiner les documents à l'avance. L'autorité poursuivante peut examiner les documents uniquement lorsqu'un juge conclut qu'ils ne sont pas privilégiés.

9. Si les documents scellés sont jugés non privilégiés, ils peuvent être utilisés dans le cours normal de l'enquête.

10. Si les documents sont jugés privilégiés, ils doivent être retournés immédiatement au détenteur du privilège ou à une personne désignée par la cour.

Le secret professionnel de l'avocat constitue une règle de preuve, un droit civil important ainsi qu'un principe de justice fondamentale en droit canadien. Même si le public a intérêt à ce que les enquêtes criminelles soient menées efficacement, il a tout autant intérêt à préserver l'intégrité de la relation avocat-client. Les communications confidentielles avec un avocat constituent un exercice important du droit à la vie privée et elles sont essentielles pour l'administration de la justice dans un système contradictoire. Les atteintes au privilège injustifiées, voire involontaires, minent la confiance qu'a le public dans l'équité du système de justice criminelle. C'est pourquoi il ne faut ménager aucun effort pour protéger la confidentialité de ces communications.

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VI - Conclusion

50 I conclude that s. 488.1 violates s. 8 of the *Charter* and must be struck down. It cannot be saved under s. 1. Accordingly, I would dismiss the appeals in *Lavallee*, *supra*, and *Fink*, *supra*. In *Fink*, the respondent should have his costs of the appeal in light of the agreement of the Crown to that effect. In *White*, *supra*, I would allow the appeal and I would set aside the decision of the Court of Appeal for Newfoundland to rewrite the impugned section; I would dismiss the cross-appeal.

51 The constitutional questions should be answered as follows:

1. Does s. 488.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

There is no need to answer the question.

2. If so, is the infringement reasonable and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

There is no need to answer this question.

3. Does s. 488.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 8 of the *Canadian Charter of Rights and Freedoms*?

Yes.

4. If so, is the infringement reasonable and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

No.

The reasons of L'Heureux-Dubé, Gonthier and LeBel JJ. were delivered by

LEBEL J. (dissenting in part) —

I. Introduction

52 I agree with my colleague Justice Arbour that lawyers' important role in the litigation process — as officers of the court and as advisers in the dispensing of legal advice — requires that the solicitor-client privilege be strictly upheld. However, I disagree with her finding that s. 488.1 of the *Criminal Code*,

VI - Conclusion

Je conclus que l'art. 488.1 viole l'art. 8 de la *Charte* et qu'il doit être annulé. Il ne peut pas être justifié par l'article premier. En conséquence, je suis d'avis de rejeter les pourvois interjetés dans les affaires *Lavallee* et *Fink*, précitées. Dans *Fink*, l'intimé devrait avoir droit aux dépens vu que le ministère était d'accord à cet égard. Dans l'affaire *White*, précitée, j'accueillerais le pourvoi et j'annulerais l'arrêt de la Cour d'appel de Terre-Neuve, dans lequel elle a réécrit la disposition contestée; je rejetterais le pourvoi incident.

Les questions constitutionnelles reçoivent les réponses suivantes :

1. L'article 488.1 du *Code criminel*, L.R.C. 1985, ch. C-46, porte-t-il atteinte à l'art. 7 de la *Charte canadienne des droits et libertés*?

Il n'est pas nécessaire de répondre à cette question.

2. Dans l'affirmative, cette atteinte est-elle raisonnable et justifiée dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte*?

Il n'est pas nécessaire de répondre à cette question.

3. L'article 488.1 du *Code criminel*, L.R.C. 1985, ch. C-46, porte-t-il atteinte à l'art. 8 de la *Charte canadienne des droits et libertés*?

Oui.

4. Dans l'affirmative, cette atteinte est-elle raisonnable et justifiée dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte*?

Non.

Version française des motifs des juges L'Heureux-Dubé, Gonthier et LeBel rendus par

LE JUGE LEBEL (dissident en partie) —

I. Introduction

Je conviens avec ma collègue le juge Arbour que le rôle important des avocats dans les recours judiciaires — en tant qu'officiers de justice et en tant que conseillers juridiques — exige que le privilège des communications entre client et avocat soit strictement respecté. Toutefois, je ne partage pas sa

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R.S.C. 1985, c. C-46, is unconstitutional, a finding she reaches on the basis of a strict and rigid interpretation of the statute and on the premise that lawyers will not discharge their professional duties in a diligent and competent manner, as required by their codes of professional conduct. Save for s. 488.1(4), s. 488.1 can be interpreted in a manner that comports with constitutional guarantees by assuming, as courts should, that lawyers will discharge their obligations to their clients in a manner which reflects their status as, sometimes, officers of the court, and, always, as independent professionals playing a key function in the life of the Canadian legal system. Section 488.1 represents a well-targeted legislative response to judgments of this Court and to the need to address the problems which attend searches and seizures executed in lawyers' offices. It aims at protecting privilege, not at destroying it. It builds on jurisprudential and legislative rules governing the issuance of search warrants. As a result, it does not infringe either s. 7 or s. 8 of the *Canadian Charter of Rights and Freedoms*.

conclusion selon laquelle l'art. 488.1 du *Code criminel*, L.R.C. 1985, ch. C-46, est inconstitutionnel, conclusion qu'elle fonde sur une interprétation stricte de la loi et à partir du principe selon lequel les avocats ne rempliront pas les devoirs de leur profession avec diligence et compétence, comme l'exigent leurs codes de déontologie. Sauf en ce qui concerne le par. 488.1(4), l'art. 488.1 peut s'interpréter d'une façon qui respecte les garanties constitutionnelles si on présume, comme devraient le faire les tribunaux, que les avocats s'acquitteront de leurs obligations envers leurs clients d'une manière qui reflète leur statut, parfois, d'officiers de justice et, toujours, de professionnels indépendants qui jouent un rôle-clé dans le fonctionnement du système juridique canadien. L'article 488.1 constitue une réponse bien ciblée sur le plan législatif aux arrêts de la Cour et à la nécessité de traiter les problèmes qui se posent lors des fouilles, perquisitions et saisies effectuées dans les cabinets d'avocats. Il vise à protéger le privilège des communications entre client et avocat et non à le supprimer. Il s'appuie sur les règles jurisprudentielles et législatives régissant la délivrance des mandats de perquisition. Par conséquent, il ne contrevient ni à l'art. 7 ni à l'art. 8 de la *Charte canadienne des droits et libertés*.

53

As Arbour J. states in her reasons, the facts are straightforward and not subject to much interpretation; I need not repeat them. The legal issues, on the other hand, have proven to be far more problematic. First, I will turn to the problems of statutory interpretation in the context of constitutional litigation. I will then review the legal underpinnings of a finding of unconstitutionality, in light of the nature and function of the legal profession in Canadian society. I will move on to a discussion of the specific provisions which are being challenged in these appeals. This analysis will lead to a different disposition of these appeals than that proposed by Arbour J.

Comme le mentionne le juge Arbour dans ses motifs, les faits sont simples et n'exigent pas beaucoup d'interprétation. Il n'y a donc pas lieu de les reprendre. Par contre, les questions juridiques se sont avérées beaucoup plus problématiques. D'abord, je traiterai des problèmes d'interprétation législative dans le contexte d'un litige constitutionnel. J'examinerai ensuite le fondement juridique d'une conclusion d'inconstitutionnalité, compte tenu de la nature et de la fonction de la profession d'avocat dans la société canadienne. Puis je passerai à l'étude des dispositions précises contestées dans les présents pourvois. Cette analyse donnera lieu à un dispositif différent de celui proposé par le juge Arbour en l'espèce.

II. Legislative Interpretation and Constitutional Litigation

II. Interprétation législative et litige constitutionnel

54

Techniques of legal interpretation are many, often subtle and, at times, apparently in conflict one with

Les techniques d'interprétation législative sont nombreuses, souvent subtiles et, parfois, elles

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another. Nevertheless, over time, key rules have emerged that play a major part in constitutional litigation. The interpreter looks first at the purpose of the statute as this Court held in the well-known and oft-cited *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21 (see also *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26). Given this overriding principle, if there is ambiguity, the interpreter then looks for an interpretation that will save the law rather than render it unconstitutional. However, if no reasonable interpretation that is consistent with the purpose and wording of the Act can be found, the statute will be held invalid. In the course of such an analysis, courts must remember that constitutionality is presumed and that invalidity must be shown. Nevertheless, ambiguity may not be artificially created in order to save a statute. (See *Bell ExpressVu*, at para. 28.)

55 The rule that, whenever different reasonable legislative interpretations remain possible, a construction which saves the validity of the law must be preferred, has been often stated. For example, in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, Lamer J. (as he then was) confirmed, at p. 1078, its validity and relevance in the context of *Charter* litigation as a central principle of constitutional interpretation:

> Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect.

56 The Court has remained faithful to this interpretive approach in constitutional litigation. In *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, McLachlin C.J. thus observed, at para. 33, that it supplements the purposive interpretation adopted in *Rizzo*:

> Supplementing this approach is the presumption that Parliament intended to enact legislation in conformity with the *Charter* . . . . If a legislative provision can be read both in a way that is constitutional and

entrent apparemment en conflit l'une avec l'autre. Néanmoins, au fil des ans, ont émergé des règles importantes qui jouent un rôle majeur dans tout litige constitutionnel. Celui qui interprète une loi en examine d'abord l'objet comme la Cour l'a jugé dans l'arrêt bien connu et souvent cité *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21 (voir également *Bell ExpressVu Limited Partnership c. Rex*, [2002] 2 R.C.S. 559, 2002 CSC 42, par. 26). Étant donné ce principe suprême, en cas d'ambiguïté, il cherche ensuite une interprétation qui va justifier la loi plutôt que la rendre inconstitutionnelle. Cependant, si on ne peut trouver d'interprétation raisonnable qui s'harmonise avec l'objet et le libellé de la Loi, celle-ci sera déclarée invalide. Dans le cadre d'une telle analyse, les tribunaux doivent se rappeler que la constitutionnalité se présume et que l'invalidité doit être prouvée. Toutefois, on ne peut pas créer artificiellement l'ambiguïté en vue de justifier une loi (voir *Bell ExpressVu*, par. 28).

La règle selon laquelle il faut préférer, dans les cas où différentes interprétations législatives raisonnables demeurent plausibles, l'interprétation qui reconnaît la validité de la loi a été souvent réitérée. Par exemple, dans *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038, le juge Lamer (plus tard Juge en chef) a confirmé, à la p. 1078, la validité et la pertinence de cette règle dans le contexte d'un litige fondé sur la *Charte* comme principe fondamental d'interprétation constitutionnelle :

> Or, quoique cette Cour ne doive pas ajouter ou retrancher un élément à une disposition législative de façon à la rendre conforme à la *Charte*, elle ne doit pas par ailleurs interpréter une disposition législative, susceptible de plus d'une interprétation, de façon à la rendre incompatible avec la *Charte* et, de ce fait, inopérante.

La Cour est restée fidèle à cette méthode d'interprétation dans les litiges constitutionnels. Dans *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, le juge en chef McLachlin a ainsi fait remarquer, au par. 33, que cette méthode ajoute à l'interprétation fondée sur l'objet qui a été adoptée dans *Rizzo* :

> Cette démarche est complétée par la présomption que le législateur a voulu adopter des dispositions conformes à la *Charte* [. . .] Lorsqu'une disposition législative peut être jugée inconstitutionnelle selon une interprétation et

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in a way that is not, the former reading should be adopted.

(See also *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065, at pp. 1071-72, *per* Lamer C.J.; *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 751, *per* Iacobucci J.; see also D. Pinard, "Le principe d'interprétation issu de la présomption de constitutionnalité et la *Charte canadienne des droits et libertés*" (1990), 35 *McGill L.J.* 305, at p. 328.)

57 Thus, whether an infringement of the *Charter*, and more particularly of s. 8, has been made out will turn, in part, on the content and meaning of the statutory provisions at issue. Content and meaning, in turn, need to be examined in the legislative context of the provisions at issue in order to characterize s. 488.1 of the *Criminal Code* accurately.

III. Nature and Purpose of Section 488.1

58 Section 488.1 does not stand in isolation. While it concerns the execution of search warrants, their issuance is governed by s. 487 and jurisprudential rules developed by this Court, more particularly in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860. Briefly stated, s. 487 requires a judicial authorization based on reasonable and probable grounds. Although concerns may have been voiced at times about the allegedly routine character of this process and the corresponding lack of effective control, such concerns are not warranted by the wording of the impugned provision and the nature of the duties imposed on the authorizing judge. As in the case of other forms of judicial authorization of investigative procedures, those duties must be discharged carefully in order to maintain standards consistent with the *Charter* principles governing searches and seizures or breaches of privacy interests by state action. (See, for example, *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at paras. 29-39.)

59 The judgment of our Court in *Descôteaux* also requires the authorizing judge to perform his or her own assessment of the need to issue a warrant. The applicant must demonstrate the absence of a reasonable alternative to the search. Warrants for search

constitutionnelle selon une autre, cette dernière doit être retenue.

(Voir également *Vidéotron Ltée c. Industries Microlec Produits Électroniques Inc.*, [1992] 2 R.C.S. 1065, p. 1071-1072, le juge en chef Lamer; *Symes c. Canada*, [1993] 4 R.C.S. 695, p. 751, le juge Iacobucci; voir également D. Pinard, « Le principe d'interprétation issu de la présomption de constitutionnalité et la *Charte canadienne des droits et libertés* » (1990), 35 *R.D. McGill* 305, p. 328.)

Ainsi, la question de savoir si on a établi un manquement à la *Charte*, et plus particulièrement à l'art. 8, dépendra, en partie, de la teneur et du sens des dispositions législatives en cause. Il faut examiner à leur tour la teneur et le sens dans le contexte législatif de ces dispositions afin de qualifier correctement l'art. 488.1 du *Code criminel*.

III. La nature et l'objet de l'art. 488.1

L'article 488.1 ne peut être étudié isolément. Il traite, certes, de l'exécution de mandats de perquisition, mais leur délivrance est régie par l'art. 487 et les règles jurisprudentielles établies par la Cour, plus particulièrement dans *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860. En bref, l'art. 487 exige l'autorisation d'un tribunal fondée sur des motifs raisonnables et probables. Il se peut, parfois, qu'on se soit dit préoccupé par le soi-disant caractère routinier de ce processus et le manque corrélatif de contrôle réel, mais de telles préoccupations ne sont pas justifiées par le libellé de la disposition contestée et par la nature des obligations imposées au juge autorisant les mandats. Comme dans le cas d'autres formes d'autorisation judiciaire de procédures d'enquête, il faut remplir ces obligations avec soin afin de maintenir des normes compatibles avec les principes énoncés dans la *Charte* qui régissent les fouilles, perquisitions et saisies ou visent la violation du droit à la vie privée de la part de l'État. (Voir, par exemple, *R. c. Araujo*, [2000] 2 R.C.S. 992, 2000 CSC 65, par. 29-39.)

Selon l'arrêt *Descôteaux* rendu par la Cour, il faut également que le juge saisi de la demande d'autorisation évalue lui-même s'il est nécessaire de décerner un mandat. Le demandeur doit prouver qu'il n'existe aucune autre solution de rechange raisonnable à la

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and seizure in law firms are not to be issued without a searching inquiry into the grounds and the alternatives, given the critically important nature of the solicitor-client privilege (*Descôteaux*, *supra*, at pp. 883-84 and at p. 890). In addition to reviewing the grounds advanced by the applicant, these rules imply that at the authorizing stage, the judge should take care to inquire into the nature of material to be searched and as to the possible existence of professional privilege.

fouille ou perquisition. Les mandats de perquisition et de saisie dans les cabinets d'avocats ne peuvent être décernés qu'après enquête sur les motifs et les solutions de rechange, étant donné l'extrême importance du privilège des communications entre client et avocat (*Descôteaux*, précité, p. 883-884 et 890). En plus de l'examen des motifs exposés par le demandeur, ces règles impliquent qu'à l'étape de l'autorisation, le juge devrait prendre soin d'enquêter sur la nature des documents visés par la perquisition et sur l'existence possible du secret professionnel.

60 Section 488.1 which, as my colleague points out, was adopted in response to *Descôteaux*, kicks in at the next stage, after the issuance of the warrant. It is designed to govern its execution and to address the problems arising out of a search carried out in a very particular environment. The provisions of this section of the *Criminal Code* do not abrogate, though, the general principles governing the issuance of search warrants targeting law offices. They remain part of the legal framework which must be considered in any discussion of the constitutional validity of s. 488.1 under s. 8 of the *Charter*.

L'article 488.1, qui, comme le signale ma collègue, a été adopté en réponse à l'arrêt *Descôteaux*, intervient à l'étape suivante, après la délivrance du mandat. Il vise à régir l'exécution du mandat et à traiter des problèmes découlant d'une fouille ou perquisition effectuée dans un environnement très particulier. Cet article du *Code criminel* n'abroge cependant pas les principes généraux régissant la délivrance de mandats de perquisition visant les cabinets d'avocats. Ces principes continuent de faire partie du cadre juridique qu'il faut prendre en considération dans tout débat sur la constitutionnalité de l'art. 488.1 sous le régime de l'art. 8 de la *Charte*.

61 Is this execution process so flawed that it should be found unreasonable and thus invalid under s. 8? For a variety of reasons, the judges in the courts below found it to be so. The alleged defects of this procedure are reviewed in the reasons of my colleague. They can be reduced to a few propositions. First, the procedure sets strict timetables which are unrealistic and are likely to lead to loss of privilege. Secondly, courts do not have any residual discretion to grant relief in cases where claims of privilege are not made in a timely manner. Therefore, the privilege may be lost through inaction of counsel without the courts' being able to control or stop the release of confidential information. Thirdly, the requirement to "name" the client in order to raise a claim of privilege would itself breach the privilege. Finally, on top of all this looms the possibility of Crown access to the seized documents under s. 488.1(4).

Ce processus d'exécution est-il imparfait au point qu'il faille le considérer comme abusif et invalide en vertu de l'art. 8? Pour diverses raisons, les juges des tribunaux d'instance inférieure en ont conclu ainsi. Ma collègue a examiné dans ses motifs les vices dont serait entachée cette procédure. Les allégations peuvent se ramener à quelques propositions. Premièrement, la procédure fixe des délais rigoureux dont le caractère irréaliste risque de mener à la perte du privilège. Deuxièmement, les tribunaux ne possèdent aucun pouvoir discrétionnaire résiduel pour accorder une réparation, dans les cas où les objections fondées sur le privilège ne sont pas formulées en temps utile. Par conséquent, la perte du privilège peut survenir par inaction de l'avocat sans que les tribunaux puissent contrôler ou arrêter la communication de renseignements confidentiels. Troisièmement, l'obligation de « désigner nommément » le client pour soulever une objection fondée sur le privilège porterait elle-même atteinte au privilège. En dernier lieu, à tout cela s'ajoute la possibilité pour le ministère public d'avoir accès, en vertu du par. 488.1(4), aux documents saisis.

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62

In my view, such propositions paint a picture of a procedure more concerned with destroying solicitor-client privilege than with protecting it. This is not, in reality, the case. It may be so if we disregard the safeguards built into the process of issuing search warrants as well as those which form part of the execution procedure in s. 488.1 itself. The acknowledgement of these safeguards which are inherent in the process requires a proper understanding of the role of counsel in the implementation of the provisions at issue and, perhaps more broadly, their duty as gatekeepers of our justice system, to act with diligence and competence.

À mon avis, de telles propositions dépeignent une procédure visant davantage à miner le privilège des communications entre client et avocat qu'à le protéger. Ce n'est, en fait, pas le cas. Il pourrait en être ainsi dans la mesure où nous ne tenons pas compte des garanties prévues dans le processus de délivrance des mandats de perquisition et de celles qui font partie de la procédure d'exécution à l'art. 488.1 lui-même. La reconnaissance de ces garanties inhérentes au processus exige une bonne compréhension du rôle des avocats dans la mise en œuvre des dispositions en cause et, peut-être, plus généralement, de leur obligation, en tant que gardiens de notre système juridique, d'agir avec diligence et compétence.

A. *Lawyers and Section 488.1*

A. *Les avocats et l'art. 488.1*

63

I must confess to very mixed feelings of puzzlement, concern and disbelief when dealing with some of the arguments raised in order to challenge the impugned provision. In particular, I have great difficulty with a finding of unconstitutionality based on the assumption that lawyers will not act with diligence or competence. For a long time, I have thought that lawyers belong to a vibrant, active, perhaps at times aggressive profession. I still have a vision of Canadian law societies representing a body of well-trained and diligent lawyers, with perhaps a few black sheep, here and there, to be culled once in a while. I retain the hope that, when faced with a challenge to the interests of a client, past or present, they will rise to the occasion and do what needs to be done in a timely, diligent and competent manner. The argument made now would actually require Parliament to build safeguards into criminal legislation itself against negligence, inattention, slowness in action and sloppiness in management and organization. Any lesser standards would breach the relevant *Charter* guarantees.

Je dois avouer que certains des arguments qu'on a soulevés pour contester la disposition en question me laissent à la fois perplexe, inquiet et incrédule. En particulier, j'ai beaucoup de difficulté à accepter la conclusion d'inconstitutionnalité fondée sur l'hypothèse selon laquelle les avocats n'agiront pas avec diligence ou compétence. Je pense depuis longtemps que les avocats appartiennent à une profession vibrante, active, peut-être parfois trop énergique. J'ai encore des barreaux canadiens la vision qu'ils représentent un corps d'avocats diligents et chevronnés, avec peut-être quelques moutons noirs, ici et là, à éliminer de temps à autre. Je garde l'espoir que, lors de la contestation des droits d'un client, présent ou passé, ils se montreront à la hauteur de la situation et feront ce qui doit être fait, en temps utile, avec diligence et compétence. L'argument présenté maintenant exigerait en réalité que le législateur prévoie dans la législation pénale elle-même des garanties contre la négligence, l'inattention, la lenteur à agir et le laisser-aller dans la gestion et l'organisation. Toute norme moindre porterait atteinte aux garanties pertinentes prévues par la *Charte*.

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A finding of unconstitutionality based on the assumption that lawyers will not perform their duties with diligence and competence does not reflect the importance the jurisprudence of our Court attaches to the legal profession and to the essential role its

Une conclusion d'inconstitutionnalité fondée sur l'hypothèse selon laquelle les avocats ne rempliront pas leurs devoirs avec diligence et compétence ne reflète pas l'importance que la jurisprudence de la Cour attache à la profession d'avocat et au rôle

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members are expected to play in the administration of justice and the upholding of the rule of law in Canadian society. Legislative provisions such as s. 488.1 must be interpreted keeping such a context in mind.

65 The role that lawyers play in society is so important that it has found its way into the Constitution of our country. At the time of an arrest, s. 10(*b*) of the *Charter* grants everyone the right "to retain and instruct counsel without delay and to be informed of that right". The right to the effective assistance of counsel is viewed as one of the principles of fundamental justice, as Major J. said in *R. v. G.D.B.*, [2000] 1 S.C.R. 520, 2000 SCC 22, at para. 24:

> Today the right to effective assistance of counsel extends to all accused persons. In Canada that right is seen as a principle of fundamental justice. It is derived from the evolution of the common law, s. 650(3) of the *Criminal Code* of Canada and ss. 7 and 11(*d*) of the *Canadian Charter of Rights and Freedoms*.

Lawyers are viewed as playing a critical function in the administration of justice. They can be properly characterized as "officers of the court", as Gonthier J. said in *Fortin v. Chrétien*, [2001] 2 S.C.R. 500, 2001 SCC 45, at para. 49:

> Accordingly, the essential role that the advocate is called upon to play in our society cannot be overemphasized. Advocates are officers of the court. By their oath of office, they solemnly affirm that they will fulfill the duties of their profession with honesty, integrity and justice and will comply with the various statutory provisions governing the practice of that profession. . . .

66 Some years before in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, McIntyre J. had emphasized, at p. 187, the reliance of the justice system on the existence of the legal profession and the competent discharge of its duties to its clients, the courts and society:

> It is incontestable that the legal profession plays a very significant — in fact, a fundamentally important — role in the administration of justice, both in the criminal and the civil law. . . . I would observe that in the absence of an independent legal profession, skilled and qualified to

essentiel que ses membres sont censés jouer dans l'administration de la justice et le maintien de la règle de droit dans la société canadienne. Les dispositions législatives telles que l'art. 488.1 doivent être interprétées compte tenu d'un tel contexte.

Le rôle que les avocats jouent dans la société est tellement important qu'il a trouvé place dans la Constitution de notre pays. Lors d'une arrestation, l'al. 10*b*) de la *Charte* accorde à chacun le droit « d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit ». Le droit à l'assistance effective d'un avocat est considéré comme l'un des principes de justice fondamentale, comme le dit le juge Major dans *R. c. G.D.B.*, [2000] 1 R.C.S. 520, 2000 CSC 22, par. 24 :

> Aujourd'hui, tout inculpé a droit à l'assistance effective d'un avocat. Au Canada, ce droit est considéré comme un principe de justice fondamentale. Il découle de l'évolution de la common law, du par. 650(3) du *Code criminel* canadien ainsi que de l'art. 7 et de l'al. 11*d*) de la *Charte canadienne des droits et libertés*.

Les avocats sont considérés comme remplissant une fonction décisive dans l'administration de la justice. On peut les qualifier à juste titre d'« officiers de justice », comme le mentionne le juge Gonthier dans *Fortin c. Chrétien*, [2001] 2 R.C.S. 500, 2001 CSC 45, par. 49 :

> En ce sens, on ne saurait trop insister sur le rôle essentiel que l'avocat est appelé à jouer dans notre société. L'avocat est un officier de justice. Par son serment d'office, il affirme solennellement qu'il remplira les devoirs de sa profession avec honnêteté, fidélité et justice et qu'il se conformera aux diverses dispositions législatives qui régissent son exercice . . .

Quelques années auparavant dans *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, le juge McIntyre avait insisté, à la p. 187, sur le fait que le système juridique dépend de la profession d'avocat et de la compétence avec laquelle elle s'acquitte de ses devoirs envers ses clients, les tribunaux et la société :

> Il est incontestable que la profession juridique joue un rôle très important et, en fait, un rôle d'une importance fondamentale dans l'administration de la justice tant en matière criminelle qu'en matière civile. [. . .] [J]e soulignerai qu'en l'absence d'une profession juridique

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play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state.

Legislatures have granted law societies broad powers in order to monitor access to the profession and its exercise. The overriding purpose of these powers is to maintain the competence of lawyers and to make sure that their conduct reflects the high ethical standards expected of them. (See *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113, 2001 SCC 67, at paras. 41-42, *per* Gonthier J.)

Moreover, whether it is the pride or the bane of our civil and criminal procedure, Canadian courts rely on an adversarial system. An impartial and independent judge oversees the trial. He or she must make sure that it remains fair and is conducted in accordance with the relevant laws and the principles of fundamental justice. Nevertheless, the operation of the system is predicated upon the presence of opposing counsel. They are expected to advance often sharply conflicting views. They are also responsible for introducing evidence and presenting argument to the court, in a spirit of sometimes vigorous confrontation. Within limits, when the fairness and fundamental legality of the process may be at stake, courts do not attempt to second-guess the tactical decisions of lawyers, which will usually bind their clients, for better or for worse (*G.D.B.*, *supra*, at paras. 26-35, *per* Major J.). An independent and competent Bar has long been an essential part of our legal system. For this purpose, lawyers have rights and privileges, but obligations flow from them. Section 488.1 is built upon this assumption.

B. *The Structure and Application of Section 488.1*

As mentioned above, the discussion in this case has focussed on the application of s. 8 of the *Charter*. Our Court must inquire as to whether the process of execution established by s. 488.1 should be characterized as form of an unreasonable search and seizure within the meaning of s. 8 and the principles which have developed since *Hunter v. Southam*

indépendante, possédant l'expérience et les compétences nécessaires à l'exercice de son rôle dans l'administration de la justice et le processus judiciaire, le système juridique en entier serait dans un état précaire.

67 Les provinces ont accordé de vastes pouvoirs aux barreaux afin de surveiller l'accès à la profession et à son exercice. Ces pouvoirs visent essentiellement à maintenir la compétence des avocats et à faire en sorte que leur conduite reflète les normes élevées de déontologie que l'on attend d'eux. (Voir *Law Society of British Columbia c. Mangat*, [2001] 3 R.C.S. 113, 2001 CSC 67, par. 41-42, le juge Gonthier.)

68 De plus, que ce soit l'orgueil ou la faiblesse de notre procédure en matière civile et en matière criminelle, les tribunaux canadiens s'appuient sur un système accusatoire. Un juge impartial et indépendant veille à la bonne marche du procès. Il s'assure que le procès reste équitable et se déroule conformément aux lois pertinentes et aux principes de justice fondamentale. Néanmoins, le fonctionnement du système se fonde sur la présence d'avocats adverses. On s'attend à ce qu'ils avancent souvent des opinions nettement opposées. Ils sont également chargés de présenter des éléments de preuve et des arguments au tribunal, dans un esprit de confrontation parfois vigoureuse. Jusqu'à un certain point, lorsque l'équité et la légalité fondamentale du processus peuvent être en jeu, les tribunaux n'essayent pas de remettre en question les décisions tactiques des avocats, qui lieront habituellement leurs clients, pour le meilleur ou pour le pire (*G.D.B.*, précité, par. 26-35, le juge Major). Un barreau indépendant et compétent constitue depuis longtemps un élément essentiel de notre système juridique. À cette fin, les avocats ont des droits et des privilèges, mais il en découle des obligations. L'article 488.1 repose sur cette hypothèse.

B. *Le régime et l'application de l'art. 488.1*

69 Tel que mentionné ci-dessus, le débat en l'espèce a surtout porté sur l'application de l'art. 8 de la *Charte*. La Cour doit déterminer si le processus d'exécution établi par l'art. 488.1 devrait être considéré comme une forme de fouille, de perquisition et de saisie abusives au sens de l'art. 8 et des principes qui ont été énoncés depuis *Hunter c. Southam*

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Inc., [1984] 2 S.C.R. 145. If the process is irretrievably flawed, no amount of trust in the future good behaviour and restraint of prosecutors and police will save it. On the other hand, if the legal structure is sound and allows for the protection of the rights at stake, the possibility of designing a better scheme for handling instances of error or of inappropriate action by the state and its agents will not render the provision at issue constitutionally void. The source of the unconstitutionality must be found in the legislation itself (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at paras. 70-73 and 82, *per* Binnie J.; at paras. 203-5, *per* Iacobucci J. (dissenting in part)).

70 In my view, the Crown does not attempt to save the legislation based on the promise or expectation that searches will be carried out in a careful manner by state agents, mindful of the constitutional values at stake. Rather, it advances the proposition that lawyers are the guardians of professional privilege and of the confidentiality of communications with their clients, past and present. The impugned legislation, which quite properly concerns searches in lawyers' offices, establishes a procedure under which counsel will be given the opportunity, in the name and in the interest of their clients, to raise a claim of privilege. Given that the search takes place in particular surroundings, the key problem is whether, in such circumstances, the legislation provides adequate procedures and safeguards. The Crown advances the proposition that everything is in place to allow a lawyer who is aware of his or her obligations and of the ethical standards of his or her profession to raise the issue of privilege and confidentiality in a timely manner.

71 The law does not shift the burden of preserving *Charter* rights to the bar. On the contrary, it establishes a well designed system, which acknowledges the existence of professional privilege, as a constitutionally protected right. The provisions of the *Criminal Code* put in place reasonable and adequate safeguards in order to protect it against illegal searches and seizures. Such provisions, as well as others dealing with other rights guaranteed by the Constitution, do not become unconstitutional

Inc., [1984] 2 R.C.S. 145. Si le processus est irrémédiablement vicié, ce n'est pas la confiance dans la bonne conduite et la retenue futures des poursuivants et des policiers qui le sauveront. Par contre, si le régime légal est fiable et permet la protection des droits en jeu, la possibilité de concevoir un meilleur régime pour traiter des erreurs commises ou des actes inappropriés posés par l'État et ses mandataires ne rendra pas inconstitutionnelle la disposition en cause. La source de l'inconstitutionnalité doit se trouver dans la loi même (*Little Sisters Book and Art Emporium c. Canada (Ministre de la Justice)*, [2000] 2 R.C.S. 1120, 2000 CSC 69, par. 70-73 et 82, le juge Binnie; par. 203-205, le juge Iacobucci (dissident en partie)).

À mon avis, le ministère public n'essaie pas de justifier la loi en se fondant sur la promesse ou l'espoir que les mandataires de l'État effectueront les fouilles ou perquisitions avec soin et conformément aux valeurs constitutionnelles en jeu. Il défend plutôt l'idée que les avocats sont les gardiens du secret professionnel et de la confidentialité des communications avec leurs clients, présents ou passés. La loi contestée, qui concerne à juste titre les perquisitions dans les cabinets d'avocats, établit une procédure en vertu de laquelle les avocats auront la possibilité, au nom et dans l'intérêt de leurs clients, de soulever une objection fondée sur le privilège. Étant donné que la perquisition a lieu dans un cadre particulier, le problème principal est de savoir si, dans ces cas, la loi prévoit des procédures et des garanties adéquates. Selon le ministère public, tout est en place pour permettre à l'avocat qui est au courant de ses obligations et des normes de déontologie de sa profession de soulever la question du privilège et de la confidentialité en temps utile.

La loi ne déplace pas vers le barreau le fardeau de protection des droits garantis par la *Charte*. Au contraire, elle établit un régime bien conçu, qui reconnaît l'existence du privilège professionnel en tant droit protégé par la Constitution. Les dispositions du *Code criminel* prévoient des garanties raisonnables et adéquates pour le protéger contre les fouilles, perquisitions et saisies illégales. Ces dispositions, ainsi que d'autres dispositions sur d'autres droits garantis par la Constitution, ne deviennent

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merely because they may be misapplied by judges or lawyers or because counsel may fail to invoke them at the opportune moment or in an appropriate manner. The legislative scheme must be assessed on its own merits. In this context, given the nature of the safeguards in the provisions under review, I agree that, as long as society and courts can assume that lawyers will behave in a competent and ethical manner, the impugned law grants adequate protection to professional privilege and to the interests of the clients of law firms. It therefore meets the constitutional standards of s. 8 — as it would of s. 7 if it was engaged — save for s. 488.1(4). In enacting the impugned provision, Parliament adequately addressed the problems flagged by this Court in *Descôteaux*.

pas inconstitutionnelles du simple fait que des juges ou des avocats risquent de mal les appliquer ou que l'avocat risque de ne pas les invoquer en temps utile ou de façon appropriée. Il faut évaluer le régime législatif objectivement. Dans ce contexte, étant donné la nature des garanties contenues dans les dispositions en cause, je suis d'accord pour dire que, tant que la société et les tribunaux peuvent supposer que les avocats agiront avec compétence et selon leur code de déontologie, la loi contestée accorde une protection adéquate au secret professionnel et aux droits des clients des cabinets d'avocats. Cette loi satisfait donc aux normes constitutionnelles de l'art. 8 — tout comme ce serait le cas de celles de l'art. 7 si ce dernier était concerné — sauf en ce qui a trait au par. 488.1(4). En adoptant la disposition contestée, le législateur a traité correctement des problèmes signalés par la Cour dans *Descôteaux*.

72

As has been seen, the challenge to the validity of the impugned law turns on a few concerns. First, the time limit to raise the objection of professional privilege is too short and rigid. Rights could thus be lost through the inaction of counsel, with the courts' lacking authority to grant relief to clients. No provision is made for notice to clients. Moreover, lawyers are compelled to name their client in order to claim privilege.

Comme on l'a vu, la contestation de la validité de la loi repose sur quelques préoccupations. D'abord, le délai pour soulever l'objection du secret professionnel est trop court et manque de souplesse. Il peut y avoir perte de droits par inaction des avocats, les tribunaux n'ayant pas le pouvoir d'accorder réparation aux clients. Aucune disposition ne prévoit d'avis à l'intention des clients. En outre, les avocats sont tenus de nommer leur client pour formuler une objection fondée sur le privilège.

73

These concerns paint a picture of a system which operates in a mechanistic way, with no room for flexibility or judicial discretion. They further reflect an underlying assumption that lawyers will not do what is necessary to protect their client's *Charter* rights during a search of their offices. These concerns ground what amounts to an argument that legislation should be drafted, not in the expectation of the normal behaviour of the actors involved in the process, like counsel, but rather in the perspective of apprehended systemic failure.

Ces préoccupations dépeignent un système qui fonctionne de façon mécanique, sans laisser de place à la souplesse ou au pouvoir discrétionnaire du tribunal. Elles reflètent de plus une hypothèse sous-jacente selon laquelle les avocats ne feront pas le nécessaire pour protéger les droits que la *Charte* accorde à leur client durant une perquisition dans leurs bureaux. Elles reposent sur ce qui équivaut à un argument selon lequel la loi devrait être rédigée non pas d'après ce qui devrait être le comportement normal des personnes impliquées dans le processus, comme les avocats, mais plutôt dans la perspective d'une omission systémique redoutée.

C. *Time Limits*

C. *Les délais*

74

Lawyers face short time limits throughout the judicial process, including the initial raising of the claim of professional privilege in respect of some

Les avocats font face à de courts délais dans tout le processus judiciaire, y compris la formulation initiale de l'objection fondée sur le secret

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files. This is not the sole instance of a short procedural time limit in civil or criminal procedure. Counsel are aware of such constraints and usually factor them in the organization of their practice. Moreover, the picture of lawyers and staff passively standing by while the police rummage through the firm's files, seizing them and carting them away, appears highly hypothetical, to say the least. Even the most incompetent lawyer or the most absent-minded legal assistant or law clerk would not confuse a squad of R.C.M.P. or Sûreté du Québec officers armed with a search warrant, barging into the reception room, with the pizza man. In any firm, large or small, this kind of event should ring a few bells and trigger some kind of a response. A reasonably competent lawyer should be expected to realize that a question of privilege could arise, that he or she would need to review some or all of the files sought by the police and should make a claim of privilege where necessary.

professionnel à l'égard de certains dossiers. Ce n'est pas le seul cas de court délai en procédure civile ou pénale. Les avocats sont au courant de telles contraintes et en tiennent compte dans l'organisation de l'exercice de leur profession. De plus, l'image des avocats et de leur personnel qui attendent passivement pendant que les policiers fouillent dans les dossiers du cabinet, les saisissant et les emportant, semble pour le moins très hypothétique. Même l'avocat le plus incompétent ou le clerc ou l'assistant d'un avocat le plus distrait ne confondraient pas avec le livreur de pizza une escouade de la G.R.C. ou de la Sûreté du Québec munie d'un mandat de perquisition et faisant irruption à l'accueil. Dans tous les cabinets, petits ou grands, ce genre d'événement devrait mettre en éveil les intéressés et déclencher une certaine réaction. On devrait s'attendre à ce qu'un avocat raisonnablement compétent se rende compte qu'une question de privilège pourrait se poser, qu'il aurait besoin d'examiner une partie ou l'ensemble des dossiers recherchés par les policiers et qu'il devrait invoquer, au besoin, le secret professionnel.

75 Section 488.1 provides for a procedure to raise immediately the claim of privilege. The section also imposes a duty on the officers carrying out the seizure to make sure that the interested parties have an adequate opportunity to make a claim of privilege. In this respect, s. 488.1(8) states a key principle which should inform the application and interpretation of the provision at issue:

> (8) No officer shall examine, make copies of or seize any document without affording a reasonable opportunity for a claim of solicitor-client privilege to be made under subsection (2).

Once a claim is made, the documents cannot be accessed by the seizing officer. If no adequate opportunity has been given to raise the privilege, the legality of the seizure and of the further use of the documents may be challenged as illegal and unreasonable.

L'article 488.1 prévoit une procédure pour soulever immédiatement l'objection fondée sur le privilège. Il impose également aux agents de police effectuant la saisie l'obligation de s'assurer que les parties intéressées aient une occasion raisonnable de formuler une objection fondée sur le privilège. À cet égard, le par. 488.1(8) mentionne un principe clé qui devrait fournir des renseignements sur l'application et l'interprétation de la disposition en cause :

> (8) Aucun fonctionnaire ne doit examiner ni saisir un document ou en faire des copies sans donner aux intéressés une occasion raisonnable de formuler une objection fondée sur le privilège des communications entre client et avocat en vertu du paragraphe (2).

Une fois l'objection formulée, le fonctionnaire qui effectue la saisie ne peut avoir accès aux documents. Si les intéressés n'ont pas une bonne occasion d'invoquer le privilège, la saisie et l'utilisation future des documents peuvent être contestées au motif de leur illégalité et de leur caractère abusif.

76 Provided a claim is made, either the Attorney General or the lawyer, in the name of the client, may apply to a court to set down a hearing in order to

Pourvu qu'une objection soit formulée, le procureur général ou l'avocat au nom du client peut s'adresser à une cour pour que soit fixée une

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decide whether the documents should be disclosed (s. 488.1(3)). The motion must be made within 14 days from the time the documents are put under custody.

77 Admittedly, this time limit is short. However, its brevity does not render it unconstitutional. No constitutional right to procrastination exists. Short time limits are common in criminal and civil procedure. They often appear necessary for a timely and efficient disposition of claims, whatever their nature may be. Competent lawyers are fully acquainted with these time limits; part of their work is to monitor them. Thus, lawyers are required to be on the alert and ready to move quickly when time limits loom large. It puts a burden on them, but one for which their training and their ethical standards have prepared them. Moreover, the procedures under s. 488.1 relate to criminal investigations where the interests of the administration of justice and of all parties concerned militate in favour of a quick and efficient resolution of the matter. The *Charter* itself views undue delay as undesirable, as s. 11(*b*) grants a constitutional right to be tried within a reasonable time. This constitutional principle imposes a significant burden on the Crown in the conduct of criminal prosecutions: *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.R. 771. Short as it is, the 14-day time limit does not appear to have been designed as a trap for overworked or careless lawyers, but as a procedural constraint designed to speed things up and move them to a quick disposition. This provision establishes a procedure which allows a reasonably diligent and competent lawyer to bring the concerns about a possible breach of solicitor-client privilege before a court.

78 In the parties' argument on the validity of s. 488.1, much was made of the asserted rigidity of the time limits and the impossibility of the lawyer or the client obtaining relief if the motion is not brought in the 14-day period. My colleague seems to agree that this concern is overrated. Although s. 488.1 does not grant in so many words the power

audience visant à décider si les documents doivent être communiqués (par. 488.1(3)). La requête doit être présentée dans les 14 jours à compter du moment où les documents sont mis sous garde.

Il faut reconnaître que le délai est court. Cependant, sa brièveté ne le rend pas inconstitutionnel. Il n'existe pas de droit constitutionnel à la procrastination. Les courts délais ne sont pas rares en procédure civile et en procédure pénale. Ils semblent souvent nécessaires pour qu'il soit disposé de façon opportune et efficace des objections, quelle qu'en soit la nature. Les avocats compétents connaissent bien ces délais; cela fait partie de leur travail de veiller à ces délais. Donc, les avocats doivent être vigilants et prêts à agir rapidement lorsque l'expiration des délais paraît imminente. Cela leur impose un fardeau, mais leur formation et leur code de déontologie les y ont préparés. En outre, les procédures prévues à l'art. 488.1 se rapportent aux enquêtes criminelles dans lesquelles les intérêts de l'administration de la justice et de toutes les parties concernées militent en faveur d'un traitement rapide et efficace de l'affaire. La *Charte* elle-même considère le délai indu comme étant déraisonnable, car l'al. 11*b*) accorde le droit constitutionnel d'être jugé dans un délai raisonnable. Ce principe constitutionnel impose un lourd fardeau au ministère public dans la conduite des poursuites pénales : *R. c. Askov*, [1990] 2 R.C.S. 1199; *R. c. Morin*, [1992] 1 R.C.S. 771. Même s'il est court, le délai de 14 jours ne semble pas avoir été conçu comme un piège pour les avocats débordés de travail ou négligents, mais comme une contrainte procédurale visant à accélérer les choses et à les faire régler rapidement. Cette disposition établit une procédure qui permet à l'avocat raisonnablement diligent et compétent de faire part au tribunal de ses craintes quant à une atteinte possible au privilège des communications entre client et avocat.

Dans leur argumentation au sujet de la validité de l'art. 488.1, les parties ont beaucoup insisté sur la prétendue rigidité des délais et sur l'impossibilité pour l'avocat ou le client d'obtenir réparation si la requête n'est pas présentée dans les 14 jours. Ma collègue semble être d'accord pour dire que cette préoccupation est surestimée. Bien que l'art.

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to extend the time limit, the trend of jurisprudential developments in respect of time limits and limitation periods has been to acknowledge the existence of a broad judicial power to grant relief or extend time limits. Under the most stringent tests, a showing of inability or impossibility to act within the stated time has been found sufficient to grant an extension or other appropriate relief. Considerations of fairness in the process remain determinative (*Novak v. Bond*, [1999] 1 S.C.R. 808, at para. 66, McLachlin J. (as she then was); *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Murphy v. Welsh*, [1993] 2 S.C.R. 1069; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 41; *Sparham-Souter v. Town and Country Developments (Essex) Ltd.*, [1976] Q.B. 858 (C.A.), at p. 867; *Construction Gilles Paquette Ltée v. Entreprises Végo Ltée*, [1997] 2 S.C.R. 299).

79 The existence of such a power should put to rest the concern about the lack of notice to clients and the difficulties a lawyer may face when tracking down a client in such circumstances. First, it must be observed that the procedure is targeted at a professional who is or was the agent or adviser of a client. Also, the identity and whereabouts of the client are sometimes better known to the lawyers. In such a context, the failure to include a requirement of notice to the client does not amount to a flaw. The impugned law merely provides for a mechanism which will allow the information to reach the client if the lawyer discharges his or her professional obligations with a reasonable degree of diligence and competence. Moreover, the procedure under s. 488.1 is not inflexible. If the lawyer cannot reach the client within the 14-day time limit or is concerned that this may prove difficult, the motion may so state and the court may grant postponements and provide for special forms of service or notice of the proceedings. If all else fails, as discussed above, courts may grant relief from the operation of the time limit itself, in the appropriate circumstances, either to the lawyer or to the client.

488.1 ne confère pas expressément le pouvoir de proroger le délai, la tendance de la jurisprudence à l'égard des délais ordinaires et des délais de prescription a été de reconnaître l'existence d'un vaste pouvoir des tribunaux d'accorder réparation ou de proroger les délais. Selon les critères les plus rigoureux, la preuve de l'incapacité ou de l'impossibilité d'agir dans le délai mentionné a été considérée comme étant suffisante pour que soit accordée une prorogation ou une autre réparation appropriée. Les considérations d'équité dans le processus restent déterminantes (*Novak c. Bond*, [1999] 1 R.C.S. 808, par. 66, le juge McLachlin (maintenant Juge en chef); *M. (K.) c. M. (H.)*, [1992] 3 R.C.S. 6; *Murphy c. Welsh*, [1993] 2 R.C.S. 1069; *Peixeiro c. Haberman*, [1997] 3 R.C.S. 549, par. 41; *Sparham-Souter c. Town and Country Developments (Essex) Ltd.*, [1976] Q.B. 858 (C.A.), p. 867; *Construction Gilles Paquette Ltée c. Entreprises Végo Ltée*, [1997] 2 R.C.S. 299).

L'existence d'un tel pouvoir devrait dissiper toute crainte au sujet de l'absence d'avis aux clients et des difficultés auxquelles un avocat peut faire face lorsqu'il essaie de joindre un client dans ces circonstances. D'abord, on doit remarquer que la procédure cible un professionnel qui est ou était le mandataire ou le conseiller d'un client. De plus, l'identité du client et le lieu où il se trouve sont parfois mieux connus des avocats. Dans un tel contexte, le fait de ne pas avoir prévu l'obligation de donner un avis au client n'équivaut pas à un vice. La loi contestée prévoit simplement un mécanisme qui permettra que l'information se rende jusqu'au client si l'avocat s'acquitte de ses obligations professionnelles avec une diligence et une compétence raisonnables. En outre, la procédure prévue à l'art. 488.1 demeure flexible. Si l'avocat ne peut pas joindre le client dans les 14 jours ou craint pouvoir difficilement le faire, il peut le mentionner dans la requête et la cour peut accorder un report du délai et prévoir une forme spéciale d'avis ou de signification de la procédure. En désespoir de cause, comme je l'ai déjà mentionné, les tribunaux peuvent relever l'avocat ou le client des conséquences de l'écoulement du délai, dans les circonstances appropriées.

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D. *Naming the Client*

The parties who challenge the constitutionality of s. 488.1 submit that the procedure established by the impugned provision is also flawed because it requires the lawyer to identify the client by their name, which in itself would breach the privilege. As explained by my colleague, names of clients are not always privileged. Privilege in respect of names of clients appears to be more of an exception than a general rule. But in cases where the identity of the client itself would be considered as privileged, it is necessary to inquire as to whether s. 488.1(2) actually requires that the lawyer identify the client. It is one possible interpretation. Nevertheless, as the Attorney General for Ontario submitted in his factum, naming does not necessarily amount to identifying by name. The name used may not be the true or full name of an individual. The impugned provision seeks to avoid broad claims of privilege. It requires that claims of privilege be raised in respect of specific files and clients, which must be designated in some manner. Nothing would prevent the lawyer from stating that client Z has a right to the protection of privileged information in respect of file X, for given reasons articulated in the motion. At a subsequent stage of the proceedings, the question of the confidentiality of names and the measures necessary to protect it would fall to be decided by the court. Given a proper and reasonable interpretation, the naming requirement does not breach any protected constitutional right or interest.

D. *L'identification du client*

80 Les parties qui contestent la constitutionnalité de l'art. 488.1 soutiennent que la procédure établie par la disposition en cause est également viciée parce qu'elle exige que l'avocat identifie le client par son nom, ce qui en soi porterait atteinte au privilège. Comme l'a expliqué ma collègue, les noms des clients ne sont pas toujours protégés par le privilège. Le privilège à l'égard du nom des clients semble constituer beaucoup plus une exception que la règle générale. Dans les cas où l'identité même du client serait considérée comme protégée par le privilège, il faudrait se demander si le par. 488.1(2) exige réellement que l'avocat identifie le client. C'est une interprétation possible. Néanmoins, comme le procureur général de l'Ontario l'a exposé dans son mémoire, l'identification n'équivaut pas nécessairement à identifier par le nom. Le nom utilisé peut ne pas être le véritable nom d'une personne ou son nom en entier. La disposition contestée cherche à annuler les objections générales fondées sur le privilège. Elle exige que les objections fondées sur le privilège soient soulevées à l'égard de dossiers et de clients précis, qui doivent être désignés de quelque façon. Rien n'empêcherait l'avocat de déclarer que le client Z a droit à la protection de renseignements confidentiels en ce qui concerne le dossier X, pour des motifs exposés dans la requête. Plus tard dans la procédure, il incomberait à la cour de statuer sur la question de la confidentialité des noms et celle des mesures nécessaires pour la protéger. En présence d'une interprétation adéquate et raisonnable, l'obligation d'identification ne porte atteinte à aucun droit constitutionnel protégé.

E. *Judicial Discretion*

In their constitutional arguments, some of the parties have emphasized the lack of judicial discretion to prevent or remedy a breach of professional privilege. When viewed as a whole, the system provides for a substantial degree of judicial discretion and intervention in order to control or prevent the communication of privileged information.

E. *Le pouvoir discrétionnaire du tribunal*

81 Dans leurs arguments d'ordre constitutionnel, certaines des parties ont insisté sur l'absence de pouvoir discrétionnaire du tribunal d'empêcher une atteinte au secret professionnel ou d'y apporter réparation. Dans l'ensemble, le système prévoit pour le tribunal un important pouvoir discrétionnaire et d'intervention afin de contrôler ou d'empêcher la communication de renseignements confidentiels.

As mentioned above, s. 488.1 lays down a set of procedures for the execution of warrants authorized

82 Comme je l'ai déjà mentionné, l'art. 488.1 expose un ensemble de procédures pour l'exécution de

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by a member of the judicial branch. Before a warrant issues, judicial discretion must be exercised. Then, in the application of s. 488.1 itself, the officer carrying out the seizure must give a reasonable opportunity to the lawyers to raise a claim of privilege. This obligation represents a fundamental requirement which informs the application of the whole section. Its breach might be raised at the stage of a motion under subs. (3). Further, subs. (8) forbids any access to the material unless the opportunity has been given to invoke the privilege. When seized with a motion under subs. (6) to turn over the material to the Crown, a judge retains the power to inquire as to whether an opportunity has been given under subs. (2). Without straining the scope and intent of this section of the *Criminal Code*, such an interpretation acknowledges that the proper execution of the duty imposed on the seizing officer under subs. (2) constitutes a condition precedent to the application of the procedure designed to give the Crown access to the material.

mandats autorisés par un juge. Avant la délivrance d'un mandat, il doit y avoir exercice d'un pouvoir discrétionnaire par un tribunal. Ensuite, dans l'application même de l'art. 488.1, le fonctionnaire effectuant la saisie doit donner aux avocats une occasion raisonnable de formuler une objection fondée sur le privilège. Cette obligation représente une exigence fondamentale qui imprègne l'application de l'article dans son ensemble. Elle peut être soulevée à l'étape d'une requête présentée en vertu du par. (3). De plus, le par. (8) interdit tout accès aux documents à moins que les intéressés aient eu l'occasion d'invoquer le privilège. Lorsqu'il est saisi d'une requête sollicitant, en vertu du par. (6), la remise de documents au ministère public, le juge garde le pouvoir d'enquêter pour savoir si cette occasion a été donnée en vertu du par. (2). Sans diminuer la portée et l'objet de cet article du *Code criminel*, une telle interprétation reconnaît que la bonne exécution de l'obligation imposée au fonctionnaire effectuant la saisie en vertu du par. (2) constitue une condition préalable à l'application de la procédure conçue pour donner au ministère public accès aux documents.

83 Better or different procedures could be imagined and designed. As it stands, with the exception of subs. (4), s. 488.1 as a whole conforms with the requirements of s. 8 of the *Charter*. It does not allow for unreasonable searches and seizure. It certainly does not violate the principles of fundamental justice within the meaning of s. 7 of the *Charter*.

On pourrait concevoir des procédures meilleures ou différentes. Au point où en sont les choses, à l'exception du par. (4), l'art. 488.1 pris dans son ensemble est conforme à l'art. 8 de la *Charte*. Il ne permet pas les fouilles, les perquisitions et les saisies abusives. Il ne contrevient certainement pas aux principes de justice fondamentale au sens de l'art. 7 de la *Charte*.

84 Nevertheless, I agree with Arbour J. that subs. (4) is unconstitutional. With perhaps the best of intents, and despite the stated desire to assist the court, it may lead to improper and premature disclosures of confidential information. It should be struck down and excised from the section, without disrupting the general procedural scheme, which remains valid, in my opinion.

Néanmoins, je conviens avec le juge Arbour que le par. (4) est inconstitutionnel. Même s'il a peut-être été adopté avec les meilleures intentions et malgré la déclaration de l'intention d'aider la cour, ce paragraphe peut mener à des communications prématurées et injustifiées de renseignements confidentiels. Il devrait être abrogé et supprimé de l'article, sans que cela désorganise le régime général de la procédure, qui reste valide, à mon avis.

IV. Conclusion

85 For these reasons, I find s. 488.1 valid, save in respect of subs. (4). I would thus allow the appeals in part in *Lavallee* and *Fink*. In *White*, I would

IV. Conclusion

Pour ces motifs, je conclus à la validité de l'art. 488.1, sauf en ce qui a trait au par. (4). Je suis donc d'avis d'accueillir les pourvois en partie dans les

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dismiss the appeal and allow the cross-appeal in part.

affaires *Lavallee* et *Fink*. Dans l'affaire *White*, je suis d'avis de rejeter le pourvoi et d'accueillir le pourvoi incident en partie.

86

The constitutional questions should be answered as follows:

1. Does s. 488.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedom*s?

Answer: No.

2. If so, is the infringement reasonable and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

Answer: No need to answer.

3. Does s. 488.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, infringe s. 8 of the *Canadian Charter of Rights and Freedoms*?

Answer: No, except subs. (4).

4. If so, is the infringement reasonable and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

Answer: No, in respect of subs. (4), no need to answer as to the other subsections of s. 488.1.

Les questions constitutionnelles reçoivent les réponses suivantes :

1. L'article 488.1 du *Code criminel*, L.R.C. 1985, ch. C-46, porte-t-il atteinte à l'art. 7 de la *Charte canadienne des droits et libertés*?

Réponse : Non.

2. Dans l'affirmative, cette atteinte est-elle raisonnable et justifiée dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte*?

Réponse : Il n'est pas nécessaire de répondre à cette question.

3. L'article 488.1 du *Code criminel*, L.R.C. 1985, ch. C-46, porte-t-il atteinte à l'art. 8 de la *Charte canadienne des droits et libertés*?

Réponse : Non, à l'exception du par. (4).

4. Dans l'affirmative, cette atteinte est-elle raisonnable et justifiée dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte*?

Réponse : Non, pour ce qui est du par. (4); il n'est pas nécessaire de répondre pour ce qui est des autres paragraphes de l'art. 488.1.

Appeal (Lavallee, Rackel & Heintz v. Canada (Attorney General)) dismissed, L'HEUREUX-DUBÉ, GONTHIER *and* LEBEL JJ. *dissenting in part*.

Appeal (White, Ottenheimer & Baker v. Canada (Attorney General)) allowed, L'HEUREUX-DUBÉ, GONTHIER *and* LEBEL JJ. *dissenting. Cross-appeal dismissed,* L'HEUREUX-DUBÉ, GONTHIER *and* LEBEL JJ. *dissenting in part*.

Appeal (R. v. Fink) dismissed, L'HEUREUX-DUBÉ, GONTHIER *and* LEBEL JJ. *dissenting in part*.

Solicitor for the appellant Her Majesty the Queen and for the respondent/appellant on cross-appeal and the intervener the Attorney General of Canada: The Department of Justice, Ottawa.

Pourvoi (Lavallee, Rackel & Heinz c. Canada (Procureur général)) rejeté, les juges L'HEUREUX-DUBÉ, GONTHIER *et* LEBEL *sont dissidents en partie.*

Pourvoi (White, Ottenheimer & Baker c. Canada (Procureur général)) accueilli, les juges L'HEUREUX-DUBÉ, GONTHIER *et* LEBEL *sont dissidents. Pourvoi incident rejeté, les juges* L'HEUREUX-DUBÉ, GONTHIER *et* LEBEL *sont dissidents en partie.*

Pourvoi (R. c. Fink) rejeté, les juges L'HEUREUX-DUBÉ, GONTHIER *et* LEBEL *sont dissidents en partie.*

Procureur de l'appelante Sa Majesté la Reine, de l'intimé/appelant au pourvoi incident et de l'intervenant le procureur général du Canada : Le ministère de la Justice, Ottawa.

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Solicitors for the respondents Lavallee, Rackel & Heintz: Singleton Urquhart, Vancouver.

Solicitors for the appellants/respondents on cross-appeal White, Ottenheimer & Baker: Benson Myles, St. John's.

Solicitor for the appellant Her Majesty the Queen and the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.

Solicitors for the respondent Fink: Falconer Charney Macklin, Toronto; Aaron Harnet, Toronto.

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy.

Solicitor for the intervener the Attorney General for Alberta: The Attorney General for Alberta, Calgary.

Solicitor for the intervener the Law Society of Alberta: The Law Society of Alberta, Calgary.

Solicitors for the intervener the Federation of Law Societies of Canada: Beaton, Derrick & Ring, Halifax.

Solicitors for the intervener the Canadian Bar Association: McCarthy Tétrault, Calgary.

Procureurs des intimés Lavallee, Rackel & Heintz : Singleton Urquhart, Vancouver.

Procureurs des appelants/intimés au pourvoi incident White, Ottenheimer & Baker : Benson Myles, St. John's.

Procureur de l'appelante Sa Majesté la Reine et de l'intervenant le procureur général de l'Ontario : Le procureur général de l'Ontario, Toronto.

Procureurs de l'intimé Fink : Falconer Charney Macklin, Toronto; Aaron Harnet, Toronto.

Procureur de l'intervenant le procureur général du Québec : Le procureur général du Québec, Ste-Foy.

Procureur de l'intervenant le procureur général de l'Alberta : Le procureur général de l'Alberta, Calgary.

Procureur de l'intervenante la Law Society of Alberta : La Law Society of Alberta, Calgary.

Procureurs de l'intervenante la Fédération des ordres professionnels de juristes du Canada : Beaton, Derrick & Ring, Halifax.

Procureurs de l'intervenante l'Association du Barreau canadien : McCarthy Tétrault, Calgary.

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Nuttall v. Krekovic,* 2018 BCCA 341

Date: 20180905
Docket: CA44983

2018 BCCA 341 (CanLII)

Between:

Robin Giles Nuttall

Respondent
(Plaintiff)

And

Harman Singh Dhillon

Respondent
(Defendant)

And

Arsen Krekovic

Appellant

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon
The Honourable Madam Justice Fisher

On appeal from: An order of the Supreme Court of British Columbia, dated November 30, 2017 (*Nuttall v. Insurance Corporation of British Columbia*, 2017 BCSC 2471, Vancouver Docket S131225).

Oral Reasons for Judgment

Counsel for the Appellant: G. Cameron

No one appearing on behalf of the Respondents

Place and Date of Hearing: Vancouver, British Columbia
September 5, 2018

Place and Date of Judgment: Vancouver, British Columbia
September 5, 2018

Summary:

The appellant, counsel for the plaintiff in the underlying action, appeals an order for special costs made against him personally. The action involved a hit and run accident in which the plaintiff was injured. After a police investigation yielded no results, the appellant took steps to investigate the identity of the driver. Eventually, he obtained an order adding the respondent as a defendant in place of John Doe. In doing so, he relied on information provided to him by counsel for another party. Shortly after serving the order on the respondent, the appellant learned that the information he had received was incorrect. He then took steps to discontinue the action against the respondent. The respondent made an application for an order for special costs to be payable by the appellant personally. The chambers judge granted the order. He found that the appellant failed to inform the application judge of all of the details of his investigation and considered this to be an abuse of process meriting an order for special costs. HELD: Appeal allowed. The appellant's conduct in making the application to add the respondent as a defendant did not approach the kind of reprehensible conduct required to justify an order for special costs against him as counsel. The chambers judge erred in principle in failing to consider the cautious approach that is required in making such orders as well as the kind of reprehensible conduct that would justify such an award. He also erred in concluding that the appellant's failure to disclose the entire circumstances of his investigation was in itself sufficient to justify an order for special costs.

[1] **FISHER J.A.**: This is an appeal with leave of an order for special costs made against Arsen Krekovic, counsel for the plaintiff in the action below, arising from an application to add the respondent, Harman Singh Dhillon, in place of an unidentified driver. The underlying action involves a hit and run accident that occurred on May 27, 2012, outside the Wheelhouse Pub in Surrey, British Columbia. After an investigation by the RCMP did not reveal the identity of the driver, Mr. Krekovic took steps to do so himself in order for his client to have access to third party liability insurance.

[2] In making the application, Mr. Krekovic relied on information he obtained from counsel for the Wheelhouse Pub (another party to the action) that Mr. Dhillon was the driver. That information turned out to be erroneous, and after Mr. Krekovic learned this, he discontinued the action against Mr. Dhillon.

[3] When Mr. Krekovic indicated that his client would pay costs when he obtained a settlement or damages award, Mr. Dhillon sought an order for special costs to be made payable personally by Mr. Krekovic. That application was heard and

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determined on November 30, 2017. The chambers judge granted the order sought on the basis that Mr. Krekovic's conduct in making the application to add Mr. Dhillon constituted an abuse of process.

[4] Mr. Krekovic asserts that the chambers judge erred in law and principle and misapprehended the evidence.

[5] Mr. Dhillon did not respond to this appeal or appear at the hearing.

Background

[6] Mr. Krekovic's efforts to identify the driver of the other vehicle began in May 2014, and continued for over two years. He retained several private investigators, but the results of those investigations were inconclusive.

[7] In September 2014, after receiving some information from his client's brother, Mr. Krekovic asked two different investigators to determine whether the respondent Mr. Dhillon was the driver. At that time, he had information suggesting that Mr. Dhillon's birthdate was May 3, 1992, and one of the investigators (a Mr. Loncaric) had information suggesting the birthdate was in 1991. Shortly after this however, on October 17, 2014, Mr. Loncaric advised Mr. Krekovic that he had information from the ICBC Special Investigations Unit that Mr. Dhillon's birthdate was November 16, 1994. He also provided an address and B.C. Driver's License number.

[8] In November 2014, Mr. Krekovic received information from the other investigator (a Mr. Westman) suggesting that the driver was a different Mr. Dhillon, but the investigator was unable to obtain any firm information.

[9] In April 2015, Mr. Krekovic shared the information he had received from Mr. Westman with the RCMP and asked them to re-open their investigation. However, the RCMP were not able to obtain any further information and in June 2015, they considered that all avenues of investigation had been exhausted.

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[10] In May 2016, Mr. Krekovic was advised by a lawyer at Dolden Wallace Folick LLP, counsel for the Wheelhouse Pub, that Mr. Loncaric had information on the hit and run driver. After trying for several months to contact Mr. Loncaric, Mr. Krekovic was advised that the investigator could no longer assist with finding the driver due to a conflict. Mr. Krekovic continued to make inquiries at Dolden Wallace Folick.

[11] Finally, on December 8, 2016, Mr. Folick advised Mr. Krekovic that his investigator had given him the identity of the driver but was not able to say how he obtained the information. Mr. Folick provided Mr. Dhillon's name, a birthdate of November 16, 1994, a residential address and a B.C. Driver's License number. All of this information was the same as that provided directly by Mr. Loncaric in October 2014.

[12] On February 8, 2017, Mr. Krekovic filed an application to add the respondent Mr. Dhillon to the notice of civil claim in place of John Doe. The affidavit in support of the application included the information provided by Mr. Folick, the fact that the RCMP had investigated without results, and that Mr. Krekovic had also retained investigators who had been unable to obtain any reliable information. The application was heard before Madam Justice Sharma on February 24, 2017. It was opposed by ICBC, whose position was that the evidence was insufficient and failed to explain how Mr. Folick obtained his information. Mr. Dhillon did not appear although duly served. The order was granted.

[13] In March 2017, Mr. Krekovic tried to obtain further information from Mr. Folick's office, in particular "a nexus" between Mr. Dhillon and the vehicle or the night in question. He was advised that their investigator had provided information that the driver was identified as "most likely" Mr. Dhillon, and two other individuals were identified as "possibly" being "correlated with the incident".

[14] The order of Madam Justice Sharma was entered on March 24, 2017 and was served on Mr. Dhillon on April 9, 2017. Meanwhile, Mr. Krekovic also passed along the information identifying Mr. Dhillon to the RCMP, requesting whether they

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could investigate him. On April 24, 2017, he sent the RCMP his investigation file and requested that the investigation be reopened.

[15] On April 27, 2017, Mr. Krekovic received correspondence from counsel for Mr. Dhillon advising that he was not the driver. He passed this information along to Mr. Folick's associate, again seeking the evidence on which their investigator had identified Mr. Dhillon. On May 2, 2017, the associate advised him that the information they had provided was incorrect, as the Mr. Dhillon they had identified had a different birthdate of May 3, 1992. That same day, Mr. Krekovic advised Mr. Dhillon's counsel of the error and that he would discontinue the action. The notice of discontinuance was eventually filed on July 17, 2017.

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[16] Mr. Krekovic deposed that the identity of the driver was important given the limits on insurance coverage in the circumstances and the value of his client's claim for damages, which he estimated to be between $2.5 and $4 million. He explained:

> [17] The decision to add Harman Singh Dhillon as a defendant in February 2017 was not made lightly. I made the decision to seek instructions to add Harman Singh Dhillon, as I thought it was my duty to pursue every reasonable avenue to obtain justice for my client. I did not seek those instructions with any malice or in bad faith. I sought those instructions after consideration of the available information at hand, while endeavoring to obtain every remedy available for my client.

<u>The chambers judge's reasons</u>

[17] The chambers judge considered that the naming of the respondent arose as a "case of mistaken identity", and that the question before him was

> [2] … who bears the blame for that mistaken identity and who bears responsibility for the cost the applicant was consequently put to as well as the degree of culpability for that step having been taken.

[18] His conclusion that Mr. Krekovic was responsible stems from the following finding:

> [13] There is no evidence of Mr. Krekovic in the course of that application having disclosed to the court any of the substance of the investigation that had taken place over the previous more than two years, including the fact that there were multiple suggested parties whose names had come forward as possibly being drivers and/or owners, and other information that would have

> tended to cast doubt on the likelihood of the applicant's involvement. He failed to disclose the inconsistent information as to the birth date of the applicant and the target of his investigation. Justice Sharma was given no reason to doubt or be concerned as to the validity of the positive identification of the applicant.

[19] The judge viewed this conduct as "indefensible and an abuse of process meriting sanction in the form of an order of special costs payable by him personally". Despite Mr. Krekovic's motivation to act in pursuance of his duty to his client, he considered the failure to disclose information about the history of the investigation to be in breach of his duty to the court to be forthright:

> [21] Mr. Krekovic, however, provides no explanation for his failure to disclose to Sharma J. the history of the investigation, including the multiple parties identified as possible targets, and particularly, the information in his possession as to the inconsistent birth dates. Had he done so, the application may very well have had a different outcome.
>
> [22] While it is true that Mr. Krekovic was conducting the application in pursuance of his duty to his client, Mr. Krekovic, as an officer of the court, was also under a duty to the court to be forthright in disclosing the entire circumstances of his investigation into the driver's identity. Chapter 2 of the *Code of Conduct* sets out the Canons of Legal Ethics. Section 2.1-2(a) of the Canons provides, "A lawyer's conduct should at all times be characterized by candour and fairness." That duty was breached.

[20] The chambers judge concluded that this finding alone was sufficient to justify an order for special costs, and that the fault was compounded by serving Mr. Dhillon "without further investigation to substantiate the hearsay evidence he had from Mr. Folick" (at para. 23). He held that Mr. Krekovic's conduct was of the nature contemplated by Rule 14-1(33) of the *Supreme Court Civil Rules* "and is deserving of reproach".

<u>On appeal</u>

[21] Mr. Krekovic asserts that the chambers judge erred in law and principle by

(a) inaccurately characterizing his conduct as an abuse of process and failing to apply the principle that the discretion to award costs against counsel must be exercised with restraint and only in rare and exceptional cases;

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(b) proceeding on the basis that where counsel fails to bring to the Court's attention all possible theories or facts which are known to them and which are later found to be material, their conduct is *ipso facto* reprehensible and thus must attract the sanction of special costs; and

(c) applying an *ex parte* standard of disclosure on a contested application.

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[22] He also asserts that the judge erred in misapprehending the evidence relating to the birthdate of Mr. Dhillon, which was a key issue underlining his finding of a breach of the duty of candour.

Standard of review of costs awards

[23] It is clear that awards of costs, being discretionary, are given a high degree of deference by this Court. A costs award should only be set aside on appeal if the judge below has made an error in principle or if the award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27. Applying these principles in *Yung v. Jade Flower Investments Ltd.*, 2013 BCCA 170, this Court stated that it will only interfere:

> [17] … "if there is misdirection or the decision is so clearly wrong as to amount to an injustice": *Agar v. Morgan*, 2005 BCCA 579 at para. 26, 47 B.C.L.R. (4th) 36. Misdirection may include making an error as to the facts, taking into consideration irrelevant factors, or failing to take into account relevant factors, all of which would amount to an error in principle: *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27 at para. 24, 77 B.C.L.R. (4th) 142.

[24] It is also clear that findings of fact may only be reversed by an appellate court where there is a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10. A misapprehension of evidence will result in a reversible error only where it goes to the core of the reasoning process of the judge: see *Tambosso v. Holmes*, 2016 BCCA 373 at para. 30 and the cases cited therein.

Analysis

[25] It is my view that the chambers judge made several errors that warrant intervention by this Court.

[26] First, special costs have a punitive or deterrent element and are only appropriate where the conduct in issue is deserving of punishment or rebuke. This well-known principle stems from numerous cases, most recently enunciated in *J.P. v. British Columbia (Children and Family Development),* 2018 BCCA 325 at para. 28. The chambers judge erred in principle by failing to consider the cautious approach to an award of special costs against a lawyer personally, as well as the kind of reprehensible conduct that would justify such an award, mandated by the Supreme Court of Canada in *Young v. Young*, [1993] 4 S.C.R. 3 and more recently in *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26.

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[27] In *Young* the court directed judges to be "extremely cautious" in awarding costs personally against lawyers given their duties to guard confidentiality of instructions and to bring forward with courage even unpopular causes:

> ... A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties or his or her calling.

[28] In *Jodoin*, the court confirmed that the threshold for exercising the power to award costs against lawyers is high, such that there must be a finding of reprehensible conduct by the lawyer. Reprehensible conduct "represents a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system" (at para. 27). Mr. Justice Gascon, for the majority, described the kind of conduct that would justify such an order at para. 29:

> [29] In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate...

[29] Consistent with these decisions, this Court has long held that such orders should be made only in "very special circumstances", and not on the basis of mistake, error in judgment or even negligence: see *Hannigan v. Ikon Office*

Solutions Inc. (1998), 61 B.C.L.R. (3d) 270 (C.A.); *Pierce v. Baynham*, 2015 BCCA 188 at para. 41.

[30] Second, the chambers judge erred in concluding that Mr. Krekovic's failure to disclose the entire circumstances of his investigation was in itself sufficient to justify an order for special costs. A special costs order is not justified only because counsel fails to disclose evidence that ultimately proves to be material or incorrect: see *Pierce* at para. 43. The chambers judge made no finding of dishonesty, accepting that Mr. Krekovic's motivation to bring the application was "in pursuance of his duty to his client". Given that, his failure to disclose more about his investigation does not constitute reprehensible conduct sufficient to justify an award of special costs. This is particularly so in the context of the evidence in the application that Mr. Krekovic clearly informed the court that his own investigation had not yielded any reliable information and he was relying only on information provided to him from another lawyer, the basis for which had not been disclosed.

[31] Moreover, I cannot agree that disclosure of further information would necessarily have yielded a different outcome in the application. The chambers judge placed considerable importance on "the discrepancy between the date of birth that he had given for the Mr. Dhillon identified by Mr. Folick, and the date of birth of the Mr. Dhillon whom his investigation had previously identified as a potential defendant". In fact, there was no discrepancy in the most recent date of birth provided by the investigator, Mr. Loncaric, and the date of birth later provided by Mr. Folick. The only discrepancy was with the earlier information Mr. Loncaric had given, which had not been confirmed. Had the application judge been informed of these or other details – such as the inconclusive information pointing to another Mr. Dhillon – the order may have nonetheless been granted. It is also important, in my view, that Mr. Dhillon did not attend himself to oppose the application. Instead, the application was opposed only by ICBC, who put the issue of the sufficiency of the information squarely before the court.

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[32] Additionally, Mr. Krekovic's conduct after the order was granted demonstrates an effort to be prudent. He did not enter the order or serve the amended notice of civil claim without making further inquiries of Mr. Folick's office about the reliability of the information, and as soon as he learned that the information was in fact incorrect, he advised Mr. Dhillon's' counsel that the action would be discontinued against him.

[33] In my opinion, Mr. Krekovic's conduct was far from being characterized as reprehensible.

[34] Finally, the chambers judge referred to Rule 14-1(33) as allowing for an order for special costs. Rule 14-1(33) gives the court discretion to make various orders if it considers that a party's lawyer "has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault". One of those orders is that the lawyer "be personally liable for all or part of any costs that his or her client has been ordered to pay to another party".

[35] This rule, which does not distinguish between party and party costs and special costs, has expanded the scope of conduct which might support a costs order against a lawyer. As explained in *Nazmdeh v. Spraggs*, 2010 BCCA 131, there is no requirement for "serious misconduct" to justify an order that a lawyer pay party and party costs, but it is still necessary to find reprehensible conduct on the part of the lawyer to justify an order for special costs. Moreover, the lower standard mandated by Rule 14-1(33) must also be exercised with restraint, as the Court reasoned at paras. 103–104:

> [103] The power to make an order for costs against a lawyer personally is discretionary. As the plain meaning of the Rule and the case law indicate, the power can be exercised on the judge's own volition, at the instigation of the client, or at the instigation of the opposing party. However, while the discretion is broad, it is, as it has always been, a power to be exercised with restraint. All cases are consistent in holding that the power, whatever its source, is to be used sparingly and only in rare or exceptional cases.
>
> [104] The restraint required in the exercise of the court's discretion is not to be confused with the standard of conduct which may support its use. Care and restraint are called for because whether the unsuccessful party or his lawyer caused the costs to be wasted may not always be clear, and lawyer and client privilege is always deserving of a high degree of protection.

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[36] In conclusion, it is my view that Mr. Krekovic's conduct in making the application to add Mr. Dhillon as a defendant did not approach the kind of reprehensible conduct required to justify an order for special costs against him as counsel.

[37] I would allow the appeal and set aside the order of the chambers judge that Mr. Krekovic personally pay the special costs of Mr. Dhillon. I would also award costs to the appellant of this appeal and for the application for special costs in the court below.

[38] **WILLCOCK J.A.**: I agree.

[39] **FENLON J.A.**: I agree.

[40] **WILLCOCK J.A.**: The appeal is allowed. The order for costs below is set aside and the appellant will have costs in this Court and on the application for special costs in the court below.

[Submissions by counsel]

[41] **WILLCOCK J.A.**: I do not know if you need an order dispensing with approval on form of order given that counsel did not appear, but in the event that any question arises in the registry, there will be an order dispensing with the approval on form of order.

"The Honourable Madam Justice Fisher"

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pemberton Music Festival Limited Partnership (Re),* 2018 BCSC 1310

Date: 20180803
Docket: B170370
Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Consolidated Bankruptcy of
Pemberton Music Festival Limited Partnership and 1115666 B.C. Ltd.

Before: The Honourable Madam Justice Iyer

Reasons for Judgment

Counsel for the Trustee, Ernst & Young, Inc.:	D. Toigo
Counsel for Pandora Media, Inc., Ticketfly, LLC and Ticketfly Canada Services Inc.:	L. Williams J. Enns
Place and Date of Hearing:	Vancouver, B.C. June 11, 2018
Place and Date of Judgment:	Vancouver, B.C. August 3, 2018

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INTRODUCTION

[1] This dispute arises because of the bankruptcy of the Pemberton Music Festival in May 2017. It concerns the proceeds from advance ticket sales for the 2017 Pemberton Music Festival ("2017 Festival"), which was cancelled because of the bankruptcy. Many advance ticket holders obtained refunds from their credit card companies and the credit card companies charged the ticket seller for that amount ("Chargebacks"). The ticket seller then filed a claim with the trustee in bankruptcy ("Trustee") for $7.9 million, which it said was the amount of the Chargebacks. The Trustee disallowed the claim. The claim was amended, and an amended disallowance was issued. The present proceeding is for review of the Trustee's amended disallowance decision.

BACKGROUND EVENTS

[2] A more detailed chronology of the events leading to the bankruptcy proceedings is found in the decision of Pearlman J. in *Re Pemberton Music Festival Limited*, 2017 BCSC 2398 ("Pearlman Decision"). Here, I will only set out the background necessary to deal with the present application.

[3] The ticket seller is Ticketfly LLC and Ticketfly Canada Services Inc., who have assigned their rights to Pandora Media Inc., the parent company of the Ticketfly entities. I will refer to these entities collectively as "Ticketfly".

[4] The Pemberton Music Festival was operated by a limited partnership called Pemberton Music Festival Limited Partnership ("PMFLP"). The general partner of PMFLP was Twisted Tree Circus GP Ltd. ("Twisted Tree"). In April 2015, PMFLP entered into a production agreement with Huka Entertainment LLC ("Huka"), a festival producer, to organize and produce the Festival ("Production Agreement"). All of Twisted Tree's directors were senior executives of Huka.

[5] The Production Agreement authorized Huka to contract with vendors, such as ticketing agents, on behalf of PMFLP. Huka had a services agreement with Ticketfly

that was amended in September 2015, to provide that Ticketfly was the exclusive ticket seller for the Pemberton Music Festival ("Services Agreement").

[6] In the three years prior to the 2017 Festival, PMFLP had sustained millions of dollars in losses each time the Pemberton Music Festival was held. By early 2017, some of the limited partner investors in PFMLP ("Investors") were concerned about the financial viability of the 2017 Festival and wanted to replace Huka with another producer. However, in February 2017, PMFLP agreed that Huka should commence 2017 Festival ticket pre-sales, and Huka instructed Ticketfly to begin selling tickets to the 2017 Festival.

[7] The relationship between the Investors and Huka deteriorated. Following mediation in April 2017, Twisted Tree was replaced with a new general partner, 111 BC Ltd. ("111 BC"), but Huka continued as producer and directed Ticketfly to remit the proceeds of the 2017 Festival ticket pre-sales to PMFLP. Ticketfly did so. On May 16, 2017, 111 BC decided to execute an assignment in bankruptcy under s. 49 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, s. B-3 ("Act") for both PMFLP and 111 BC. The 2017 Festival was cancelled, the estates of PMFLP and 111 BC were consolidated, and the Trustee was appointed.

[8] Ticketfly ceased selling tickets on May 18, 2017. The Trustee encouraged ticketholders to seek refunds from their credit card companies. On June 6, 2017, Ticketfly filed a proof of claim with the Trustee alleging an unsecured and contingent claim of $7.9 million representing the amount of the Chargebacks it said it had paid.

[9] On June 24, 2017, Ticketfly informed the Trustee that it intended to claim a constructive trust over the ticket sale funds held by the estate. Ticketfly filed its constructive trust application in this court on October 18, 2017.

[10] On November 17, 2017, the Trustee disallowed Ticketfly's proof of its claim ("Disallowance").The Trustee also demanded that Ticketfly remit to the Trustee any ticket sale proceeds from the 2017 Festival that it had retained.

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[11] The Disallowance stated two reasons for disallowing Ticketfly's claim. First, the Trustee found that Ticketfly had not suffered a loss, because its parent company, Pandora, had absorbed the loss. Second, the Trustee found that, as Ticketfly had a claim against Huka under the Services Agreement for the Chargebacks, it should be pursuing Huka, and not the debtors' estate.

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[12] On November 28, 2017, following discussions between the parties, Ticketfly submitted an amended proof of claim and additional evidence relating to Ticketfly's assignment of the claim to Pandora.

[13] The Pearlman Decision was issued on December 29, 2017. Applying the conditions for imposition of a constructive trust based on unjust enrichment, Justice Pearlman denied Ticketfly's claim on the basis that the debtors' estate was not unjustly enriched by the value of the ticket sale proceeds remitted by Ticketfly because there was a juristic reason for the enrichment (at para. 81):

> However, I find that there is a juristic reason for the enrichment of the debtors' estates. By the Services Agreement, Ticketfly was the exclusive ticket seller for the Festival. Ticket holders purchased their tickets for the 2017 Festival from Ticketfly. By paragraph 9 of the Services Agreement, Ticketfly was required to collect all proceeds from ticket sales, deposit them to a Ticketfly account, and then remit the net proceeds due to Huka. Pursuant to the Services Agreement, Ticketfly Canada, initially at Huka's direction, and later at the direction of Huka and/or 111 B.C. Ltd., remitted the net ticket sale proceeds to PMFLP. In my view, the payment of the net ticket sale proceeds to the debtors pursuant to the Services Agreement constituted a juristic reason for the enrichment of the estate.

[14] Justice Pearlman also found that Ticketfly had validly assigned any right of recovery in the bankruptcy proceedings to Pandora and that, had he found a constructive trust, Ticketfly would have been entitled to be subrogated to the position of the ticket purchasers whose purchases were refunded through the Chargebacks.

[15] On January 31, 2018, the Trustee issued the amended notice of disallowance ("Amended Disallowance"), stating the following reasons:

Disallowance of unsecured claim under the Services Agreement

1. The services agreement dated July 25. 2013, amended by agreement dated September 16, 2015 (as amended, the “Services Agreement”) is an agreement between TicketFly and Huka Productions, LLC (“Huka”). Huka did not enter into the Services Agreement in its capacity as agent for the PMFLP and the PMFLP is not a party to the Services Agreement, including for the following reasons:

   (a) Huka executed the Services Agreement in its own capacity, and not in its capacity as agent for the PMFLP.

   (b) At term 7.3 of the Services Agreement, Huka expressly represents to TicketFly that it is only acting as an agent of each ‘Venue’. ‘Venue’ is a defined term under the Services Agreement and does not include the PMFLP (see term 1.14 and Exhibit C).

2. To the extent TicketFly. or its assignee, has any claim under the Services Agreement, that claim is against Huka. This is reflected in the terms of the Services Agreements, including:

   (a) Term 5.1 of the Services Agreement expressly provides that in the case of a cancelled event, Huka is responsible to deliver to TicketFly the amount of any deficiency if there are insufficient funds on account to cover refunds paid by TicketFly.

   (b) Term 5.2 of the Services Agreement expressly provides that Huka is responsible for any chargebacks TicketFly receives from its merchant bank.

   (c) Term 9.1 of the Services Agreement, expressly provides that Huka will indemnify TicketFly for any losses suffered as a result of any cancelled event.

Disallowance of subrogated claims

3. The Trustee does not contest TicketFly Canada or its assignee’s claim to subrogation to the unsecured claims of ticketholders.

4. However, in the Trustee’s view, ticketholders do not have claims against the Estate, including for the following reasons:

   (a) Term 13 of the Services Agreement expressly provides that neither party to the agreement has the right, power or authority to create any obligations on behalf of the other party. Accordingly, although TicketFly represented itself as an agent for the event promoter (i.e. Huka) when it contracted with ticketholders, it was not authorized to make this representation and any claim of the ticketholders relating to ticket sales from the 2017 Festival is against TicketFly.

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(b) Alternatively, if TicketFly was entitled to act as agent for Huka in contracting with ticketholders to sell tickets for the 2017 Festival, any claims of the ticketholders are against Huka and not the PMFLP for the reasons set out above.

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ISSUES

[16] After addressing the standard of review, I must answer the following two questions arising from the Amended Disallowance:

a) Should the Trustee's disallowance of Ticketfly's claim under the Services Agreement be set aside?

b) Should the Trustee's disallowance of Ticketfly's subrogated claim be set aside?

[17] Ticketfly also argued that, in issuing the Amended Disallowance, the Trustee inappropriately attempted to "cooper up" the reasons set out in the original Disallowance. However, Ticketfly wrote to the Trustee on January 24, 2018, stating that it would not take a position on the Trustee's ability to file an amended disallowance. I agree with the Trustee that this precludes Ticketfly from advancing this objection. Ticketfly can and does disagree with the content of the reasons set out in the Amended Disallowance, but it cannot object to the fact that the Amended Disallowance was issued.

STANDARD OF REVIEW

[18] The parties agree that the Court of Appeal's recent decision in *8640025 Canada Inc. (Re)*, 2018 BCCA 93, establishes that the standard applicable to issues of fact or mixed fact and law is palpable and overriding error, while the standard applicable to extricable issues of law remains correctness. The parties disagree about how to characterize the issues in this case.

[19] *8640025 Canada Inc. (Re)* concerned an appeal of a monitor's dismissal of a claim under the *Companies Creditors' Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA"). However, the Court considered that the same standard of review would

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apply to disallowance decisions made by a trustee under s. 135(4) of the *Act* (at paras. 58-59). Newbury J.A. held that issues of fact and of mixed fact and law, “are not subject to a correctness standard, but should now be subject to a standard of palpable and overriding error” (at para. 64). The standard of review on extricable questions of law is correctness. She said the following about distinguishing between the two types of issues (at para. 65):

> . . . To the extent that questions of law – for example the question of whether the assets of a company that is not in *CCAA* proceedings may be sold by reason of the fact that its *parent company* is in *CCAA* proceedings – can be ‘extricated’, the correctness standard applies. But obviously, not all issues entailed in determining a proof of claim will be extricable issues of law. Indeed, *most* such issues (including the valuation of creditors’ claims) will be ones of fact or mixed fact and law, to which the applicable standard will be that of palpable and overriding error.

[20] The parties agree that the issues before the Trustee concerned contract interpretation, but disagree about whether they include extricable questions of law. Both parties rely on the Supreme Court of Canada’s decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

[21] As Rothstein J. writing for the Court explained in *Sattva*, pure questions of law ask what the legal test is, whereas questions of mixed fact and law ask how a legal test applies to a set of facts (at para. 49). In general interpretation of contracts asks the latter question (at para. 50):

> . . . 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.

[22] Justice Rothstein warned that courts should be cautious about identifying extricable questions of law, but gave several examples of such issues (at paras. 53-54):

> . . . 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.

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SHOULD THE TRUSTEE'S DISALOWANCE OF TICKETFLY'S CLAIM UNDER THE SERVICES AGREEMENT BE SET ASIDE?

[23] Both of the Trustee's reasons for disallowing Ticketfly's claim under the Services Agreement flow from the conclusion that Huka was not acting as PMFLP's agent when it signed the amended Services Agreement with Ticketfly. That conclusion is based on the Trustee's understanding of the law of agency, specifically, whether an agent entering into a contract with a third party can bind the principal without disclosing the agency to the third party. This is an extricable question of law, reviewable on the correctness standard.

[24] In the event that I am wrong in that conclusion, I will also consider whether the Trustee made a palpable and overriding error in disallowing Ticketfly's claim.

Extricable Question of Law

[25] The Trustee's submissions state that the Trustee considered both the Production Agreement and the Services Agreement in making the Amended Disallowance decision. Article V of the Production Agreement expressly authorizes Huka to enter into contracts as PMFLP's agent:

> V. Third-Party Contract Negotiation.
>
> a. When deemed appropriate or necessary to do so, [Huka] shall engage third parties in contracts pursuant to the provision of Services described herein, on behalf of [PMFLP], and [Huka] has express authority to execute such contracts on behalf of [PMFLP] pursuant to the terms of this Agreement and within budgetary constraints. Contracts of this nature may include, but are not limited to, talent fee agreements, venue rental agreements, event advertising and promotion agreements, and vendor contracts, though these third-parties are not considered third-party beneficiaries of the instant Agreement between [Huka] and [PMFLP], nor do these third-parties have any rights or obligations under this Agreement. Where [PMFLP] has notice of such agreements done in furtherance of the Services, [PMFLP] shall indemnify [Huka] for all such agreements.

[26] As stated in the reasons for the Amended Disallowance, the Trustee found nothing in the terms of the Services Agreement that notified Ticketfly, at the time it

entered into the Services Agreement, that Huka was acting as agent for PMFLP and not in a personal capacity. Paragraph 15 of the Trustee's submissions confirm that Ticketfly's knowledge of an agency relationship between Huka and PMFLP was central to the Trustee's interpretation of the Services Agreement and disallowance of Ticketfly's claim:

> 15. There is no evidence regarding Ticketfly's actual or constructive knowledge of the Production Agreement, or Huka's dealing with PMFLP, when Ticketfly contracted with Huka under the Services Agreement. . .

[27] In other words, the premise underlying the Amended Disallowance was that, absent evidence in the language of the contract or its factual matrix that Ticketfly knew that Huka was acting as an agent when it entered into the Services Agreement, Ticketfly could not have a legal claim against PMFLP.

[28] That premise is incorrect as a matter of law.

[29] A third party may sue an undisclosed principal on a contract made with the principal's agent where there is privity of contract between the undisclosed principal and the third party. A principal is undisclosed where the third party does not know the identity of the principal nor that the agent is acting as an agent. In other words, the third party believes it is contracting personally with the agent: Gerald Fridman, *Canadian Agency Law*, 3rd ed., (Toronto: LexisNexus, 2017) at 160.

[30] Professor Fridman explains that three conditions must exist to establish privity between an undisclosed principal and the third party:

> (a) the terms of the contract and the surrounding circumstances must permit the possibility of identifying the undisclosed principal by showing that the agent was not doing so as the real and only principal;
>
> (b) the personality of the principal was a matter of indifference to the third party; and

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> (c) the agent acted with authority in making the contract in issue.
>
> *Canadian Agency Law* at 186.

[31] Where, as is the case here, the third party makes a claim against the principal, the third party's ignorance of the existence of a principal does not bar the claim if the contract was within the scope of the agent's authority (*Canadian Agency Law* at 190).

[32] In *Friedmann Equity Developments*, the Supreme Court of Canada noted that this rule has been criticized, but concluded that it remains the law:

> 15 When a third party contracts with an agent and the contract is not under seal, the principal has the same rights and liabilities under the contract whether he or she was disclosed to the third party and despite the fact that his or her name did not appear on the face of the contract. Therefore, undisclosed principals can sue and be sued in their own name on any simple contracts made on their behalf by their agents as long as those agents have acted within the scope of their delegated authority in so doing.
>
> 16 The rule which allows an undisclosed principal to sue or be sued on a simple contract has been criticized. Some argue that the doctrine is anomalous and that it violates some of the basic tenets of the laws of contract and of agency: see, e.g., J. B. Ames, "Undisclosed Principal -- His Rights and Liabilities" (1909), 18 Yale L.J. 443; M. Schiff, "The Undisclosed Principal: An Anomaly in the Laws of Agency and Contract" (1983), 88 Com. L.J. 229. Critics of the rule argue that contracts are premised upon the agreement of two or more persons to be bound to each other and to the terms pursuant to which they will be so bound. It appears to be inconsistent with this fundamental principle to bind the third parties to principals with whom they did not contract.
>
> 17 While some commentators have criticized the rule relating to undisclosed principals, other commentators have argued that the rule is consistent with commercial reality. Although the undisclosed principal may not be named in the contract, he or she does exist in fact and directs the agent. The agent is simply the instrument through which the principal acts. Since the principal controls the agent and receives the benefit of the contract with the third party, there does not appear to be any injustice in making the principal directly answerable to the third party or in allowing the principal to enforce the contract against the third party. The rule simply gives effect to what exists in fact, even if that fact is not reflected in the contract: see Keighley Maxsted & Co. v. Durant, [1901] A.C. 240 (H.L.), at p. 261, per Lindley L.J.; E. J. Weinrib, "The Undisclosed Principle of Undisclosed Principals" (1975), 21 McGill L.J. 298.

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> 18 Regardless of the criticism of the rule, it is firmly established that <u>undisclosed principals may sue or be sued on simple contracts entered into by their agents. Parties are presumed to be aware of the possibility that those with whom they are bargaining are acting on behalf of an unnamed principal.</u> The parties to a contract can avoid the application of the rule, either by including an express term in the contract which limits liability to the parties named in the contract itself, or by executing the contract under seal.
>
> [Emphasis added]

[33] By failing to determine whether there was privity of contract between PMFLP, the undisclosed principal, and Ticketfly, the Trustee made an error of law in the Amended Disallowance.

[34] The evidence before the Trustee supports the conclusion that the requirements of privity were met. The Services Agreement was an amendment to a services agreement between Huka and Ticketfly that had been made on July 25, 2013 ("2013 Agreement"). The Services Agreement incorporated all of the terms and conditions of the 2013 Agreement, and the 2013 Agreement incorporated Ticketfly's "Standard Terms and Conditions" ("Ticketfly Terms"). Importantly, the Services Agreement added the "Pemberton Music Festival" to the "List of Venues and Events" in Exhibit C and contained express terms about service fees for tickets to it.

[35] Article 3 of the Services Agreement states:

> During the Term, Ticketfly will act as Huka's sole and exclusive provider of Ticket Sales, as defined in this Agreement, for any Venues and Events for which [Huka] controls the ticketing. A list of [Huka's] currently existing Venues and Events is attached as Exhibit C.

[36] The Ticketfly Terms define "Event" and "Venue" as follows:

> 1.4 Event(s): any live or recorded entertainment feature, music concert, sporting event or cultural attraction or other sponsored, promoted or hosted by [Huka] for which attendance or passage is limited or restricted through the sale of Tickets.
>
> 1.14 Venue: Any venue or location of any nature whatsoever, indoors or outdoors, whether now existing or existing at any time during the term hereof, at which [Hula] promotes, schedules or presents an Event in respect of which [Huka] has authority to sell Tickets.

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[37] Exhibit C is a single page with the following wording:

> List of Venues and Events
>
> Current Partner Festivals:
>
> - Tortuga Music Festival
> - Pemberton Music Festival
>
> Current Partner Venues:
>
> - Greenfield Lake Amphitheater
> - Brooklyn Arts Center
> - Freret Street Publiq House
> - Alchemy Tavern
> - O'Daly's Irish Pub

[38] "Festival" is not a defined term in the Services Agreement and it is not used anywhere in it other than in the titles, "Tortuga Music Festival" or "Pemberton Music Festival".

[39] Term 7.3 of the Ticketfly Terms contains Huka's warranties and covenants to Ticketfly. Under subsection (a), Huka warrants and covenants as follows:

> [Huka] is an agent of each Venue at which any of its Events are held and is duly authorized in such capacity to execute and deliver the Agreement for ticketing services and/or software licensing and to schedule and present Events at the Venue.

[40] These contractual provisions "permit the possibility of identifying the undisclosed principal" because they show that Huka was acting as an agent and not in a personal capacity. While the Pemberton Music Festival is listed under the heading "Current Partner Festival" not "Current Partner Event", Exhibit C expressly states that it contains the list of Events and Venues, as defined in the Services Agreement. With respect to the second requirement for privity, there is no evidence that the contract between Ticketfly and Huka, as agent for PMFLP, was one that relied on the personality of the agent or that Ticketfly was induced to contract with Huka to the exclusion of an undisclosed principal.

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[41] Article V of the Production Agreement between Huka and PMFLP, referenced above, establishes that Huka was acting within the scope of its authority when it entered into the Services Agreement. Huka had express authority to engage third parties in contracts on behalf of PMFLP, and PMFLP was to indemnify Huka for these agreements.

[42] Accordingly, there was privity of contract between Ticketfly and PMFLP, as the undisclosed principal, and Ticketfly was legally entitled to assert its claim under the Services Agreement against PMFLP. The Trustee made an error of law in concluding otherwise, and the Amended Disallowance must be set aside on that basis.

Palpable and Overriding Error

[43] If I am wrong in my conclusion that the Trustee erred on an extricable question of law, I would set aside the Amended Disallowance on the basis of palpable and overriding error.

[44] The Pearlman Decision expressly found that Ticketfly's remittance of the ticket sale proceeds to the debtors' estate was a juristic reason for the enrichment of the estate. The only way that the estate could be legally entitled to the ticket proceeds collected by Ticketfly is if Huka entered into the Services Agreement as PMFLP's agent.

[45] The conduct of the Trustee himself prior to the Amended Disallowance suggests that the Trustee considered that Huka was PMFLP's agent when it contracted with Ticketfly. On November 17, 2017, the Trustee demanded that Ticketfly remit any advance ticket sale proceeds that it had retained from the 2017 Festival to the Trustee *on the basis that they were PMFLP's property*.

[46] The inconsistency between the Trustee's conduct in demanding that Ticketfly remit ticket sales proceeds to the debtors' estate, which entitlement could only arise if Huka had entered into the Services Agreement on PMFLP's behalf, yet disallowing

Ticketfly's Claim on the basis that Huka was not PMFLP's agent is inexplicable. The Trustee's submissions do not address this issue.

[47] "Palpable and overriding error" is a highly deferential standard. It requires that the error be one that is obvious or plainly seen, going to the core of the outcome of the case: *Smithies Holdings Inc. v. RCS Holdings Ltd.,* 2016 BCCA 479 at para. 18. In my view, the fundamental inconsistency between the Trustee's conclusion that Huka was not PMFLP's agent, on the one hand, and both the Pearlman Decision and the Trustee's prior conduct on the other, constitutes a palpable and overriding error. I would also set aside the Amended Disallowance on this basis.

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SHOULD THE TRUSTEE'S DISALLOWANCE OF THE SUBROGATED CLAIM BE SET ASIDE?

[48] In the Amended Disallowance, the Trustee accepts that Ticketfly is subrogated to the unsecured claims of ticket holders. However, the Trustee concludes that the ticket holders do not have a claim against the debtors' estate because, under the Services Agreement, Ticketfly was not Huka's agent when it contracted with the ticket holders. Alternatively, the Trustee concludes that if Ticketfly was Huka's agent, the ticket holders' claims are only against Huka and not against PMFLP because Huka was not PMFLP's agent.

[49] The Trustee's decision on the subrogated claim is a matter of contract interpretation and is reviewable on the standard of palpable and overriding error.

[50] Both Ticketfly and the Trustee rely on Article 13 of the Services Agreement, which states in full:

> Each Party is an independent contractor and not an agent or partner or, or joint-venturer with, the other Party for any purpose other than as set forth in the Agreement. Neither Party by virtue of the Agreement shall have any right, power, or authority to act or create any obligation, express or implied, on behalf of the other Party.

[51] Ticketfly relies on the first sentence of this provision, which it reads as expressly authorizing Ticketfly to act as Huka's agent for the purposes of performing its obligations under the Services Agreement. The Amended Disallowance refers

only to the second sentence, which the Trustee reads as expressly providing that Ticketfly is not Huka's agent.

[52] In his submissions, the Trustee also points to Article 3 of the Services Agreement, reproduced above. That term provides that Ticketfly will act as Huka's "sole and exclusive provider" of ticket sales for any "Venues and Events for which [Huka] controls the ticketing" and goes on to reference Exhibit C as containing a list of "Venues and Events". The Trustee accepts that Ticketfly is Huka's agent for the "Venues" listed in Exhibit C, but says that it is not Huka's agent for the Pemberton Music Festival because it is listed as a "Festival" and not as an "Event" or "Venue".

[53] I disagree. In my view, the Trustee's interpretation of Article 3 of the Services Agreement is at odds with the entire context of the Services Agreement and the intentions of the parties to it. The whole purpose of the Services Agreement was to make Ticketfly Huka's ticketing agent for the items listed in Exhibit C, as revised from time to time. Section 6 of the 2015 Amendment expressly provides for service fees that Ticketfly may charge for the Tortuga and Pemberton festivals. It would make no sense for Ticketfly and Huka to include in Exhibit C occasions or locations for which Ticketfly would not be Huka's ticketing agent.

[54] Turning to the interpretation of Article 13, it is hard to reconcile the meaning of its two sentences. However, construing the second sentence of Article 13 in the way the Trustee does would deprive the first sentence of any meaning. In my view, read in its entirety in light of the contract as a whole, this provision states that each party is not an agent for the other for a purpose outside of the Services Agreement, not that each party is not an agent for the other for all purposes, including the purposes of the Services Agreement.

[55] If Ticketfly had no authority to act for Huka at all, it would not be necessary to say that it had no such authority for a purpose outside the Services Agreement. That is the clear meaning of the first sentence. Moreover, the Services Agreement was essentially a ticketing sales agreement. It was a vehicle by which Huka ensured that tickets to the productions it was operating or promoting would be sold. The purchase

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terms and conditions of the tickets themselves also made it clear that Ticketfly was acting as agent for the “Event Provider”.

[56] I agree with Ticketfly’s submission that the consequence of the Trustee’s decision is that the ticket holders, who were the source of the ticket sales proceeds that were remitted by Ticketfly to PMFLP, would have no right to recover the money they paid to attend a music festival that PMFLP cancelled. This gives PMFLP (and now its creditors) a windfall and on its face seems unjust.

[57] Disallowance of Ticketfly’s subrogated claim on the basis that it is not Huka’s agent is also inconsistent with the Trustee’s acceptance that Ticketfly is subrogated to the ticketholders’ claims. If Ticketfly had no authority to act as agent for Huka, then there would be no subrogated claim because Ticketfly would not have been liable to Huka (or as it were, PMFLP) for the Chargebacks. As Justice Pearlman found, Ticketfly was obliged to pay the Chargebacks.

[58] I reach the same conclusion on the Trustee’s alternative basis for disallowing the subrogated claim. For the reasons stated earlier, Huka was PMFLP’s agent and contracted with Ticketfly in that capacity.

[59] While palpable and overriding error is a very deferential standard, I conclude that the Trustee’s disallowance of the subrogated claims was a palpable and overriding error and cannot stand.

CONCLUSION

[60] At the outset of the hearing, counsel for the Trustee advised me that the Trustee had filed an application for production by Ticketfly of documents necessary to carry out the claims process in the event that Ticketfly is successful in the main application. Ticketfly consents to this.

[61] Accordingly, I make the following Order:

a) The Applicant’s appeal from the Amended Disallowance of the Trustee dated January 31, 2018 is allowed;

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b) The Amended Disallowance is set aside in its entirety;

c) The Applicant's Amended Proof of Claim is admitted as a proven claim for the amount of any Chargebacks;

d) By no later than August 31, 2018, the Ticketfly Group shall deliver to the Trustee a complete and accurate listing, in Excel spreadsheet format, of the following information in relation to each ticket holder (each a "Ticket Holder" and collectively, the "Ticket Holders") that purchased ticket(s) (each a "Ticket" and collectively, the "Tickets") for the 2017 Pemberton Music Festival:

   i. the full name of the Ticket Holder;

   ii. the contact details of the Ticket Holder including the Ticket Holder's complete mailing address, phone number and email address;

   iii. the number of Tickets purchased by the Ticket Holder;

   iv. the total purchase price paid for the Tickets purchased by the Ticket Holder denominated in either Canadian or U.S. dollars; and

   v. for Tickets purchased using a credit card, the name of the financial institution or credit card company that processed the transaction.

e) By no later than August 31, 2018, the Ticketfly Group shall deliver to the Trustee a complete and accurate listing, in Excel spreadsheet format, of the following information in relation to each charge back (each a "Chargeback" and collectively, the "Chargebacks") paid by the Ticketfly Group to financial institutions or credit card companies that processed and issued refunds to Ticket Holders.

   i. the name of the financial institution or credit card company that executed the Chargeback and received payment of the Chargeback amount from the Ticketfly Group;

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ii. the total dollar amount of the Chargeback denominated in Canadian or U.S. dollars;

iii. the full name of the refunded Ticket Holder which the Chargeback relates to; and

iv. the date the Chargeback was paid.

f) Notwithstanding any other term of this Order, the Trustee may consent to the Ticketfly Group providing the information set forth herein in the manner most convenient to the Trustee and the Ticketfly Group.

g) In addition to the foregoing, the Ticketfly Group shall deliver to the Trustee those materials in its possession or control which are reasonably requested by the Trustee to confirm the information provided by the Ticketfly Group in accordance with terms (d) and (e) of this Order.

[62] If the parties cannot agree on costs they may apply to me to make submissions on that issue.

"IYER J."

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In the Court of Appeal of Alberta

Citation: PetroFrontier Corp v Macquarie Capital Markets Canada Ltd, 2022 ABCA 136

Date: 20220412
Docket: 2101-0041AC
Registry: Calgary

2022 ABCA 136 (CanLII)

Between:

PetroFrontier Corp., PetroFrontier (Australia) Pty Ltd.
and Texalta Australia Pty Ltd.

Respondents
(Plaintiffs)

- and -

Macquarie Capital Markets Canada Ltd.

Appellant
(Defendant)

The Court:

The Honourable Justice Thomas W. Wakeling
The Honourable Justice Jo'Anne Strekaf
The Honourable Justice Anne Kirker

Memorandum of Judgment of The Honourable Justice Thomas W. Wakeling

Memorandum of Judgment of
The Honourable Justice Jo'Anne Strekaf and The Honourable Justice Anne Kirker
Concurring in the Result

Appeal from the Decision by
The Honourable Justice G.A. Campbell
Dated the 22nd day of January, 2021
(2021 ABQB 54; Docket: 1401 07429)

Memorandum of Judgment

Wakeling, J.A.:

I.

[1] This appeal is part of the fallout from a failed bought-deal financing.

[2] Macquarie Capital Markets Canada Ltd. terminated an underwriting agreement with PetroFrontier Corp., PetroFrontier (Australia) Pty Ltd. and Texalta Australia Pty Ltd. when the PetroFrontier companies failed to file a final prospectus before Monday, July 9, 2012, the deadline set out in the underwriting agreement.[1]

[3] The PetroFrontier companies sued Macquarie. They alleged that Macquarie and its external legal counsel, Torys LLP, agreed to extend the prospectus-filing deadline to Friday, July 13, 2012. The claim alleged that Torys had actual and ostensible authority to bind Macquarie.[2]

[4] Macquarie defended, claiming that Torys neither agreed to an extension nor had authority to do so.[3] The defence also made this assertion: "PetroFrontier and its counsel knew that

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[1] *PetroFrontier Corp. v. Macquarie Capital Markets Canada Ltd.*, 2021 ABQB 54, ¶ 5.

[2] Statement of Claim filed July 7, 2014, ¶¶ 21-25 ("[Paragraph] 21. On July 5, 2012, Shane Kozak ('Mr. Kozak'), Vice-President of Finance and Chief Financial Officer of PetroFrontier, spoke by telephone to Mr. Colcleugh [a managing director with Macquarie]. Mr. Kozak advised Mr. Colcleugh of the need to have the Texalta Statements received and asked whether the Defendant would agree to an extension of the Final Prospective Filing Date from July 9, 2012. Mr. Colcleugh advised that the Defendant agreed to the extension and stated that the Defendant also wanted an extension of time in order to allow it more time to sell the Subscription Receipts. The parties agreed to extend the Final Prospectus Filing Date to July 13, 2012. [Paragraph] 22. On July 5, 2012 Torys LLP (counsel for the Defendant) wrote to Burstall Winger LLP (PetroFrontier's counsel), Mr. Colcleugh, Mr. Kozak and others to confirm the Defendant's agreement to the form of the Amending Agreement that granted an extension of the Final Prospectus Filing Date until Friday, July 13, 2012. [Paragraph] 23. On July 6, 2012 at 9:45 a.m. Torys LLP wrote to KPMG LLP (PetroFrontier Corp.'s former auditors that were retained to work for the Offering) and stated: 'Also, as of late yesterday, it looks like the filing of the final prospective will be delayed until Friday, the 13th'. This confirmed that the Defendant had agreed to an extension of time until Friday, July 13, 2012 for the Final Prospectus Filing Date. [Paragraph] 24. Also on July 6, 2012 at 9:56 a.m., Torys LLP wrote an email to PricewaterhouseCoopers LLP (PetroFrontiers current auditors that were retained for work on the Offering) and stated: 'It is now confirmed that we are delayed in going final until Friday, the 13'. This again confirmed that the Defendant had agreed to an extension of time until Friday, July 13, 2012 for the Final Prospectus Filing Date. [Paragraph] 25. Torys LLP had *authority*, or alternatively, *ostensible authority*, to bind the Defendant to the agreements described in paragraphs 22, 23 and 24"). Appeal Record 10 (emphasis added).

[3] Statement of Defence filed October 8, 2014, ¶ 86 ("Contrary to the assertions in paragraphs 22 to 25 of the statement of claim, counsel for the parties did not agree to an extension, nor did they have *authority* to do so. PetroFrontier and its counsel knew that Macquarie's counsel (i) did not agree to an extension, (ii) had *no instructions* to agree to an

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Macquarie's counsel (i) did not agree to an extension, (ii) had no instructions to agree to an extension, and (iii) had no actual or ostensible authority to bind Macquarie to any extension agreement."[4]

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[5] During questioning, counsel for PetroFrontier asked questions of Macquarie's corporate representative and former Macquarie employees about the communications between Macquarie and Torys relating to the Monday, July 9, 2012 deadline.[5] Macquarie's corporate representative and other witnesses declined to answer them or related undertakings[6] claiming the communications were privileged.

[6] PetroFrontier secured an order from Master Farrington directing Macquarie's corporate representative and the other witnesses to answer most of the contested questions and undertakings.[7]

[7] Macquarie appealed.[8]

[8] Justice Campbell, the chambers judge, held that Macquarie's statement of defence raised a new factual issue – that Macquarie never instructed Torys to agree to an extension – and that most of the questions and undertakings under review – those relating to the July 9, 2012 deadline – must be answered because Macquarie had waived lawyer-client privilege.[9]

II.

[9] I am satisfied that Justice Campbell applied the correct legal principles[10] and that her decision cannot be characterized as one that is clearly wrong – palpable and overriding error.

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extension, and (iii) had *no actual* or ostensible authority to bind Macquarie to any extension agreement"). Appeal Record 30 (emphasis added).

[4] Id.

[5] *PetroFrontier Corp. v. Macquarie Capital Markets Canada Ltd.*, 2021 ABQB 54, ¶ 1.

[6] Id. sch. 1-7.

[7] Id. ¶ 2.

[8] Id. ¶ 3.

[9] Id. ¶¶ 82 & 83.

[10] *PetroFrontier Corp. v. Macquarie Capital Markets Canada Ltd*., 2021 ABQB 54, ¶¶ 73 & 77 ("Fairness and consistency may require a finding that privilege has been waived when a party acts in a manner that makes the continued protection of the communication inappropriate. ... [T]here can be no waiver of privilege where it is the party seeking disclosure and not the party claiming privilege who puts reliance on legal advice at issue ... . Such pleadings relying on another party's legal advice cannot be used as a sword to pierce privilege. .... First, there is no allegation in the Statement of Claim that the Defendant's external counsel had 'instructions' to agree to the extension. This was a fact volunteered by the Defendant and the inclusion of this fact by the Defendant put its external counsel's receipt of instructions and its communications regarding the alleged extension agreement, at issue"). See S. Lederman, A. Bryant & M. Fuerst, The Law of Evidence in Canada 1025 & 1026 (5th ed. 2018) ("waiver may occur even in the absence of

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[10] There are three key points that are the basis for my decision.

A.

[11] First, one must understand the core elements of the lawyer-client privilege. Dean Wigmore, in his classic text A Treatise on the System of Evidence in Trials at Common Law published in 1905[11] set out the test that the Supreme Court of Canada[12] first adopted in 1979 and has consistently reconfirmed:[13]

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any intention to waive the privilege. .... [I]f a client denies that he or she gave instructions to the lawyer to settle a debt, the other party who is seeking to enforce the settlement is free to examine the lawyer on what was said between the lawyer and the client").

[11] 4 J. Wigmore, A Treatise on the System of Evidence in Trials at Common Law 3204 (1905) (emphasis added). Dean Wigmore made two minor modifications to the test in the 1923 second edition. 5 J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law 21-22 ("(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications *relating* to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the *protection be waived*"). He made no revisions in the 1940 third edition. Professor McNaughton did not change a word in his 1961 revision. 8 J. Wigmore, Evidence in Trials at Common Law 554 (J. McNaughton rev. 1961). This means that the Wigmore test the Supreme Court of Canada has utilized was first published in 1905. See Frankfurter, "John Henry Wigmore: A Centennial Tribute", 58 NW. U. L. Rev. 443, 443 (1963) ("Wigmore's Treatise on Evidence is unrivalled as the greatest treatise on any single subject of the law. I make no exception to this superlative statement").

[12] *Solosky v. Canada*, [1980] 1 S.C.R. 821, 835 (1979) per Dickson, J. ("Wigmore [8 Wigmore, *Evidence* (McNaughton rev. 1961) para. 2292] framed the modern principle of privilege for solicitor-client communications").

[13] *The Queen v. McClure*, 2001 SCC 14, ¶ 36; [2001] 1 S.C.R. 445, 460 per Major, J. See also *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R 860, 872 per Lamer, J. (the Court approved the formulation presented in the 1961 McNaughton revised edition that is identical to the text of the 1923 second edition). Other common law jurisdictions deal with the lawyer-client privilege in both statutes and case law. E.g., *Police and Criminal Evidence Act 1984*, c. 60 s. 10(1) (U.K.) ("Subject to subsection (2) below [communications for a criminal purpose], in this Act 'items subject to legal privilege' means – (a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client"); *The Queen v. Central Criminal Court ex p. Francis & Francis*, [1989] A.C. 346, 392 (H.L. 1988) per Lord Goff (section 10(1) is consistent with the common law); *Daniels Corp. Int'l Pty. Ltd. v. Australian Competition and Consumer Comm'n*, [2002] HCA 49, ¶ 9; 213 C.L.R. 543, 552 per Gleeson, C.J. & Gaudron, Gummow & Hayne, JJ. ("legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings"); *Evidence Act 1995*, No. 25, s. 118 (N.S.W.) ("Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of – (a) a confidential communication made between the client and a lawyer, ... for the dominant purpose of the lawyer ... providing legal advice to the client."); *Evidence Act 2001*, s. 118 (Tasmania) ("Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of – (a) a confidential communication made between the client and a lawyer ... for the dominant purpose of the lawyer ... providing legal advice to the client") & *Evidence Act 1995*, s. 118 (Cth) ("Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in

> The phrasing of the general principle, so as to represent all its essentials, but only essentials, and to group them in natural sequence, is a matter of some difficulty. The following form seems to accomplish this: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relevant to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the client waives the protection.

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[12] This formulation makes it clear that the privilege protects the client's interests and attaches to more than just the advice that a professional legal adviser gives his or her client. The phrase "communications relevant to that purpose" throws a wide net. It catches the information that the

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disclosure of – (a) a confidential communication made between the client and a lawyer ... for the dominant purpose of the lawyer ... providing legal advice to the client").

client discloses to the professional legal adviser or his or her staff,[14] the fees the lawyer charges,[15] and perhaps even the existence of a lawyer-client relationship.[16]

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[14] See *Anderson v. Bank of British Columbia*, 2 Ch. D. 644, 649 (C.A. 1876) per Jessel, M.R. ("Now, as to the extent of the rule. It goes not merely to a communication made to the professional agent ... by the client directly, it goes to all communications made by the client to the solicitor through intermediate agents, and he is not bound to write letters through the post, or to go himself personally to see the solicitor; he may employ a third person to write the letter, or he may send the letters through a messenger, or he may give a verbal message to a messenger, and ask him to deliver it to the solicitor, with a view to his prosecuting his claim, or of substantiating his defence"); *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, 892-93 per Lamer, J. ("In summary, a lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship, which arises as soon as the potential client takes the first steps, and consequently even before the formal retainer is established"); *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) per Rehnquist, J. ("the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice") & 2 P. Sankoff, The Law of Witnesses and Evidence in Canada 17-72 (loose-leaf release 2020-4) ("Though the doctrine of legal advice privilege is designed to protect communications made between lawyer and client, this does not mean that only communications made *directly* between these individuals are protected. Obviously, the practice of law involves the employment of others in the course of that practice – secretaries, assistants, paralegals and the like – and the privilege will not be lost merely because a communication is made to or in the presence of someone employed by the lawyer in the course of his or her professional activities. Where the communication is made to someone who is not directly employed by the lawyer, the privilege may still apply, but the court will more carefully scrutinize the interaction to ensure that the third party is truly an agent").

[15] *Maranda v. Richer*, 2003 SCC 67, ¶ 33; [2003] 3 S.C.R. 193, 214 ("In law, when authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, as a general rule, protected by solicitor-client privilege. ... Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, recognizing a presumption that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved").

[16] *Lavallee, Rackel and Heintz v. Canada*, 2002 SCC 61, ¶ 28; [2002] 3 S.C.R. 209, 235 per Arbour, J. ("The name of the client may very well be protected by solicitor-client privilege, although this is not always the case") & *Lavallee, Rackel and Heintz v. Canada*, 60 D.L.R. 4th 508, 516 (Alta. Q.B. 1998), aff'd 2000 ABCA 54; 184 D.L.R. 4th 25, aff'd, 2002 SCC 61; [2002] 3 S.C.R. 209 per Veit, J. ("In some situations it may be critically important for a client to be confident that no one will know that she has consulted a divorce lawyer, or a lawyer who specializes in sterilization claims, or in claims for individuals who contracted AIDS through the blood supply, or in defending drunk driving charges"). See A. Wooley, Understanding Lawyers' Ethics in Canada 192 (2d ed. 2016) ("Under the law of privilege, identity is confidential where the identity and the fact of the representation disclose something material about the client's legal issues").

[13] Common law jurisdictions[17] promote and protect[18] the integrity of the relationship between lawyers and their clients for essentially the same reasons. Justice Major, in *The Queen v. McClure*,[19] presents the Canadian perspective:

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[17] *The Queen v. Derby Magistrates Court ex p. B,* [1996] A.C. 487, 510 (H.L.) per Lord Nicholls ("Legal professional privilege is concerned with the interaction between two aspects of the public interest in the administration of justice. The public interest in the efficient working of the legal system requires that people should be able to obtain professional legal advice on their rights and liabilities and obligations. This is desirable for the orderly conduct of everyday affairs. Similarly, people should be able to seek legal advice and assistance in connection with the proper conduct of court proceedings. To this end communications between clients and lawyers must be uninhibited. But, in practice, candour cannot be expected if disclosure of the contents of communications between client and lawyer may be compelled, to a client's prejudice and contrary to his wishes"); *Grant v. Downs*, 135 C.L.R. 674, 685 (Austl. High Ct. 1976) per Stephen, Mason & Murphy, JJ. ("The rationale of ... [the legal professional] ... privilege ... is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek ... advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor*"); Martin v. Legal Aid Board*, [2007] IEHC 76, ¶ 34; [2007] 2 I.R. 759, 775 per Laffoy, J. ("the existence ... of legal professional privilege is predicated on there being a public interest requirement for it in the proper conduct of the administration of justice. It also identifies the nature of such requirement, which is the underlying rationale of the privilege – that the client should not be inhibited in the conduct of litigation or in obtaining legal advice by forced disclosure of communications and advice. Such inhibition might lead to the client 'not being able to make a clean breast of it' ..., or holding 'back half the truth' ... or even tempt a client's counsel 'to forgo conscientiously investigating his own case' until 'the eve of or during the trial' ... or constitute 'a prohibition upon professional advice and assistance' ... . It is to obviate such outcomes which would undermine the proper, fair, and efficient administration of justice that legal professional privilege exists and has been elevated beyond a mere rule of evidence to 'a fundamental condition on which the administration of justice as a whole rests'"); *The Queen v. Uljee*, [1982] 1 N.Z.L.R. 561, 569 (C.A.) per Cooke, J. ("There are several reasons why, on balance, it has been seen to be in the public interest to allow consultations with a legal adviser to be uninhibited by fear of disclosure in evidence. They include more efficient administration of justice; bringing to light and better presentation of defences; encouragement of lawful conduct; avoidance of litigation; possibilities of guilty pleas or co-operation with the police. In criminal matters there is also ... a strong sense that any person charged or in peril of a charge has a fundamental human right to professional advice – which may not be effectively given if facts are withheld"); *Upjohn Co. v. United States*, 449 U.S. 383, 389 per Rehnquist, J. (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. ... Its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. ... 'The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out'") & *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) per Fuller, C.J. ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). See Hardgrove, "Scope of Waiver of Attorney-Client Privilege: Articulating a Standard that Will Afford Guidance to Courts", 1998 U. Ill. L. Rev. 643, 646-47 ("The attorney-client privilege serves several important purposes. First, the privilege ensures that a person seeking advice from an attorney may do so freely and safely. In effect, the privilege encourages the full and truthful revelation by the client of all the facts in his or her possession. Second, the privilege exists to help the attorney effectively and loyally serve the client, because the attorney's ability to render advice will be hindered

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unless he or she becomes familiar with all of the pertinent facts. Together, these two objectives support a third and ultimate purpose of the privilege – the advancement of broad public interests in the observance of law and administration of justice") & Andrews, "The Influence of Equity upon the Doctrine of Legal Professional Privilege", 105 Law Q. Rev. 608, 610 & 636 (1989) ("In civil matters the privilege fosters candid communication between client and lawyer which, it is hoped, will reduce the number of bad cases which are litigated by enabling the lawyer to sift out specious and insubstantial claims and defences. .... In civil matters the principal public interest is the fostering of settlement and avoidance or shortening of litigation. The connection between privilege and this policy can be traced as follows: Privilege conduces to candid revelation by clients to their lawyers of material facts and motives; the lawyer is best placed to assess the client's case if all pertinent information is divulged in this fashion; once the lawyer has received this information, he can sift out any bogus or insubstantial points; to the extend that this sieve operates efficiently, time and expense in litigating specious points can be saved").

[18] *Information and Privacy Commissioner of Alberta v. University of Calgary*, 2016 SCC 53, ¶ 28; [2016] 2 S.C.R. 555, 574 per Côté, J. ("To give effect to solicitor-client privilege as a fundamental policy of the law, legislative language purporting to abrogate it, set it aside or infringe it must be interpreted restrictively and must demonstrate a clear and unambiguous legislative intent to do so"); *Lavallee, Rackel and Heintz v. Canada*, 2002 SCC 61, ¶ 36; [2002] 3 S.C.R. 209, 241 per Arbour, J. ("solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance"); *The Queen v. McClure*, 2001 SCC 14, ¶ 35; [2001] 1 S.C.R. 445, 459 per Major, J. ("solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case- by-case basis") & *Glencore Int'l AG v. Comm'r of Taxation*, [2019] HCA 26, ¶ 21; 265 C.L.R. 646, 658 ("Legal professional privilege has been described as a right which is fundamental to persons and to our legal system. It has also been described as 'a practical guarantee of fundamental, constitutional or human rights'. Such descriptions point up the importance of the privilege. They serve to show that it is not merely an aspect of curial procedure or a mere rule of evidence but a substantive right founded upon a matter of public interest") & *Daniels Corp. Int'l Pty. Ltd. v. Australian Competition and Consumer Comm'n*, [2002] HCA 49, ¶ 86; 213 C.L.R. 543, 576 per Kirby, J. ("Legal professional privilege is also an important human right deserving of special protection for that reason").

[19] 2001 SCC 14, ¶ 33; [2001] 1 S.C.R. 445, 459 per Major, J. See also *Pritchard v. Ontario Human Rights Commission*, 2004 SCC 31, ¶ 14; [2004] 1 S.C.R. 809, 816 per Major, J. ("Clients must feel free and protected to be frank and candid with their lawyers with respect to their affairs so that the legal system ... may properly function"); *The Queen v. Gruenke*, [1991] 3 S.C. R. 263, 289 per Lamer, C.J. ("The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication"); *0678786 B.C. Ltd. v. Bennett Jones LLP*, 2021 ABCA 62, ¶ 21, leave to appeal ref'd, [2021] S.C.C.A. No. 78 ("Solicitor and client privilege is a well-established feature of Canadian law. It is considered to be a substantive principle of fundamental importance to the Canadian legal system, because it allows clients to fully and frankly discuss their legal issues with their counsel, without fear of those discussions and the resulting advice being revealed"); *Director of Investigation and Research v. Shell Canada Ltd.*, [1975] F.C. 184, 193 (Ct. App.) per Jackett, C.J. ("It is sufficient to say ... that ... [the lawyer-client privilege] has been recognized from very early times that the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him") & 2 P. Sankoff, The Law of Witnesses and Evidence in Canada 17-64 (loose-leaf release 2020-4) ("The relationship between lawyer and clients is properly regarded as a vital foundation of the Canadian justice system. In Canada, everyone is entitled to retain legal counsel to defend and protect their interests, and in order for such counsel to be effective, there must be close to an absolute trust between lawyer and client. If confidences shared between client and lawyer were not protected, it would inhibit the client's ability to confide in the lawyer, and would ultimately harm their interests. Consequently, there is at common law a right in a client not to disclose or have

> The importance of solicitor-client privilege to both the legal system and society as a whole assist in determining whether and in what circumstances the privilege should yield to an individual's right to make full answer and defence. The law is complex. Lawyers have a unique role. Free and candid communication between the lawyer and client protects the legal rights of the citizen. It is essential for the lawyer to know all of the facts of the client's position. The existence of a fundamental right to privilege between the two encourages disclosure within the confines of the relationship. The danger in eroding solicitor-client privilege is the potential to stifle communication between the lawyer and client.

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[14] There is no controversy in this case about the existence of a lawyer-client relationship between Macquarie and Torys.

B.

[15] Second, the privilege is not absolute. It may be lost as a result of an intentional act by the privilege holder that directly results in the disclosure of protected information to a third party[20] or by operation of law.[21] A court may refuse to recognize the privilege when the privilege holder

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disclosed any communication passing between himself and his legal adviser made confidentially in the course of obtaining or seeking legal advice").

[20] 8 J. Wigmore, Evidence in Trials at Common Law 634 (J. McNaughton rev. 1961) ("The privilege is designed to secure the client's confidence in the secrecy of his communications …; hence, the privilege is not violated by receiving such disclosures as the client by his own will permits to be made"); 2 P. Sankoff, The Law of Witnesses and Evidence in Canada 17-104 (loose-leaf release 2020-4) ("It is indisputable that the client can choose to waive privilege at any time, either personally or through an agent"); S. Lederman, A. Bryant & M. Fuerst, The Law of Evidence in Canada 1023 (5th ed. 2018) ("An obvious scenario of waiver is if the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of a communication") & C. Tapper, Cross & Tapper on Evidence 441 (12th ed. 2010) ("Legal professional privilege may always be waived by the client"). See *Paragon Finance Plc v. Freshfields*, [1999] 1 W.L.R. 1183, 1188 (C.A.) per Lord Bingham ("a client expressly waives his legal professional privilege when he elects to disclose communications which the privilege would entitle him not to disclose") & *People v. Ottenstror*, 127 Cal. App. 2d 104, 110; 273 P. 2d 289, 293 (Dist. Ct. Ap. 1954) ("Appellant's complaint that the court committed prejudicial error in permitting Deputy Public Defender Still, who represented the former, to testify to conversations had between the appellant and his counsel on the ground the same were privileged is answered by the statement that any privilege which could be said to have existed was fully waived by appellant when he himself testified to the same conversations. When … the client voluntarily testifies as a witness to confidential communications made by him to his attorney, he thereby waives the privileged character of such communications, and both he and his attorney may then be fully examined in relation thereto").

[21] 8 J. Wigmore, Evidence in Trials at Common Law 635-36 (J. McNaughton rev. 1961) ("What constitutes a *waiver by implication*? Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the elements of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended the result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder") (emphasis in original); Developments in the Law, "Privileged Communications", 98 Harv. L. Rev. 1450, 1630-31 (1985) ("'Fairness' becomes an important

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concern during litigation when one party would suffer prejudice from his opponent's abuse of the privilege. Most commonly, such prejudice occurs in three types of situations: (1) the strategic introduction into evidence of only part of a larger class of privileged material ...; (2) the strategic timing of the decision to rely upon privileged evidence, as in pre-trial disclosure; and (3) the pleading of claims that place at issue the subject matter of privileged communications. In response to such strategic manipulation of privileges, courts have invoked the doctrine of waiver to ensure the full and timely disclosure of any communications that one party seeks to use against the other") & S. Lederman, A. Bryant & M. Fuerst, The Law of Evidence in Canada 1025 (5th ed. 2018) ("waiver may occur when fairness requires it"). See *Petro Can Oil & Gas Corp. v. Resource Service Group Ltd*., 90 A.R. 220, 223 (Q.B. 1988) per Mason, J. ("It would be unfair to permit a party who has set up a claim or defence based on privileged communications to preclude his opponent from discovering against that claim by relying upon the privilege"); *Paragon Finance Plc v. Freshfields*, [1999] 1 W.L.R. 1183, 1188 (C.A.) per Lord Bingham ("While there is no rule that a party who waives privilege in relation to one communication is taken to waive privilege in relation to all, a party may not waive privilege in such a partial and selective manner that unfairness or misunderstanding may result"); *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd*., [1983] 4 W.W.R. 762, 765-66 (B.C. Sup. Ct.) per McLachlin, J. ("As pointed out in Wigmore on Evidence … double elements are predicated in every waiver — implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived"); *Mann v. Carnell*, [1999] HCA 66, ¶ 29; 201 C.L.R. 1, 13 per Gleeson, C.J. & Gaudron, Gummow & Callinan, JJ. ("Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of law'. This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. ... What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large"); *Goldberg v Ng*, [1995] HCA 39, ¶ 18; 185 C.L.R. 83, 95-96 per Deane, Dawson & Gaudron, JJ. ("The circumstances in which a waiver of legal professional privilege will be imputed by operation of law cannot be precisely defined in advance. The most that can be done is to identify a number of general propositions. Necessarily, the basis of such an imputed waiver will be some act or omission of the persons entitled to be benefit of the privilege. Ordinarily, that act or omission will involve or relate to a limited actual or purported disclosure of the contents of the privileged material. When some such act or omission of the person entitled to the benefit of the privilege gives rise to a question of imputed waiver, the governing consideration is whether 'fairness requires that this privilege shall cease whether he intended that result or not'"); *Attorney General for the Northern Terr. v. Maurice*, 1986 HCA 80, ¶ 7; 161 C.L.R. 475, 481 per Gibbs, C.J. ("the question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production") & *United States v. St. Pierre*, 132 F. 2d 837, 840 (2d Cir. 1942), cert. granted, 318 U.S. 751 per Hand, Cir. J. ("It must be conceded that the [attorney-client] privilege is to suppress the truth, but that does not mean that it is a privilege to garble it although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition").

engages in conduct[22] that either demonstrates an intention to disclose information covered by the lawyer-client privilege to a third party or justifies depriving the privilege holder of the protection of the privilege by operation of law.[23]

[16] Voluntary disclosure is easy to recognize – so are the consequences, most of the time.[24] The privilege holder actually discloses or authorizes the disclosure of information that is subject

[22] *0678786 B.C. Ltd v, Bennett Jones LLP*, 2021 ABCA 62, ¶ 41, leave to appeal ref'd, [2021] S.C.C.A. No. 78 ("the allegation is that Voorheis conducted itself in such a way that the privilege had, in law, been deemed to be waived").

[23] Id. ¶ 40 ("The client can waive its solicitor and client privilege. This can be done expressly, or in certain circumstances the conduct of the client will amount to a waiver. ... While sometimes referred to as instances of 'implied intent to waive', in the absence of any actual intention these factors are more helpfully described as circumstances where by operation of law the privilege is regarded as having been lost") & Andrews, "The Influence of Equity upon the Doctrine of Legal Professional Privilege", 105 Law Q. Rev. 608, 623-24, (1989) ("termination of [legal professional] privilege in this situation is an imposition of law").

[24] But see the conflict between *Fyffes Plc v. DDC Plc*, [2005] IESC 3; [2005] 1 I.R. 59 (the Supreme Court recognized the continued existence of lawyer-client privilege and upheld a High Court order dismissing a disclosure application in a civil action for insider trading relating to a document the respondent privilege holder had filed in confidence with the Irish Stock Exchange in support of its request that the Irish Stock Exchange not forward an insider trading allegation to the Director of Public Prosecution for possible criminal prosecution); *Redfern Ltd. v. O'Mahony*, [2009] ICSC 18, ¶ 17; [2009] 3 I.R. 583, 590 per Finnegan, J. ("If the document comes into the public domain privilege will be lost. It will not, however, be lost where there is limited disclosure for a particular purpose or to parties with a common interest. ... Such disclosure does not evince; *B v. Auckland District Law Society*, [2003] UKPC 38, ¶ 71; [2003] 2 AC 736, 762 ("a lawyer must be able to give his client an unqualified assurance, not only that what passes between them shall never be revealed without his consult in any circumstances, but should he consent in future to disclosure for a limited purpose those limits will be respected"); *British Coal Corp v. Dennis Rye Ltd*, [1988] 1 W.L.R. 1113, 1121-22 (C.A. 1988) per Neill, L.J. ("the action of the plaintiff in making documents available [for the defendants] for the purpose of the criminal trial did not constitute a waiver of the privilege to which it is entitled in the present civil proceeding. Its action in regard to both the Category A and the Category B documents was in accordance with its duty to assist [the defendants] in the conduct of the criminal proceedings, and could not properly be continued as an express or implied waiver of its rights in it own civil litigation"); *Property Alliance Group Ltd v Royal Bank of Scotland*, [2015] EWHC 1557 (CL), ¶ 106 ("[The Royal Bank of Scotland PLC] ... can maintain its claim to privilege because two conditions are satisfied. First, the agreements with the US authorities explicitly state that the documents are being provided on the basis that confidentiality and privilege would be preserved as against third parties. Second, the documents were provided for the limited purpose of the ongoing investigations. Therefore, there has been no waiver"); & *Citic Pacific Ltd. v. Secretary for Justice Governor of Police*, 2015 HK LRD 20, ¶ 75 ("Like English law, Hong Kong recognizes the concept of limited waiver"), on the one hand, and *Goldberg v. Ng*, [1995] HCA 39, ¶ 27; 185 C.L.R. 83, 100-01 per Deanne, Dawson & Gaudron, JJ. ("There remains for consideration the question whether Mahoney, JA and Clarke JA fell into error in concluding that Mr. Goldberg's provision of the privileged documents [the documents Mr. Goldberg had prepared for the lawyer he retained to defend the action commenced against him by his former clients and the complainants who filed a complaint against Mr. Goldberg with the Law Society] to the Law Society created a situation where considerations of fairness required an imputed waiver of Mr. Goldberg's legal professional privilege in relation to those documents. ... [I]n the context of the inference that Mr. Goldberg's delivery of the documents to the Law Society was voluntary and for the calculated purpose of assisting him to rebut Mr. Ng's complaint, it appears to us that those considerations [preserving the privilege] are outweighed by other considerations which favour ... [the contrary conclusion]").

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to the lawyer-client privilege to a third party.[25] It is usually clear that the privilege holder does not intend to maintain the confidentiality of the information that is drawn from the lawyer-client pool of protected facts. This act undermines the purpose that the privilege serves.

[17] For example, if O, an offender, wishes to withdraw his guilty plea on account of inadequate or incorrect legal advice, O must provide an evidentiary basis for his application.[26] O discloses the advice his lawyer gave him and authorizes his lawyer to discuss relevant facts with the Crown.[27] O's disclosure of his lawyer's advice is voluntary.

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[25] See *Smith v. Smith*, [1958] O.W.N. 135, 136 (Master 1957) ("the plaintiff … by filing an affidavit setting out the gist of the conversations had between himself and his former solicitor thereby waived any privilege he may have respecting such conversations. … [I]t would be most unfair to allow the plaintiff to base his application … on information he alleges was given to him by a solicitor, and then obtain a privilege for such communication and thus prevent the defendant from checking the accuracy of the plaintiff's statement"); *Goldberg v. Ng*, [1995] HCA 39, ¶ 30; 185 C.L.R. 83, 102 (the High Court upheld an order requiring Mr. Goldberg to disclose privileged documents he provided to the Law Society in response to a misconduct complaint: "The conclusion ... that there was an imputed waiver by Mr Goldberg of legal professional privilege in relation to the documents provided to the Law Society was correct"); *Carnegie Institute of Washington v. Pure Grown Diamonds, Inc.*, 481 F. Supp. 3d 276, 280 (S.D.N.Y. 2020) ("Huron Capital [a potential investor in M7D] waived its privilege [in legal advice provided by its attorneys regarding the intellectual property and trade secrets of M7D] when it shared its attorneys' analysis with M7D and TM Capital [M7D's financial advisor], and in any event when it shared it with a group of potential investors on November 7, 2018"); *AMCA Int'l Corp. v. Phipard*, 107 F.R.D. 39, 44 (D. Mass. 1985) (the plaintiff's disclosure to the defendant of a memorandum from plaintiff's corporate counsel stating counsel's opinion on the proper method to calculate royalties waived privilege with respect to the memorandum but nothing else); *United States v. Moriel*, 201 F. Supp. 2d 952, 956 (S.D. Iowa 2002) ("When Moriel entered the relationship with her bankruptcy attorney, the attorney-client privilege existed. But then, she voluntarily filed exhibit 2 with the bankruptcy court. Exhibit 1 was a document prepared by Moriel, and used by her attorney to prepare exhibit 2. This petition was a disclosure of a significant part of the communication between Moriel and her bankruptcy lawyer, and she thereby waived the attorney-client privilege with respect to the underlying document used in preparing the petition") & *United States v. Jones*, 696 F. 2d 1069, 1073 (4th Cir. 1982) ("Assuming ... that the attorney-client privilege applies to the subpoenaed documents and testimony, the privilege was nevertheless waived by the appellants. The success of appellants' business venture depended upon convincing potential investors that purported tax benefits existed in fact, and this rested on interpretation of the tax laws. The appellants not only obtained the tax law opinions for the ultimate use of persons other than themselves, but also *publicized* portions of the legal opinions in brochures and other printed material. They cannot now assert a right to quash the subpoenas (1) to block the grand jury's access to documents substantial portions of which the appellants have published to the public at large, or (2) to prevent the revelation of the factual communications between the appellants and their attorneys underlying the published opinion letters") (emphasis added).

[26] *The Queen v. Tokaryk*, 2019 ABCA 439, ¶ 25 ("no waiver was provided by the appellant. Without more, the materials before us provide no evidentiary basis for concluding that trial counsel failed to make ss. 8 and 9 *Charter* applications") & *The Queen v. Meer*, 2015 ABCA 141, ¶ 35; 401 D.L.R. 4th 417, 441, aff'd, 2016 SCC 5; [2016] 1 S.C.R. 23 ("To make this argument effectively it is generally necessary for the appellant to waive solicitor-client privilege").

[27] *The Queen v. Sewak*, 2019 ABCA 303, ¶ 24; 92 Alta. L.R. 6th 27, 32-33 (the Court allowed the Crown to admit as fresh evidence an affidavit of the appellant's trial lawyer, whom the appellant alleged provided ineffective assistance)

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[18] Or suppose A.B. Corporation instructs its lawyers to prepare a draft statement of claim challenging the constitutionality of a bylaw adopted by X, a statutory delegate, and an opinion explaining why X's bylaw is unconstitutional. A.B. Corporation instructs its lawyers to disclose this work product to X. Both A.B. Corporation and its lawyers believe that its legal position is so strong that X will reconsider its legal position and repeal its suspect bylaw. When A.B. Corporation's lawyers intentionally forwarded the draft claim and legal opinion to X's lawyers, A.B. Corporation lost its privilege in the draft claim and legal opinion. This is so regardless of X's response.

[19] Waiver by operation of law[28] – as a rule, triggered by acts of the privilege holder that do not involve actual disclosure of information covered by lawyer-client privilege to a third party – is a more challenging concept.

[20] The abstract inquiry that must be answered when considering whether the law ought to deny the privilege holder the continued benefit of the privilege is this: When is it just on the basis of fairness and consistency to deny a privilege holder the privilege? Unfairness exists when the detriment that the non-privilege holder suffers as a result of recognition of the privilege and denying the non-privilege holder access to the protected facts – impairment of the non-privilege holder's ability to present its case – exceeds the harm that befalls the privilege holder by extinguishing the privilege and putting the otherwise protected facts into issue.

& *The Queen v. Peequaquat*, 2019 ABCA 236, ¶ 14 ("Mr. Peequaquat waived solicitor-client privilege permitting Mr. Chartrand [his former lawyer] to testify").

[28] *Goldberg v. Ng*, [1995] HCA 39, ¶ 17; 185 C.L.R. 83, 95 per Deane, Dawson & Gaudron, JJ. ("It is clear that there has been no express or intentional general waiver by Mr Goldberg of legal professional privilege in the present case. ... Accordingly, if there was a waiver of the privilege as against the Ngs, it was a waiver imputed by operation of law in the particular circumstances"); *United States v. Workman*, 138 F. 3d 1261, 1263-64 (8th Cir. 1998) per Murphy, Cir. J. ("The attorney client privilege may also be implicitly waived ... and one way that is done is by raising attorney advice as a defense. ... During his opening statement and by his questioning of Levad [the former lawyer], Workman's trial counsel placed Levad's advice in issue by asserting that Workman had relied on the advice in cashing the checks [issued by the Railroad Retirement Board after his father's death]. Workman cannot selectively assert the privilege to block the introduction of information harmful to his case after introducing other aspects of his conversations with Levad for his own benefit. ... The attorney client privilege cannot be used as both a shield and a sword ... and Workman cannot claim in his defense that he relied on Levad's advice without permitting the prosecution to explore the substance of that advice"); *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co*., 32 F. 3d 851, 863 (3d Cir. 1994) ("Courts have found that by placing the advice [of counsel] in issue, the client has opened to examination facts relating to that advice. ... The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication"); *Re Windeshausen*, 546 B.R. 798, 809 (Bankr. Ct. W.D. Wis. 2016) ("if a debtor asserts as a defense that he was acting on the advice of his attorney, the privilege is waived") & *Stern v. O'Quinn*, 253 F.R.D. 663, 676 (S.D. Fla. 2008) ("a party waives ... privilege protection when (1) assertion of the protection results from some affirmative act by the party invoking the protection; (2) through this affirmative act, the asserting party puts the protected information at issue by making it relevant to the case; and (3) application of the protection would deny the opposing party access to information vital to its defense").

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[21] Suppose a lawyer settles a dispute[29] between his client and the potential defendant's insurer. The client subsequently retains another lawyer and commences a lawsuit seeking damages for the same wrong the first lawyer settled. The insurer defends, relying on the settlement. This is what happened in *Conlon v. Conlons, Ltd*.[30] In answer to a personal injury claim, the defendant pleaded that it – through its insurer – had accepted a settlement offer from the plaintiff's solicitor. Part of the defence reads as follows:[31]

> [3] Further, or in the alternative, by letters passing between the plaintiff's solicitors and the defendants by their duly authorized agents [the insurer] dated Mar. 17 and 23 and April 3, 1950, and by two cheques from the defendants or their … agents enclosed in the last letter the plaintiff's claim was compromised by way of accord and satisfaction for £ 1,000 and twenty-one guineas costs … .

The plaintiff delivered a reply, a portion of which follows:[32] "2. The plaintiff denies that he agreed to compromise his claim as in para. 3 of the defence alleged or at all. 3. If any such agreement purported to have been entered into as alleged, which is denied, the plaintiff's solicitor had no authority to make the same." The plaintiff refused to answer interrogatories relating to the alleged settlement letters. The Court of Appeal dismissed an appeal from an order of the Queen's Bench Division upholding an order of the master directing the plaintiff to answer the interrogatories. The

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[29] Lawyer-client privilege and settlement privilege protect two different interests and serve very different purposes. *Union Carbide Canada Inc. v. Bombardier Inc*., 2014 SCC 35, ¶ 31; [2014] 1 S.C.R. 800, 818 per Wagner, J. ("Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the 'without prejudice' rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement") & *Cutts v. Head*, [1984] 1 All E.R. 597, 605 per Oliver, L.J. ("parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations … may be used to their prejudice in the course of the proceedings. They should … be encouraged freely and frankly to put their cards on the table"). A party that seeks to prove settlement negotiations were successful may lead evidence of the facts the party alleges support its claims that the parties settled a matter. *Union Carbide Canada Inc. v. Bombardier Inc*., 2014 SCC 35, ¶ 35; [2014] 1 S.C.R. 800, 821 per Wagner, J. ("A communication that has led to a settlement will cease to be privileged if disclosing it is necessary in order to prove the existence or the scope of the settlement. Once the parties have agreed on a settlement, the general interest of promoting settlements requires that they be able to prove the terms of their agreement"); *Moving Picture Machine Operators Union Local No. 162 v. Glasgow Theatres Inc*., 86 Cal. Rptr. 33, 37 (Ct. App. 1970) ("evidence relative to the issue of whether there has been an accord and satisfaction is not subject to the objection that it violates the rule which excludes offers of compromise"). The underlying purpose of the law that preserves from judicial scrutiny attempts litigants or potential litigants make to settle their differences no longer has any force if one of the litigants or potential litigants asserts that the parties have resolved their difference. S. Lederman, A. Bryant & M. Fuerst, The Law of Evidence in Canada 1103 (5th ed. 2018) ("If the negotiations are successful and result in a consensual agreement, then the communications may be tendered in proof of the settlement where the existence or interpretation of the agreement is itself in issue").

[30] [1952] 2 All E.R. 462, 463 (C.A.).

[31] Id.

[32] Id.

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plaintiff's assertion in his reply that his solicitor had "no authority" puts into issue the solicitor's actual authority. Lord Justice Singleton opined that the defendant would have been entitled to have the plaintiff answer this interrogatory: "Did you authorise your solicitors to accept £ 1,000 and costs, or to settle the case for £ 1,000 and costs?".[33]

C.

[22] Third, pleadings are important.[34] They identify the issues a court must resolve.[35]

[23] A commencement document must set out the facts on which the plaintiff bases its claim for relief and the relief sought.[36] It should also allege the cause of action that justifies the relief claimed.

[24] A defence document informs the plaintiff and the court of the defendant's defence – the facts on which it relies and the legal consequences of the pleaded facts.

[25] A privilege holder must proceed with great caution if responding to an allegation in a pleading that the privilege holder's lawyer did something that is adverse to the position the privilege holder now wishes to advance.

[26] While I am aware that neither side asked for advice on how a privilege holder should draft its pleadings to reduce the risk its pleadings will cause a court to conclude that the privilege is

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[33] Id. 466.

[34] W. Stevenson & J. Côté, Alberta Civil Procedure Handbook 2022, at 13.24 ("Pleadings are of key importance").

[35] L. Abrams & K. McGuinness, Canadian Civil Procedure Law 739 (2d ed. 2010) ("the purposes of pleadings are: to define the issues in dispute, to give notice to the other side of the case to be met"); A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 328-29 (4th ed. 2021) ("The process of identifying the issue in dispute is carried out by exchanging statements of case, previously known as pleadings. .... In a statement of case, a party needs to state all the material facts pertinent to their case. Where a claimant has not pleaded a fact necessary to establish a particular cause of action, the court has no jurisdiction to give judgment on that point. Likewise, a defendant who has chosen not to plead all the factual ingredients of a given defence could not rely on that defence"); *Al Rawi v. Security Service*, [2010] EWCA Civ 482, ¶ 18; [2010] 4 All E.R. 559, 565, aff'd [2011] UKSC 34; [2012] 1 All E.R. 1 per Lord Neuberger, M.R. ("a civil claim should be conducted on the basis that a party is entitled to know, normally through a statement of case, the essentials of its opponent's case in advance, so that the trial can be fairly conducted, and, in particular, the parties can properly prepare their respective evidence and arguments for trial"); C. Wright & A. Miller, Federal Practice and Procedure, § 1202 (4th ed. 2021) ("Historically pleadings have served four major functions: (1) giving notice of the nature of a claim or a defense, (2) stating the facts each party believes to exist; (3) narrowing the issues that must be litigated; and (4) providing a means for speedy disposition of sham claims and insubstantial defenses") & *Banque Commerciale SA v. Akhil Holdings Ltd.*, 169 C.L.R. 279, 286 (High Ct. Austl. 1990) per Mason, C.J. ("The function of pleadings is to state with sufficient clarity the case that must be met ... . In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision").

[36] *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 13.6(2)(a) & (c).

lost,[37] I do so because the case law and the literature seldom discuss this topic, the subject matter is of importance to lawyers,[38] and I believe that I might be able to provide some clarity to this vexing problem.

[27] I am satisfied that a privilege holder may safely plead that the privilege holder's lawyer[39] did not do that which the adversary alleges in its pleadings – what opposing lawyers say to each other either orally or in writing is not privileged – or that the lawyer had no ostensible or apparent authority[40] – as opposed to actual authority – to do what the lawyer is alleged to have done – again, what opposing lawyers say to each other either orally or in writing is not privileged on account of the lawyer-client privilege. A court cognizant of the governing legal principles will not determine that the privilege holder has lost its lawyer-client privilege on account of such pleadings.

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[37] See *Saskatchewan Provincial Court Judges Ass'n v. Saskatchewan*, [1996] 2 W.W.R. 129, 137 (Sask. C.A. 1995) per Wakeling, J.A. ("I agree … that the pleadings could be improved. … I am aware [that] … when pleadings as originally drafted are examined with the benefit of factums and the comments of skilled counsel, an appellate court is in an uniquely advantageous position to provide positive useful advice on the improvement of the relevant pleadings. What makes me somewhat reluctant to proceed with a detailed analysis of these pleadings is the realization the application before the chamber judge was not to seek help in the redrafting of the pleadings, but to see whether they disclosed a cause of action as drafted and that objective should remain the primary focus").

[38] See Marcus, "The Perils of Privilege: Waiver and the Litigator", 84 Mich. L. Rev. 1605, 1609 (1986) ("The risk of waiver can lead to the expenditure of extraordinary amounts of energy (and money) to avoid waiver, particularly in discovery").

[39] P. Watts & F. Reynolds, Bowstead and Reynolds on Agency 4 (22nd ed. 2021) ("a solicitor ... when merely giving advice to a client is not an agent, but while acting for the client in communicating with outside parties would be an agent") & G. Fridman, Canadian Agency Law 31 (3d ed. 2017) ("A lawyer may be employed in various capacities, and not only in the conduct of litigation. In the course of such employment, a lawyer may involve the client in legal responsibility for an agreement made on the client's behalf by the lawyer acting as the client's agent").

[40] An agent may have actual authority – on account of an objective assessment of the interaction between the principal and the agent – or ostensible or apparent authority – on account of an objective assessment of the nature of the interaction between the principal and a third party. 1 Restatement (Third) of Agency § 2.01 (October 2021 update) ("An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the *agent reasonably believes*, in accordance with the *principal's manifestations to the agent*, that the principal wishes the agent to act") & § 2.03 ("Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a *third party* reasonably believes the actor has authority to act on behalf of the principal and that belief is *traceable to the principal's manifestations*") (emphasis added) & P. Watts & F. Reynolds, Bowstead and Reynolds on Agency 1 (22nd ed. 2021) ("Where such authority results from a manifestation of assent that the agent should represent or act for the principal expressly or impliedly made by the principal to the agent personally, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority"). An agent may have ostensible or apparent authority even if the agent has no actual authority. 1 Restatement (Third) of Agency § 2.03 (October 2021 update) ("The definition [of apparent authority] thus applies to actors who appear to be agents but are not, as well as to agents who act beyond the scope of their actual authority") & P. Watts & F. Reynolds, Bowstead and Reynolds on Agency 9 (22nd ed. 2021) ("apparent authority can be said to be no authority at all, in that the principal has not authorized the agent to act, even if a third party is entitled to assume that the principal has").

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[28] Let me return to the *Conlon v. Conlons Ltd.*[41] fact pattern to illustrate this contention. Suppose Conlon, in his reply, denied that his solicitor ever communicated with the defendant's insurer or that either he or his solicitor received a cheque from the insurer payable to the plaintiff. There is no risk that these statements would justify a determination that the plaintiff has lost the benefit of the lawyer-client privilege and would require the plaintiff to answer the contested question the subject of the master's order. This is because the pleaded facts do not come from the pool of facts protected by the lawyer-client privilege and do not put them into issue. The same result would occur if the plaintiff's reply denied that anything he or his solicitor said to the defendant or the insurer supported the conclusion that the plaintiff's solicitor had ostensible or apparent authority to settle the plaintiff's claim against the defendant. Again, this is because the facts that are relevant in an ostensible authority inquiry are not drawn from the pool of facts that are protected by the lawyer-client privilege and the pleading does not put them in issue. Nothing the plaintiff or his solicitor says to the insurer or the defendant is under the lawyer-client umbrella.

[29] This leaves open the question of how a privilege holder may respond to an allegation in a pleading by a party adverse in interest that the privilege holder's lawyer had actual authority[42] to do something without waiving privilege. In this case the plaintiffs alleged in their statement of claim that Torys LLP had actual authority to agree to an extension of the deadline date set out in the underwriting agreement.[43]

[30] Suppose P is a construction company that specializes in building gas stations and has been retained by D on thirty occasions to construct gas stations. D is in the gasoline-retail business. D has often retained FG Law to negotiate the construction contracts with P, and, as far as P knows, with other construction companies with which D does business. D informs P that it wishes to construct new gasoline stations and will shortly retain counsel to negotiate mutually acceptable terms with P. D informs an FG Law lawyer that it wants P to build all the new gas stations and that D wishes to retain FG Law to negotiate the construction contract. FG Law accepts the retainer and subsequently notifies P in writing that it has been retained to negotiate a construction contract for the ten new sites. Before FG Law sends its notice letter to P, D notifies FG Law that it had decided to build only six of the gasoline stations. Unfortunately, as a result of a miscommunication within FG Law, the FG Law lawyer assigned the task of negotiating the construction contract with P does not know that D wants P to construct only six service stations. FG Law negotiates a construction contract with P that relates to the ten service stations. In keeping with past practice, P and D treat the correspondence between FG Law and P as the binding contract. P makes several binding commitments to suppliers before FG Law and D discover the error. D refuses to make P

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[41] [1952] 2 All E.R. 462 (C.A.).

[42] P. Watts & F. Reynolds, Bowstead and Reynolds on Agency 123 (22nd ed. 2021) ("The authority of an agent may be – (a) actual (express or implied) where it results from a manifestation of assent that the agent should represent or act for the principal expressly or impliedly made by the *principal to the agent*") (emphasis added).

[43] Statement of Claim filed July 7, 2014, ¶ 25 ("Torys LLP had authority, or alternatively, ostensible *authority*, to bind the Defendant to the agreements described in paragraphs 22, 23 and 24") (emphasis added).

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whole and P sues D for $500,000. P pleads that FG Law had actual or ostensible authority or both to bind D with respect to contract terms for the construction of ten gasoline service stations. P also asserts that D had notified it orally that it intended to construct a number of new service stations and wanted P to build them and that it would retain counsel to negotiate a construction contract on its behalf. In addition, it claimed that FG Law notified P in writing that D had retained FG Law to negotiate construction contracts for ten new service stations and that FG Law and P entered into a binding construction agreement.

[31] D, in its defence, could safely assert that the facts P relied on in its statement of claim do not support P's claim that FG Law had actual or apparent authority to negotiate on behalf of D a contract for the construction of ten gasoline service stations. As well, D could plead that P's assertion of actual authority is the subject of lawyer-client privilege and D invokes the privilege.[44] This strikes me as the safest port in what otherwise may be a stormy sea.

[32] Or suppose P pleaded that D retained FG Law on November 2, 2021 to negotiate on behalf of D a construction contract for ten gasoline service stations in accordance with drawings D delivered to P and acceptable price ranges and firm completion dates for each of the ten stations. P asserted that FG Law had actual or ostensible authority or both to bind D.

[33] Again, the safest course for D to follow is to state that P has pleaded facts that are subject to lawyer-client privilege and to invoke the lawyer-client privilege. If D did not do this, and instead denied the specific fact allegations that are subject to lawyer-client privilege, there is a substantial risk that a court may conclude that D has put in issue these facts. This would give P the opportunity to question D about facts subject to the lawyer-client privilege. I am aware that rule 13.12(1) of the *Alberta Rules of Court*[45] states that "[e]very fact in a pleading is denied if the fact is not admitted in another pleading filed by a party opposite in interest". But I am satisfied this rule does not apply if the pleaded facts are subject to the lawyer-client privilege and the party opposite in interest invokes the lawyer-client privilege.

[34] A privilege holder should not plead a fact that is covered by the lawyer-client privilege and put into issue the existence of a fact covered by lawyer-client privilege unless the privilege holder

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[44] This response is consistent with the protocol adopted by the *Alberta Rules of Court* and the *Federal Rules of Civil Procedure* governing the claiming of privilege in the discovery process. See *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 5.8 ("(1) … [F]or each producible record that a party objects to produce, the affidavit of records must … (b) describe the grounds for the objection to produce the record. (2) For the purposes of this rule, the description in the affidavit of records of any record the party objects to produce and the grounds for the objection must be sufficient to enable a court reviewing the records to confirm that each record is disclosed in the affidavit without undermining or proving the privilege that is claimed in respect of the records") & *Fed. R. Civ. P*. 26(b)(5)(A) ("(5) Claiming Privilege … (A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged … the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged …, will enable other parties to assess the claim").

[45] Alta. Reg. 124/2010.

concludes that the pleaded fact and other related facts protected by the privilege that the privilege holder may be ordered to disclose[46] supports the privilege holder's position and outweighs the detriment associated with the disclosure of related facts.

[35] A privilege holder that did what Conlin did – plead that his solicitor "had no authority" – or what Macquarie did – plead that it had given Torys LLP "no instructions to agree to an extension" and that its lawyer had no authority to do so – has put into issue the actual authority of the lawyers and lost the protection of the privilege on this narrow ground – what the privilege holder instructed the lawyers to do.[47]

[36] Macquarie, confronted with an allegation that Torys had notified PetroFrontier that its client had agreed to extend the prospectus-filing deadline and that Torys had both actual and ostensible authority to bind Macquarie to the extension, could have denied the allegation that Torys notified the plaintiffs its client had agreed to an extension or denied that the pleaded facts constituted Torys' ostensible or actual authority to bind Macquarie or both. In addition, Macquarie could have pleaded that it invoked lawyer-client privilege with regards to the plaintiffs' allegation that Torys had actual authority to bind Macquarie to a prospectus-filing extension.

[37] Instead, Macquarie claimed that its counsel did not agree to an extension and had neither instructions nor actual authority to do so.[48] An objective reader, giving the words in Macquarie's

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[46] 8 J. Wigmore, Evidence in Trials at Common Law 638 (J. McNaughton rev. 1961) ("When the client alleges a breach of duty to him by the attorney, the privilege is waived as to all communications relevant to that issue").

[47] *Newman v. Nemes*, 8 C.P.C. 229, 232 (Ont. High Ct. 1978) ("the defendant waived any privilege over the question of whether or not she gave the instructions [to her lawyer to settle] by denying that she gave the instructions and thereby putting the question in issue"); *Bentley v. Stone*, 42 O.R. 3d 149, 153 (Gen. Div. 1998) ("the affidavit of the defendant Stone [I never authorized counsel to serve an offer to settle], by implication, amounts to a waiver of privilege. … In fairness, the plaintiff and the third parties ought to be able to test the defendant Stone's evidence on the issue of authority by checking the veracity or accuracy of her evidence as against the evidence of her solicitor"); *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Co*., 249 Conn. 36, 52-53; 730 A. 2d 51, 60 (Sup. Ct. 1999) ("Because of the important public policy considerations that necessitated the creation of the attorney-client privilege, the 'at issue,' or implied waiver, exception is invoked only when the contents of the legal advice is integral to the outcome of the legal claims of the action. … Such is the case when a party specifically pleads reliance on an attorney's advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication, or specifically places at issue, in some other manner, the attorney-client relationship. In those instances the party has waived the right to confidentiality by placing the content of the attorney's advice directly at issue because the issue cannot be determined without an examination of that advice"); 5 C. Wright & A. Miller, Federal Practice and Procedure § 2016 (4th ed. 2021) ("When a party puts privileged matter in issue as evidence in a case, it thereby waives the privilege as to all related privileged matters on the same subject") & 8 J. Wigmore, Evidence in Trials at Common Law 638 (J. McNaughton rev. 1961) ("The client's offer of his own or the attorney's testimony as to specific communications to the attorney is a waiver to all other communications to the attorney on the same matter") (emphasis deleted).

[48] Statement of Defence filed October 8, 2014, ¶ 86 ("Contrary to the assertions in paragraphs 22 to 25 of the statement of claim, counsel for the parties did not agree to an extension, nor did they have *authority* to do so. PetroFrontier and its counsel knew that Macquarie's counsel (i) did not agree to an extension, (ii) had no instructions to agree to an

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defence their ordinary meaning, would fairly conclude that Macquarie has put in issue the communications that passed between Macquarie and Torys in relation to whether or not Macquarie instructed Torys to agree to an extension of the Monday, July 9, 2012 prospectus-filing deadline.

[38] Macquarie's pleading is a clear assertion that Macquarie did not instruct Torys to agree to an extension of the July 9, 2012 deadline.

[39] Having pleaded a defence based on this assertion, the law infers that Macquarie intended to waive privilege on this specific topic.[49]

[40] To allow Macquarie to invoke the lawyer-client privilege and prevent PetroFrontier from exploring the validity of the assertion would be inconsistent with the waiver of the privilege and unfair to PetroFrontier. Without access to the communication between Macquarie and its counsel on this topic, PetroFrontier would not be able to determine the validity of this defence.

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extension, and (iii) had no *actual* or ostensible authority to bind Macquarie to any extension agreement"). Appeal Record 30 (emphasis added).

[49] Once a court has concluded that a privilege holder has lost privilege, it must determine what the extent of the loss is. *Iozzo v. Weir*, 2004 ABQB 259, ¶ 26 per Slatter, J. ("Once privilege over a subject matter or topic is lost, it is lost with respect to all communications on that topic, not just the ones [selected] … for disclosure"); *Tsakiris v. Tsakiris*, 45 R.F.L. 6th 186, 192 (Ont. Super. Ct. 2007) ("Mr. Tsakiris' assertion in his affidavit that 'I never agreed to a joint valuation' constitutes, in effect, a denial that Mr. Middlebrook [his counsel] had instructions to write the letter that he did on November 1, 2006. By making that assertion, I find that Mr. Tsakiris waived solicitor-client privilege on the narrow issue of whether he gave instructions to Mr. Middlebrook to communicate to the applicant his agreement to a joint valuation for which he would pay"); *Eurasian Natural Resources Corp. v. Dechert LLP*, [2016] EWCA Civ 375, ¶ 32; [2017] 3 All E.R. 1084, 1094 per Gloster, L.J. ("the principle of implied waiver had two limitations: (a) the waiver only extended to those documents which were necessary for the solicitor to defend himself; and (b) the waiver did not entitle the solicitor to see any documents which he had not previously seen in the course of his relationship with the client"); *United States v. Jones*, 696 F. 2d 1069, 1072 (4th Cir. 1982) ("Any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter") & *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 150 (D. Del. 1977) ("In general, the voluntary waiver by a client, without limitation, of one or more privileged documents passing between a certain attorney and the client discussing a certain subject waives the privilege as to all communications between the same attorney and the same client on the same subject").

III.

[41] I dismiss the appeal.

Appeal heard on November 8, 2021

Memorandum filed at Calgary, Alberta
This 12th day of April, 2022

Wakeling J.A.

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Strekaf J.A. and Kirker J.A. (concurring in the result):

Introduction

[42] We have had the opportunity to read our colleague's thoughtfully prepared reasons. We agree with the articulation of the facts and of the core elements of lawyer-client privilege. We also agree with the conclusion that the chambers judge applied the correct legal principles and that there is no basis upon which this Court can interfere with her decision.

[43] We respectfully disagree with:

(a) the formulation at paragraph 20 of the inquiry that must be answered to determine whether circumstances exist where an intention to waive privilege can be inferred; and with,

(b) the suggestion at paragraph 33 that the mere denial of allegations of lawyer-client privileged facts may demonstrate a voluntary intention to waive privilege.

When can a voluntary intention to waive privilege be inferred?

[44] In our view, it is not necessary for a party seeking to establish a waiver of privilege to show that the detriment they will suffer if the privilege is maintained exceeds the harm that will befall the privilege holder if the privilege is lost. The inquiry is not a balancing exercise.

[45] Rather, the passage from Wigmore, found at our colleague's footnote 21, guides the analysis: see *United States of America v Friedland* (1996), 30 OR (3d) 568, 1996 CarswellOnt 3604 (SC) (WL) at para 12, per Sharpe J (as he then was).

[46] In *S & K Processors Ltd v Campbell Avenue Herring Producers Ltd* (1983), 45 BCLR 218, 1983 CanLII 407 (BCSC) at para 10, McLachlin J (as she then was) relied upon the Wigmore passage and stated:

> As pointed out in Wigmore...double elements are predicated in every waiver — implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Rogers v. Hunter*, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 1979 CanLII 1904 (ON CA), 27 O.R. (2d) 395, 11 C.C.L.T. 49, 14 C.P.C. 247, 59 C.C.C. (2d) 87, 106 D.L.R. (3d) 340 (C.A.), it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the [party seeking to maintain the privilege]

> chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.

[47] In *Petro Can Oil & Gas Corp v Resource Service Group Ltd* (1988), 90 AR 220, 1988 CarswellAlta 65 (QB) (WL) at para 18, Mason J explained the rationale for inferring waiver in circumstances where a party relies upon privileged communications to ground a claim or base a defence with the following plain language:

> ... It would be unfair to permit a party who has set up a claim or defence based on privileged communications to preclude his opponent from discovering against that claim by relying upon the privilege. If privilege were successfully raised, the opponent would be left with no reasonable method for exploring the validity of the claim or defence ... [citations omitted].

[48] The central issue in this case is whether Macquarie's statement of defence introduces issues of fact that are subject to lawyer-client privilege. This issue is answered at paragraph 37 of our colleague's reasons: "An objective reader, giving the words in Macquarie's defence their ordinary meaning, would fairly conclude that Macquarie has put in issue the communications that passed between Macquarie and [its external counsel] in relation to whether or not Macquarie instructed [its external counsel] to agree to an extension of the Monday, July 9, 2012 prospectus filing deadline."

[49] Confronted with the allegations in the statement of claim that Macquarie's external legal counsel agreed to extend the prospectus filing deadline and had both actual and ostensible authority to bind Macquarie to the extension, Macquarie could have just denied the allegations, effectively pleading that the facts upon which PetroFrontier relied were not admitted and must be proven and that it must be demonstrated that the proven facts establish the actual or ostensible authority alleged. It would then be entitled to rely upon lawyer-client privilege to prevent PetroFrontier from attempting to discover facts to support the actual authority claim advanced by PetroFrontier. Macquarie chose instead to plead – and thus place in issue – the additional facts that its external counsel had no instructions to agree to an extension and no actual authority to bind Macquarie to any extension agreement.

[50] Having set up a defence based, in part, upon these asserted facts, it can be inferred that Macquarie intended to waive privilege at least to a limited extent. To allow Macquarie to rely upon privilege to prevent PetroFrontier from exploring the validity of these assertions would be inconsistent with the waiver of privilege and unfair to PetroFrontier.

[51] This brings us to the second issue.

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Can an intention to waive privilege be inferred from a mere denial?

[52] Allegations that rely on an opposing party's privileged communications "cannot be used as a sword to pierce privilege": *Manson Insulation Products Ltd v Crossroads C & I Distributors*, 2014 ABQB 634 at para 67. If the mere denial of such allegations demonstrates a voluntary intention to waive privilege, then a sword to pierce privilege is what those allegations become. This is because a mere denial does not change the plaintiff's position in the litigation in any respect: *Pax Management Ltd v AR Ristau Trucking Ltd* (1987), 14 BCLR (2d) 257, 1987 CarswellBC 158 at para 25 (CA) (WL). Indeed, where silence in response to an alleged fact is deemed by Rule 13.12(1) to be a denial, the plaintiff's pleading alone could determine the waiver.

[53] Put differently by the court in *Sovereign General Insurance Company v Taner Industries Ltd*, 2002 ABQB 101 at paras 40-41, citing *Pax Management*:

> A simple denial is akin to saying "prove it". "Proving it" is precisely the burden the Plaintiff shoulders in making the allegation. How then could identifying what must be done result in some implied waiver of privilege. There is no rational connection between the insistence on proof and a waiver of privilege. There is nothing in the denial which calls upon privileged material. If the Applicant's position is accepted, then every allegation, once denied, would compel production in the face of privilege.
>
> … a simple denial does not authorize the Applicant to root around in the Respondent's brief [citing *PAX Management*].

[54] It is only where a pleading goes further than simply denying the allegations by putting into issue additional facts that are subject to lawyer-client privilege that an inference of waiver can be drawn.

Appeal heard on November 8, 2021

Memorandum filed at Calgary, Alberta
This 12th day of April 2022

Strekaf J.A.

Kirker J.A.

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Appearances:

A.W. Wilkinson
for the Respondents

R.W. Staley and J.R. Lambert
for the Appellant

Director of Criminal and Penal Prosecutions *Appellant*

v.

Robert Jodoin *Respondent*

and

Director of Public Prosecutions, Criminal Lawyers' Association (Ontario), Association des avocats de la défense de Montréal, Trial Lawyers Association of British Columbia and Canadian Civil Liberties Association *Interveners*

Indexed as: Quebec (Director of Criminal and Penal Prosecutions) *v.* Jodoin

2017 SCC 26

File No.: 36539.

2016: December 5; 2017: May 12.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Criminal law — Costs — Lawyers — Courts — Jurisdiction — Superior Court dismissing motions of defence lawyer for writs of prohibition and awarding costs against lawyer personally — Court of Appeal setting award aside — Criteria and process applicable to exercise by courts of their power to impose such sanction on lawyer — Whether awarding costs against lawyer personally was justified in this case — Whether Court of Appeal erred in substituting its own opinion for that of Superior Court.

J, an experienced criminal lawyer, was representing 10 clients charged with impaired driving. On the morning of a scheduled hearing in the Court of Québec on a motion for disclosure of evidence in his clients' cases, before it even began, J had the office of the Superior Court stamp a series of motions for writs of prohibition in which he challenged the jurisdiction of the Court of

Directeur des poursuites criminelles et pénales *Appelant*

c.

Robert Jodoin *Intimé*

et

Directeur des poursuites pénales, Criminal Lawyers' Association (Ontario), Association des avocats de la défense de Montréal, Association des avocats plaideurs de la Colombie-Britannique et Association canadienne des libertés civiles *Intervenants*

Répertorié : Québec (Directeur des poursuites criminelles et pénales) *c.* Jodoin

2017 CSC 26

N° du greffe : 36539.

2016 : 5 décembre; 2017 : 12 mai.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Droit criminel — Dépens — Avocats — Tribunaux — Compétence — Cour supérieure rejetant les requêtes d'un avocat de la défense sollicitant la délivrance de brefs de prohibition et condamnant celui-ci personnellement au paiement des dépens — Condamnation annulée en appel — Critères et processus régissant l'exercice par les tribunaux de leur pouvoir d'infliger une telle sanction à un avocat — La condamnation personnelle aux dépens était-elle justifiée en l'espèce? — La Cour d'appel a-t-elle erré en substituant son opinion à celle de la Cour supérieure?

J, avocat criminaliste d'expérience, représente 10 clients accusés de conduite avec facultés affaiblies. Le matin d'une audience prévue en Cour du Québec sur une requête en communication de la preuve dans les dossiers de ses clients, avant qu'elle ne débute, J fait timbrer au greffe de la Cour supérieure une série de requêtes sollicitant la délivrance de brefs de prohibition contestant

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Québec judge who was to preside over the hearing, alleging bias on the judge's part. However, before the motions were served, the parties learned that another judge would be presiding instead. The motions were therefore put aside, and the hearing on the motion for disclosure of evidence began. At the hearing, J objected to the testimony of an expert witness called by the Crown on the ground that he had not received the required notice. The judge decided to authorize the examination in chief of the expert after the lunch break. During the break, J drew up a new series of motions for writs of prohibition, this time challenging that judge's jurisdiction and alleging, once again, bias on the judge's part. After the break, he informed the judge of this and the hearing was adjourned, as the service of such motions suspends proceedings until the Superior Court has ruled on them. The Superior Court dismissed the motions and, at the Crown's request, awarded costs against J personally. The Court of Appeal affirmed the Superior Court's judgment on the disposition of the motions, but allowed the appeal solely to set aside the award of costs against J personally.

Held (Abella and Côté JJ. dissenting): The appeal should be allowed and the award of costs restored.

Per McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ.: The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them. A court therefore has an inherent power to control abuse in this regard and to prevent the use of procedure in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. This is a discretion that must be exercised in a deferential manner, but it allows a court to ensure the integrity of the justice system.

The awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct. This power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases, which means that it may be

la compétence du juge de la Cour du Québec appelé à présider et alléguant sa partialité. Toutefois, avant la signification des requêtes, les parties apprennent que ce sera plutôt un autre juge qui présidera l'audience. Les requêtes sont donc mises de côté et l'audience sur la requête en communication de la preuve débute. En cours d'audience, J s'oppose au témoignage d'un expert du ministère public, au motif qu'il n'a pas reçu le préavis requis. Le juge décide d'autoriser l'interrogatoire principal de l'expert après la pause du midi. Pendant la pause, J rédige une nouvelle série de requêtes sollicitant la délivrance de brefs de prohibition contestant la compétence de ce juge et alléguant, pour lui également, sa partialité. Au retour de la pause, il en informe le juge et l'audience est ajournée, car la signification de telles requêtes opère sursis des procédures jusqu'à ce que la Cour supérieure se soit prononcée sur celles-ci. La Cour supérieure rejette les requêtes et, à la demande du ministère public, condamne personnellement J au paiement des dépens. La Cour d'appel confirme le jugement de la Cour supérieure sur le sort des requêtes mais accueille l'appel, à seule fin d'annuler la condamnation personnelle de J aux dépens.

Arrêt (les juges Abella et Côté sont dissidentes) : Le pourvoi est accueilli et la condamnation aux dépens est rétablie.

La juge en chef McLachlin et les juges Moldaver, Karakatsanis, Wagner, Gascon, Brown et Rowe : Les tribunaux ont le pouvoir de veiller au respect de leur autorité. Cela inclut le pouvoir de gérer, contrôler et maîtriser les procédures qui se déroulent devant eux. Ils possèdent ainsi le pouvoir inhérent de réprimer les abus à cet égard et d'empêcher que la procédure ne soit utilisée d'une manière qui serait manifestement injuste envers une partie au litige, ou qui aurait autrement pour effet de discréditer l'administration de la justice. Il s'agit d'un pouvoir discrétionnaire qui doit s'exercer avec retenue, mais qui permet à un tribunal d'assurer l'intégrité du système judiciaire.

La condamnation personnelle d'un avocat aux dépens découle du droit et du devoir des tribunaux de superviser la conduite des avocats présents devant eux et de signaler, et parfois sanctionner, toute conduite de nature à mettre en échec l'administration de la justice ou y porter atteinte. En tant qu'officiers de la cour, les avocats ont le devoir de respecter l'autorité des tribunaux. Le défaut des avocats d'agir en conformité avec leur statut peut obliger les tribunaux à sévir à leur endroit en sanctionnant leur inconduite. L'exercice par les tribunaux de ce pouvoir de condamner personnellement un avocat au paiement des dépens ne se limite pas aux instances civiles; il s'étend

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exercised against defence lawyers. This power applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members.

The threshold for exercising the courts' discretion to award costs against a lawyer personally is a high one. An award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate.

There are two important guideposts that apply to the exercise of this discretion. The first guidepost relates to the specific context of criminal proceedings, in which the courts must show a certain flexibility toward the actions of defence lawyers, whose role is not comparable in every respect to that of a lawyer in a civil case. If costs are awarded against a lawyer personally, the purpose must not be to discourage the lawyer from defending his or her client's rights and interests, and in particular the client's right to make full answer and defence. Thus, the considerations to be taken into account in assessing the conduct of defence lawyers can be different from those that apply in the case of lawyers in civil proceedings. The second guidepost requires a court to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial. To consider facts external to the case before the court can be justified only for the limited purpose of determining, first, the intention behind the lawyer's actions and whether he or she was acting in bad faith, and, second, whether the lawyer knew, on bringing the impugned proceeding, that the courts do not approve of such proceedings and that this one was unfounded.

A court cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards. A lawyer upon whom such a sanction may be imposed should be given prior notice of the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts, and should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should have an opportunity to make separate

aussi aux instances criminelles et peut donc viser les avocats de la défense. Ce pouvoir s'exerce parallèlement à celui des tribunaux de sévir par une condamnation pour outrage au tribunal et à celui des barreaux de sanctionner l'inconduite de leurs membres sur le plan déontologique.

L'application du pouvoir discrétionnaire des tribunaux de condamner personnellement un avocat au paiement des dépens est circonscrite par des critères d'exercice élevés. Une condamnation personnelle de l'avocat aux dépens ne peut se justifier que de manière exceptionnelle, en présence d'une atteinte sérieuse à l'autorité des tribunaux ou d'une entrave grave à l'administration de la justice. Ce critère élevé est respecté lorsqu'un tribunal est en présence d'une procédure mal fondée, frivole, dilatoire ou vexatoire, qui dénote un abus grave du système judiciaire ou une inconduite malhonnête ou malveillante, commis de propos délibéré par l'avocat.

Deux balises importantes encadrent l'exercice de ce pouvoir discrétionnaire. La première balise découle du contexte particulier des procédures en matière criminelle, lequel requiert une certaine souplesse de la part des tribunaux à l'égard des actions entreprises par les avocats de la défense, dont le rôle n'est pas comparable en tous points à celui de l'avocat en matière civile. La condamnation personnelle aux dépens ne doit pas viser à décourager l'avocat dans la défense des droits et intérêts de son client, notamment son droit à une défense pleine et entière. Ainsi, l'évaluation de la conduite de l'avocat de la défense doit tenir compte de considérations parfois différentes de celles de l'avocat en matière civile. La seconde balise exige que les tribunaux s'en tiennent aux faits propres à l'affaire dont ils sont saisis et qu'ils s'abstiennent de faire indirectement le procès du dossier disciplinaire de l'avocat, voire de sa carrière. Recourir à des faits externes à l'instance concernée ne peut se justifier que dans l'objectif limité de déterminer, d'une part, l'intention et la mauvaise foi derrière les actions de l'avocat et, d'autre part, la connaissance par ce dernier, au moment où il a entrepris les procédures qu'on lui reproche, de la désapprobation de celles-ci par les tribunaux et de leur caractère mal fondé.

Un tribunal ne peut condamner personnellement un avocat aux dépens sans respecter un certain processus et certaines garanties procédurales. L'avocat passible d'une telle sanction devrait recevoir un avis préalable l'informant des allégations formulées à son endroit et des conséquences qui pourraient en découler. Cet avis devrait contenir des informations suffisantes sur les faits reprochés et sur la teneur de la preuve à l'appui, et être transmis suffisamment à l'avance pour permettre à l'avocat de se préparer adéquatement. Ce dernier devrait avoir

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submissions on costs and to adduce any relevant evidence in this regard. The applicable standard of proof is the balance of probabilities. In criminal proceedings, the Crown's role on this issue must be limited to objectively presenting the evidence and the relevant arguments.

l'occasion de présenter des observations distinctes au sujet des dépens, et, le cas échéant, des éléments de preuve pertinents à cet égard. La norme de preuve qui s'impose est celle de la preuve prépondérante. Dans les instances criminelles, le rôle du ministère public sur cette question doit se limiter à présenter objectivement la preuve et les arguments pertinents.

The circumstances of this case were exceptional and justified an award of costs against J personally. The Superior Court correctly identified the applicable criteria and properly exercised its discretion. As the court noted, J's conduct in the cases in question was particularly reprehensible. The purpose of that conduct was unrelated to the motions he brought. J was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. J thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the court to conclude that J had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice. The Court of Appeal should not have intervened in the absence of an error of law, a palpable and overriding error of fact or an unreasonable exercise of discretion by the Superior Court.

La situation en l'espèce était exceptionnelle et autorisait la condamnation personnelle de J au paiement des dépens. La Cour supérieure a bien dégagé les critères applicables et correctement exercé son pouvoir discrétionnaire. Comme elle l'a souligné, la conduite de J dans ces dossiers était particulièrement répréhensible. Elle visait un but étranger aux requêtes entreprises. J était animé par une volonté d'obtenir une remise de l'audience plutôt que par une croyance sincère dans l'inimitié des juges qui étaient la cible de ses requêtes. J a ainsi utilisé les recours extraordinaires à une fin purement dilatoire dans le seul but d'entraver de manière calculée le bon déroulement du processus judiciaire. Devant cela, la cour pouvait raisonnablement conclure que J a fait preuve de mauvaise foi et a abusé des procédures, portant ainsi sérieusement atteinte à l'administration de la justice. La Cour d'appel ne devait pas intervenir en l'absence d'erreur de droit, d'erreur manifeste et déterminante en faits ou d'exercice déraisonnable par la Cour supérieure de son pouvoir discrétionnaire.

Per Abella and Côté JJ. (dissenting): Personal costs orders are of an exceptional nature. In the criminal context, such orders could have a chilling effect on criminal defence counsel's ability to properly defend their client. Accordingly, they should only be issued in the most exceptional of circumstances and the Crown should be very hesitant about pursuing them.

Les juges Abella et Côté (dissidentes) : Les ordonnances condamnant personnellement un avocat aux dépens sont des mesures de nature exceptionnelle. Dans le contexte de procédures criminelles, de telles ordonnances pourraient avoir un effet paralysant sur la capacité des avocats de la défense à défendre adéquatement leurs clients. En conséquence, une telle sanction ne devrait être infligée que dans les circonstances les plus exceptionnelles et le ministère public devrait faire montre de beaucoup de circonspection avant de demander qu'elle le soit.

In the instant case, J's behaviour did not warrant the exceptional remedy of a personal costs order. It appears that his conduct was not unique and that he was being punished as a warning to other lawyers engaged in similar tactics. The desire to make an example of J's behaviour does not justify straying from the legal requirement that his conduct be rare and exceptional before costs are ordered personally against him.

En l'espèce, la conduite de J ne justifiait pas l'imposition de la sanction exceptionnelle que représente la condamnation personnelle d'un avocat aux dépens. Il semble que sa conduite ne présentait pas un caractère exceptionnel et que la sanction qui lui était infligée se voulait un avertissement aux autres avocats ayant recours à des tactiques similaires. Le désir de faire un exemple de J en sanctionnant sa conduite ne saurait justifier de déroger à la règle de droit exigeant que la conduite qu'on lui reproche présente un caractère rare et exceptionnel afin que le tribunal puisse le condamner personnellement aux dépens.

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Moreover, J's motions for writs of prohibition were not unfounded to a sufficient degree to attract a personal costs order. The Crown had not provided J with the notice required for an expert witness testimony under s. 657.3(3) of the *Criminal Code*. J was, as a result, entitled to an adjournment under s. 657.3(4). The judge presiding in the Court of Québec only granted him a brief one over the lunch break and mistakenly said that J had already cross-examined the Crown's expert in other matters. In the circumstances, J's filing of motions for writs of prohibition for the purpose of suspending the proceedings can easily be seen as an error of judgment, but hardly one justifying a personal costs order. For these reasons, the appeal should be dismissed.

De plus, les requêtes sollicitant la délivrance de brefs de prohibition n'étaient pas mal fondées au point de commander une condamnation personnelle aux dépens. Le ministère public n'avait pas donné à J, comme le requiert le par. 657.3(3) du *Code criminel*, de préavis de son intention de faire témoigner un expert. Par conséquent, J avait droit à un ajournement en vertu du par. 657.3(4). Le juge de la Cour du Québec qui présidait l'audience ne lui a accordé qu'une brève suspension pendant la pause du midi et a affirmé à tort que J avait déjà contre-interrogé le témoin expert du ministère public dans d'autres instances. Dans les circonstances, le dépôt par J des requêtes sollicitant la délivrance de brefs de prohibition en vue d'obtenir la suspension des procédures peut aisément être considéré comme une erreur de jugement, mais difficilement comme une erreur justifiant une condamnation personnelle aux dépens. Pour ces motifs, le pourvoi devrait être rejeté.

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By Abella and Côté JJ. (dissenting)

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Daniel Royer and *Catherine Dumais*, for the appellant.

Catherine Cantin-Dussault, for the respondent.

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Daniel Royer et *Catherine Dumais*, pour l'appelant.

Catherine Cantin-Dussault, pour l'intimé.

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Gilles Villeneuve and *Mathieu Stanton*, for the intervener the Director of Public Prosecutions.

Maxime Hébrard and *Marlys A. Edwardh*, for the intervener the Criminal Lawyers' Association (Ontario).

Walid Hijazi, *Lida Sara Nouraie* and *Nicholas St-Jacques*, for the intervener Association des avocats de la défense de Montréal.

Mathew P. Good and *Ariane Bisaillon*, for the intervener the Trial Lawyers Association of British Columbia.

Frank Addario and *Stephen Aylward*, for the intervener the Canadian Civil Liberties Association.

English version of the judgment of McLachlin C.J. and Moldaver, Karakatsanis, Wagner, Gascon, Brown and Rowe JJ. delivered by

Gascon J. —

I. Overview

[1] This appeal concerns the scope of the courts' power to award costs[1] against a lawyer personally in a criminal proceeding. Although the courts have the power to maintain respect for their authority and to preserve the integrity of the administration of justice, the appropriateness of imposing such a sanction in a criminal proceeding must be assessed in light of the special role played by defence lawyers and the rights of the accused persons they represent. In such cases, the courts must be cautious in exercising this discretion.

[1] The Superior Court and the Court of Appeal used the French term "*dépens*" in their reasons and in their conclusions. The appellant and the respondent have referred sometimes to the concept of "*dépens*" and sometimes to that of "*frais*". For consistency, I will use the term used by the courts below in the French version of these reasons.

Gilles Villeneuve et *Mathieu Stanton*, pour l'intervenant le directeur des poursuites pénales.

Maxime Hébrard et *Marlys A. Edwardh*, pour l'intervenante Criminal Lawyers' Association (Ontario).

Walid Hijazi, *Lida Sara Nouraie* et *Nicholas St-Jacques*, pour l'intervenante l'Association des avocats de la défense de Montréal.

Mathew P. Good et *Ariane Bisaillon*, pour l'intervenante l'Association des avocats plaideurs de la Colombie-Britannique.

Frank Addario et *Stephen Aylward*, pour l'intervenante l'Association canadienne des libertés civiles.

Le jugement de la juge en chef McLachlin et des juges Moldaver, Karakatsanis, Wagner, Gascon, Brown et Rowe a été rendu par

Le juge Gascon —

I. Aperçu

[1] Ce pourvoi porte sur l'étendue du pouvoir des tribunaux de condamner personnellement un avocat au paiement des dépens[1] en matière criminelle. Si les tribunaux ont le pouvoir de veiller au respect de leur autorité et au maintien de l'intégrité de l'administration de la justice, l'opportunité d'imposer une telle sanction dans une instance criminelle doit être soupesée au regard du rôle particulier de l'avocat de la défense et des droits de l'accusé qu'il représente. Dans de tels cas, les tribunaux doivent faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire.

[1] La Cour supérieure et la Cour d'appel utilisent le terme « dépens » dans leurs motifs et leurs dispositifs. L'appelant et l'intimé se réfèrent tantôt à la notion de « dépens », tantôt à celle de « frais ». Aux fins d'uniformité, je m'en tiendrai au terme utilisé dans les décisions inférieures.

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[2] The respondent is an experienced criminal lawyer and a member of the Barreau du Québec. In several impaired driving cases joined for hearing on a single motion for disclosure of evidence, he filed two series of motions on the same day for writs of prohibition against two judges of the Court of Québec, each time on questionable grounds of bias, apparently in order to obtain a postponement of the scheduled hearing. A first judge had initially been assigned to preside over that hearing, but a second one replaced the first unexpectedly at the last minute. In response to that unprecedented strategy, which resulted in the postponement of the hearing in the Court of Québec, the appellant, the Crown, asked not only that the motions be dismissed, but also that the costs of the motions be awarded against the respondent personally.

[3] The Superior Court held that awarding costs against a lawyer personally can be justified in the case of a frivolous proceeding that denotes a serious and deliberate abuse of the judicial system. The judge expressed the opinion that the respondent's intentional acts were indicative of such abuse and constituted exceptional conduct that justified making an award against him personally. The Court of Appeal acknowledged that the motions for writs of prohibition should be dismissed, but nonetheless set aside the award of costs against the respondent personally, finding that his conduct did not satisfy the strict criteria developed by the courts in this regard.

[4] In my opinion, the appeal should be allowed. The Superior Court correctly identified the applicable criteria and properly exercised the discretion it has in such matters. The Court of Appeal should not have intervened in the absence of an error of law, a palpable and overriding error of fact or an unreasonable exercise of his discretion by the motion judge. Although the exercise of this discretion will be warranted only in rare cases, the circumstances of the instant case were exceptional and justified an award of costs against the respondent personally.

[2] L'intimé est un avocat criminaliste d'expérience, membre du Barreau du Québec. Dans le cadre de plusieurs dossiers de conduite avec facultés affaiblies réunis pour une même audience sur une même requête en communication de la preuve, il a déposé le même jour deux séries de requêtes sollicitant la délivrance de brefs de prohibition contre deux juges de la Cour du Québec, chaque fois pour des motifs de partialité douteux, vraisemblablement afin d'obtenir une remise de l'audience prévue. Un premier juge devait initialement présider cette audience, mais un second l'a remplacé à la dernière minute, contre toute attente. Devant cette démarche inédite qui a entraîné le report de l'audience devant la Cour du Québec, l'appelant, le ministère public, a demandé non seulement le rejet des requêtes, mais aussi la condamnation personnelle de l'intimé au paiement des dépens en découlant.

[3] La Cour supérieure a conclu que la condamnation personnelle de l'avocat aux dépens pouvait se justifier en présence d'une procédure frivole qui dénote un abus grave du système judiciaire commis de propos délibéré. Le juge a estimé que les gestes intentionnels de l'intimé révélaient un tel abus et constituaient une conduite exceptionnelle justifiant sa condamnation personnelle. Tout en reconnaissant qu'il y avait lieu de rejeter les requêtes sollicitant la délivrance de brefs de prohibition, la Cour d'appel a néanmoins infirmé la condamnation personnelle de l'intimé aux dépens, exprimant l'avis que sa conduite ne répondait pas aux critères stricts élaborés par la jurisprudence.

[4] J'estime qu'il y a lieu d'accueillir l'appel. La Cour supérieure a bien dégagé les critères applicables et correctement exercé son pouvoir discrétionnaire en la matière. La Cour d'appel ne devait pas intervenir en l'absence d'erreur de droit, d'erreur manifeste et déterminante en faits ou d'exercice déraisonnable par le premier juge de son pouvoir discrétionnaire. Bien que les cas justifiant cet exercice demeurent rares, la situation en l'espèce était exceptionnelle et autorisait la condamnation personnelle de l'intimé au paiement des dépens.

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II. Context

[5] The relevant context of this case can be summarized briefly. In April 2013, the respondent was representing 10 clients charged with driving while impaired by alcohol or while their blood alcohol level exceeded the legal limit. There were 12 cases, and they were joined for a hearing scheduled in the Court of Québec on a motion for disclosure of evidence, because the accused were all represented by the respondent. On the morning of the hearing, before it even began, the respondent had the office of the Superior Court stamp a series of motions for writs of prohibition in which he challenged the jurisdiction of the Court of Québec judge who was to preside over the hearing, alleging bias on the judge's part. As an experienced criminal lawyer, the respondent was well aware that the filing of such motions results in the immediate postponement of the hearing then under way until the Superior Court has ruled on them.

[6] However, the same morning, before the motions were served, the parties learned that another judge would be presiding over the hearing instead. The motions were therefore put aside, and the hearing on the motion for disclosure of evidence began. At the hearing, the Crown stated that it wished to call its expert witness. The respondent objected on the ground that he had not received the notice required by s. 657.3(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, and that he had been unable to consult the expert's resumé. He requested a postponement. The judge heard the parties on this subject and decided to authorize the examination in chief of the expert after the lunch break. In his view, the respondent would have an opportunity to examine the expert's resumé before the hearing resumed.

[7] During the break, the respondent chose instead to draw up a new series of motions for writs of prohibition, this time challenging the second judge's jurisdiction and alleging, once again, bias on the judge's part. After the break, he informed the judge of this. As a result of s. 25 of the *Rules of Practice of the Superior Court of the Province of Quebec, Criminal Division, 2002*, SI/2002-46, which provides that

II. Contexte

[5] Le contexte pertinent dans le cadre du litige se résume succinctement. En avril 2013, l'intimé représente 10 clients accusés de conduite d'un véhicule alors que leurs facultés étaient affaiblies par l'alcool ou que leur alcoolémie dépassait la limite permise. Douze dossiers sont concernés, et ils sont réunis pour les besoins d'une audience fixée en Cour du Québec sur une requête en communication de la preuve car les accusés sont tous représentés par l'intimé. Le matin de l'audience prévue, et ce, avant même qu'elle ne débute, l'intimé fait timbrer au greffe de la Cour supérieure une série de requêtes sollicitant la délivrance de brefs de prohibition contestant la compétence du juge de la Cour du Québec appelé à présider et alléguant sa partialité. Avocat expérimenté en droit criminel, l'intimé est alors bien au fait que le dépôt de telles requêtes entraîne la remise immédiate de l'audience en cours jusqu'à ce que la Cour supérieure se soit prononcée sur celles-ci.

[6] Toutefois, le même matin, avant la signification de ces requêtes, les parties apprennent que ce sera plutôt un autre juge qui présidera l'audience. Les requêtes sont donc mises de côté, et l'audience sur la requête en communication de la preuve débute. En cours d'audience, le ministère public indique qu'il souhaite faire témoigner son expert. L'intimé s'y oppose, au motif qu'il n'a pas reçu le préavis requis par le par. 657.3(3) du *Code criminel*, L.R.C. 1985, c. C-46, et qu'il n'a pu consulter le curriculum vitae de l'expert. Il exige une remise. Le juge saisi entend les parties sur le sujet et décide d'autoriser l'interrogatoire principal de l'expert après la pause du midi. Il estime que l'intimé aura eu, dans l'intervalle, l'occasion d'étudier le curriculum vitae de l'expert.

[7] Pendant la pause, l'intimé choisit plutôt de rédiger une nouvelle série de requêtes sollicitant la délivrance de brefs de prohibition contestant cette fois la compétence de ce deuxième juge et alléguant, une fois de plus, la partialité du juge. Au retour de la pause, il en informe le juge saisi. Vu l'article 25 des *Règles de procédure de la Cour supérieure du Québec, chambre criminelle (2002)*, TR/2002-46, qui

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the service of such motions suspends proceedings, the judge had no choice but to adjourn the hearing.

[8] The appellant, believing that the sole purpose of these successive extraordinary remedies was to obtain a postponement for an ulterior motive, objected to the respondent's tactic. He told the respondent that he intended to seek an award of costs against the respondent personally because of the latter's dilatory motions and abuse of process. The Superior Court thus heard the motions for writs of prohibition both on the merits and on the award of costs being sought against the respondent personally.

III. Judicial History

A. *Quebec Superior Court (2013 QCCS 4661)*

[9] The Superior Court judge began by rejecting the arguments on the merits of the motions for writs of prohibition against the Court of Québec judge. He found that the motions were unfounded and frivolous and that they were of questionable legal value for an experienced lawyer such as the respondent.

[10] The judge then dealt with the costs award being sought against the respondent. Indeed, he devoted the bulk of his reasons to that issue, as it was clear, to say the least, that the proceeding was frivolous, given that there was nothing in the words of the Court of Québec judge to indicate an excess of jurisdiction.

[11] On the law applicable to the issue of costs in criminal proceedings, the Superior Court judge cited *Quebec (Attorney-General) v. Cronier* (1981), 63 C.C.C. (2d) 437 (Que. C.A.). He noted that L'Heureux-Dubé J.A., as she then was, had emphasized [TRANSLATION] "the inherent power of the Superior Court to manage cases within its jurisdiction and to award costs not provided for by statute" (para. 115 (CanLII)). On the basis of the principles enunciated in *Cronier*, the judge found that the issue was whether what was before him was "a frivolous proceeding that denotes a serious abuse of the

prévoit que la signification de telles requêtes opère sursis des procédures, le juge n'a d'autre choix que d'ajourner l'audience.

[8] Estimant que ces recours extraordinaires successifs n'ont comme seul objectif que l'obtention d'une remise sur la base d'un motif oblique, l'appelant s'oppose à la démarche. Il annonce à l'intimé son intention de demander sa condamnation personnelle aux dépens en raison de ces requêtes dilatoires et de cet abus de procédures. Les requêtes sollicitant la délivrance de brefs de prohibition sont donc entendues par la Cour supérieure tant sur le fond que sur le volet de la condamnation aux dépens recherchée personnellement contre l'intimé.

III. Historique judiciaire

A. *Cour supérieure du Québec (2013 QCCS 4661)*

[9] Le juge de la Cour supérieure écarte d'abord les arguments sur le fond des requêtes visant à obtenir la délivrance des brefs de prohibition à l'encontre du juge de la Cour du Québec. Il constate que ces requêtes sont mal fondées, frivoles et d'une valeur juridique douteuse pour un avocat d'expérience comme l'intimé.

[10] Le juge traite ensuite de la question de la condamnation aux dépens réclamée contre l'intimé. Il y consacre du reste l'essentiel de ses motifs, le caractère frivole de la procédure étant pour le moins manifeste, alors qu'il n'y avait dans les propos du juge de la Cour du Québec aucun indice d'excès de compétence.

[11] Sur le droit applicable à la question des dépens en matière criminelle, le juge de la Cour supérieure s'en remet à l'arrêt *Québec (Procureur général) c. Cronier* (1981), 23 C.R. (3d) 97 (C.A. Qc). Il en retient que dans ses motifs, la juge L'Heureux-Dubé, alors à la Cour d'appel du Québec, met en lumière « le pouvoir inhérent de la Cour supérieure de gérer les dossiers de sa juridiction et d'accorder des dépens non prévus par une loi » (par. 115 (CanLII)). Sur la foi des enseignements de cet arrêt, le juge estime que la question consiste à déterminer s'il est en présence d'« une procédure frivole qui dénote un abus grave

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judicial system", an abuse that was "deliberate" (para. 117).

[12] On the facts of the case before him, the judge found that the [TRANSLATION] "preparation, at lunchtime on April 23, 2013, of a series of motions for writs of prohibition in a legal situation that did not call for such a proceeding, and the continued presentation of those proceedings," constituted abuse of "section 25 of the *Rules of Practice* and the suspension order it entails" (para. 118). In his analysis, the judge took the respondent's conduct in other cases into account in determining whether he had had culpable intent to file, as a calculated act, proceedings that he knew to be frivolous and abusive.

[13] The judge concluded that the respondent's conduct satisfied the applicable criteria and that it had [TRANSLATION] "led, in a manner that well-informed Canadians would not approve of, to paralysis of the legitimate work of the Court of Québec sitting in a criminal proceeding and to disruption of its local judges' case management work" (para. 119). He dismissed the motions for writs of prohibition and awarded costs against the respondent personally, setting them at $3,000 for all the cases combined, or $250 per case.

B. *Quebec Court of Appeal (2015 QCCA 847)*

[14] The Court of Appeal affirmed the Superior Court's judgment on the disposition of the motions for writs of prohibition, but allowed the appeal solely to set aside the award of costs against the respondent personally. It noted that, in criminal cases, [TRANSLATION] "costs have no longer been systematically awarded since the 1954 reform of the criminal justice system" (para. 5 (CanLII)). However, it acknowledged that, "in circumstances that are quite rare and exceptional", the Superior Court can, "in the exercise of its inherent superintending and reforming powers, award costs" (para. 6). In the case at bar, the Court of Appeal was of the view that the Superior Court should not have exercised those inherent powers to sanction conduct that had occurred in another court

du système judiciaire » commis « de propos délibéré » (par. 117).

[12] Sur les faits propres à l'espèce dont il est saisi, le juge note que la « préparation, sur l'heure du dîner du 23 avril 2013, d'une série de requêtes en émission d'un bref de prohibition, dans une situation juridique qui ne commandait nullement une telle procédure, tout autant que le maintien de la présentation de ces procédures, » constitue un abus « de l'utilisation de l'article 25 des *Règles de procédure* et de son ordonnance de sursis » (par. 118). Dans son analyse, le juge fait état du comportement de l'intimé dans des dossiers distincts afin d'apprécier son intention coupable de déposer, par des gestes réfléchis, des actes de procédure qu'il sait frivoles et abusifs.

[13] Le juge conclut que la conduite de l'intimé satisfait aux critères applicables et qu'elle a « entraîné, d'une manière que le justiciable canadien bien informé n'approuverait pas, la paralysie des travaux légitimes de la Cour du Québec siégeant en matière criminelle et la perturbation du travail de gestion de ses juges locaux » (par. 119). Il rejette les requêtes demandant la délivrance de brefs de prohibition et condamne personnellement l'intimé au paiement des dépens, qu'il fixe à 3 000 $ pour l'ensemble des dossiers concernés, soit 250 $ par dossier.

B. *Cour d'appel du Québec (2015 QCCA 847)*

[14] La Cour d'appel confirme le jugement de la Cour supérieure sur le sort des requêtes sollicitant la délivrance de brefs de prohibition, mais accueille l'appel, à seule fin d'annuler la condamnation personnelle de l'intimé aux dépens. Elle souligne qu'en matière criminelle, « l'octroi systématique de frais n'existe plus depuis la refonte du système de justice criminelle en 1954 » (par. 5 (CanLII)). Elle reconnaît que, « dans des circonstances plutôt rares et de nature exceptionnelle », la Cour supérieure peut toutefois, « en vertu de ses pouvoirs inhérents de surveillance et de contrôle, adjuger des dépens » (par. 6). Or, en l'espèce, la Cour d'appel estime que la Cour supérieure ne devait pas exercer ces pouvoirs inhérents à l'endroit de comportements

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that itself had the power to punish for contempt of court. It concluded that, on the facts, the situation "does not have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice" (para. 11).

IV. Issue

[15] The only issue in this appeal is whether the Superior Court was justified in awarding costs against the respondent personally. What must be done to resolve it is, first, to determine the scope of the courts' power to impose such a sanction, the applicable criteria and the process to be followed, next, to ascertain whether the criteria were properly applied by the Superior Court judge and, finally, to determine whether the intervention of the Court of Appeal was necessary.

V. Analysis

A. *Awarding of Costs Against a Lawyer Personally*

(1) Power of the Courts

[16] The courts have the power to maintain respect for their authority. This includes the power to manage and control the proceedings conducted before them (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 58). A court therefore has an inherent power to control abuse in this regard (*Young v. Young*, [1993] 4 S.C.R. 3, at p. 136) and to prevent the use of procedure "in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute": *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting, reasons approved in 2002 SCC 63, [2002] 3 S.C.R. 307. This is a discretion that must, of course, be exercised in a deferential manner (*Anderson*, at para. 59), but it allows a court to "ensure the integrity of the justice system" (*Morel v. Canada*, 2008 FCA 53, [2009] 1 F.C.R. 629, at para. 35).

survenus devant une autre juridiction possédant elle-même le pouvoir de condamner l'outrage au tribunal. Elle en conclut que, dans les faits, la situation « ne révèle pas le caractère exceptionnel et rare que sont une atteinte sérieuse à l'autorité de ce tribunal ou une atteinte grave à l'administration de la justice » (par. 11).

IV. Question en litige

[15] La seule question que soulève le pourvoi est celle de savoir si la Cour supérieure était justifiée de condamner personnellement l'intimé au paiement des dépens. Pour y répondre, il faut d'abord cerner l'étendue du pouvoir des tribunaux d'infliger une telle sanction, les critères applicables et le processus à suivre, ensuite, vérifier si l'application des critères par le juge de la Cour supérieure était légitime et, enfin, déterminer si une intervention de la Cour d'appel s'imposait.

V. Analyse

A. *La condamnation personnelle de l'avocat aux dépens*

(1) Le pouvoir des tribunaux

[16] Les tribunaux ont le pouvoir de veiller au respect de leur autorité. Cela inclut le pouvoir de gérer, contrôler et maîtriser les procédures qui se déroulent devant eux (*R. c. Anderson*, 2014 CSC 41, [2014] 2 R.C.S. 167, par. 58). Ils possèdent ainsi le pouvoir inhérent de réprimer les abus à cet égard (*Young c. Young*, [1993] 4 R.C.S. 3, p. 136) et d'empêcher que la procédure ne soit utilisée [TRADUCTION] « d'une manière qui serait manifestement injuste envers une partie au litige, ou qui aurait autrement pour effet de discréditer l'administration de la justice » : *Canam Enterprises Inc. c. Coles* (2000), 51 O.R. (3d) 481 (C.A.), par. 55, le juge Goudge, dissident, opinion approuvée par 2002 CSC 63, [2002] 3 R.C.S. 307. Il s'agit d'un pouvoir discrétionnaire qui doit certes s'exercer avec retenue (*Anderson*, par. 59), mais qui permet à un tribunal « d'assurer l'intégrité du système judiciaire » (*Morel c. Canada*, 2008 CAF 53, [2009] 1 R.C.F. 629, par. 35).

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[17] It is settled law that this power is possessed both by courts with inherent jurisdiction and by statutory courts (*Anderson*, at para. 58). It is therefore not reserved to superior courts but, rather, has its basis in the common law: *Myers v. Elman*, [1940] A.C. 282 (H.L.), at p. 319; M. Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 126.

[17] Il est acquis que ce pouvoir appartient tant aux tribunaux jouissant d'une compétence inhérente qu'aux tribunaux d'origine législative (*Anderson*, par. 58). Il n'est donc pas réservé aux cours supérieures et tire plutôt son fondement de la common law : *Myers c. Elman*, [1940] A.C. 282 (H.L.), p. 319; M. Code, « Counsel's Duty of Civility : An Essential Component of Fair Trials and an Effective Justice System » (2007), 11 *Rev. can. D.P.* 97, p. 126.

[18] There is an established line of cases in which courts have recognized that the awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice: *Myers*, at p. 319; *Pacific Mobile Corporation v. Hunter Douglas Canada Ltd.*, [1979] 1 S.C.R. 842, at p. 845; *Cronier*, at p. 448; *Pearl v. Gentra Canada Investments Inc.*, [1998] R.L. 581 (Que. C.A.), at p. 587. As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct (M. Code, at p. 121).

[18] Une jurisprudence bien établie reconnaît que la condamnation personnelle d'un avocat aux dépens découle du droit et du devoir des tribunaux de superviser la conduite des avocats présents devant eux et de signaler, et parfois de sanctionner, toute conduite de nature à mettre en échec l'administration de la justice ou y porter atteinte : *Myers*, p. 319; *Pacific Mobile Corporation c. Hunter Douglas Canada Ltd.*, [1979] 1 R.C.S. 842, p. 845; *Cronier*, p. 110; *Pearl c. Gentra Canada Investments Inc.*, [1998] R.L. 581 (C.A. Qc), p. 587. En tant qu'officiers de la cour, les avocats ont le devoir de respecter l'autorité des tribunaux. Le défaut des avocats d'agir en conformité avec leur statut peut obliger les tribunaux à sévir à leur endroit en sanctionnant leur inconduite (M. Code, p. 121).

[19] This power of the courts to award costs against a lawyer personally is not limited to civil proceedings, but can also be exercised in criminal cases (*Cronier*). This means that it may sometimes be exercised against defence lawyers in criminal proceedings, although such situations are rare: *R. v. Liberatore*, 2010 NSCA 26, 292 N.S.R. (2d) 69; *R. v. Smith* (1999), 133 Man. R. (2d) 89 (Q.B.), at para. 43; *Canada (Procureur général) v. Bisson*, [1995] R.J.Q. 2409 (Sup. Ct.); M. Code, at p. 122.

[19] L'exercice par les tribunaux de ce pouvoir de condamner personnellement un avocat au paiement des dépens ne se limite pas aux instances civiles; il s'étend aussi aux instances criminelles (*Cronier*). Bien qu'une telle situation soit rare, ce pouvoir peut donc viser parfois les avocats de la défense en matière criminelle : *R. c. Liberatore*, 2010 NSCA 26, 292 N.S.R. (2d) 69; *R. c. Smith* (1999), 133 Man. R. (2d) 89 (B.R.), par. 43; *Canada (Procureur général) c. Bisson*, [1995] R.J.Q. 2409 (C.S.); M. Code, p. 122.

[20] The power to control abuse of process and the judicial process by awarding costs against a lawyer personally applies in parallel with the power of the courts to punish by way of convictions for contempt of court and that of law societies to sanction unethical conduct by their members. Punishment for contempt is thus based on the same power the courts have "to enforce their process and maintain

[20] Ce pouvoir de contrôler les abus de procédure et le processus judiciaire en condamnant personnellement un avocat au paiement des dépens s'exerce parallèlement à celui des tribunaux de sévir par une condamnation pour outrage au tribunal et à celui des barreaux de sanctionner l'inconduite de leurs membres sur le plan déontologique. Ainsi, la sanction de l'outrage repose sur ce même pouvoir qu'ont

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their dignity and respect" (*United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 931). These sanctions are not mutually exclusive, however. If need be, they can even be imposed concurrently in relation to the same conduct.

les tribunaux « de faire observer leur procédure et de maintenir leur dignité et le respect qui leur est dû » (*United Nurses of Alberta c. Alberta (Procureur général)*, [1992] 1 R.C.S. 901, p. 931). Ces sanctions ne sont par contre pas mutuellement exclusives. Elles peuvent même, à la rigueur, être appliquées concurremment pour une même conduite.

[21] This being said, although the criteria for an award of costs against a lawyer personally are comparable to those that apply to contempt of court (*Cronier*, at p. 449), the consequences are by no means identical. Contempt of court is strictly a matter of law and can result in harsh sanctions, including imprisonment. In addition, the rules of evidence that apply in a contempt proceeding are more exacting than those that apply to an award of costs against a lawyer personally, as contempt of court must be proved beyond a reasonable doubt. Because of the special status of lawyers as officers of the court, a court may therefore opt in a given situation to award costs against a lawyer personally rather than citing him or her for contempt (I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Leg. Probl.* 23, at pp. 46-48).

[21] Cela dit, même si les critères qui permettent une condamnation personnelle de l'avocat aux dépens se comparent à ceux applicables à l'égard de l'outrage au tribunal (*Cronier*, p. 111), les conséquences qui en découlent sont loin d'être identiques. L'outrage au tribunal est de droit strict et peut entraîner des sanctions sévères, dont l'emprisonnement. Les règles de preuve y afférentes sont du reste plus exigeantes que pour une condamnation personnelle de l'avocat aux dépens, l'outrage au tribunal devant être prouvé hors de tout doute raisonnable. Parce que les avocats ont le statut particulier d'officiers de la cour, un tribunal peut ainsi, dans une situation donnée, opter pour une condamnation personnelle aux dépens plutôt que pour une citation à comparaître pour outrage au tribunal (I. H. Jacob, « The Inherent Jurisdiction of the Court » (1970), 23 *Curr. Leg. Probl.* 23, p. 46-48).

[22] As for law societies, the role they play in this regard is different from, but sometimes complementary to, that of the courts. They have, of course, an important responsibility in overseeing and sanctioning lawyers' conduct, which derives from their primary mission of protecting the public (s. 23 of the *Professional Code*, CQLR, c. C-26). However, the judicial powers of the courts and the disciplinary powers of law societies in this area can be distinguished, as this Court has explained as follows:

> The court's authority is preventative — to protect the administration of justice and ensure trial fairness. The disciplinary role of the law society is reactive. Both roles are necessary to ensure effective regulation of the profession and protect the process of the court. [Emphasis deleted.]

(*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 35)

[22] Quant aux barreaux, ils jouent à ce chapitre un rôle différent, mais parfois complémentaire, de celui des tribunaux. Ils ont bien sûr une responsabilité importante dans la surveillance et la sanction des comportements des avocats, responsabilité qui découle de leur mission première de protection du public (art. 23 du *Code des professions*, RLRQ, c. C-26). Cependant, les pouvoirs judiciaires des tribunaux et disciplinaires des barreaux en la matière se distinguent, comme l'a expliqué notre Cour dans les termes suivants :

> Le pouvoir judiciaire se veut préventif. Il vise à protéger l'administration de la justice et à assurer un procès équitable. Le rôle disciplinaire du barreau a un caractère réactif. Les deux sont nécessaires pour bien encadrer l'exercice de la profession d'avocat et protéger la procédure de la cour. [Italiques omis.]

(*R. c. Cunningham*, 2010 CSC 10, [2010] 1 R.C.S. 331, par. 35)

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[23] The courts therefore do not have to rely on law societies to oversee and sanction any conduct they may witness. It is up to the courts to determine whether, in a given case, to exercise the power they have to award costs against a lawyer personally in response to the lawyer's conduct before them. However, there is nothing to prevent the law society from exercising in parallel its power to assess its members' conduct and impose appropriate sanctions.

[24] In most cases, of course, the implications for a lawyer of being ordered personally to pay costs are less serious than those of the other two alternatives. A conviction for contempt of court or an entry in a lawyer's disciplinary record generally has more significant and more lasting consequences than a one-time order to pay costs. Moreover, as this appeal shows, an order to pay costs personally will normally involve relatively small amounts, given that the proceedings will inevitably be dismissed summarily on the basis that they are unfounded, frivolous, dilatory or vexatious.

(2) Applicable Criteria

[25] While the courts do have the power to award costs against a lawyer personally, the threshold for exercising it is a high one. It is in fact rarely exercised, and the question whether it should be arises only infrequently: *Cronier*; *Young*; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 85; *R. v. Trang*, 2002 ABQB 744, 323 A.R. 297, at para. 481; *Fearn v. Canada Customs*, 2014 ABQB 114, 586 A.R. 23, at para. 121; *Smith*, at para. 43. Only serious misconduct can justify such a sanction against a lawyer. Moreover, the courts must be cautious in imposing it in light of the duties owed by lawyers to their clients:

Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties

[23] Aussi, les tribunaux n'ont pas à s'en remettre aux ordres professionnels pour encadrer et sanctionner les conduites dont ils peuvent être témoins. Il appartient aux tribunaux de déterminer s'ils doivent, dans un cas précis, recourir au pouvoir dont ils disposent de condamner personnellement un avocat aux dépens pour la conduite qu'il a eue devant eux. Néanmoins, rien n'empêche que s'exerce en parallèle le pouvoir de l'ordre professionnel d'évaluer la conduite de ses membres et de déterminer les sanctions appropriées.

[24] Dans la plupart des cas, il faut bien réaliser que la condamnation personnelle de l'avocat aux dépens comporte pour le professionnel des implications moins fâcheuses que les deux autres possibilités. Contrairement à une condamnation ponctuelle au paiement de dépens, une condamnation pour outrage au tribunal ou une inscription au dossier disciplinaire de l'avocat ont généralement des conséquences plus importantes et plus durables. En outre, ce pourvoi en témoigne, une condamnation personnelle aux dépens implique normalement des sommes relativement peu élevées, puisque les procédures seront forcément écartées sommairement en raison de leur nature mal fondée, frivole, dilatoire ou vexatoire.

(2) Les critères applicables

[25] Si le pouvoir des tribunaux de condamner personnellement un avocat au paiement de dépens existe, son application est par contre circonscrite par des critères d'exercice élevés. Son exercice reste en effet exceptionnel et la décision d'y recourir ou non ne se présente que dans de rares cas : *Cronier*; *Young*; *R. c. 974649 Ontario Inc.*, 2001 CSC 81, [2001] 3 R.C.S. 575, par. 85; *R. c. Trang*, 2002 ABQB 744, 323 A.R. 297, par. 481; *Fearn c. Canada Customs*, 2014 ABQB 114, 586 A.R. 23, par. 121; *Smith*, par. 43. Seules les conduites graves justifient la condamnation d'un avocat à une telle sanction. Il importe d'ailleurs que les tribunaux demeurent prudents en la matière en raison des devoirs de l'avocat envers ses clients :

De plus, les tribunaux doivent faire montre de la plus grande prudence en condamnant personnellement un

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upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

(*Young*, at p. 136)

[26] The type of conduct that can be sanctioned in this way was analyzed in depth in *Cronier*. L'Heureux-Dubé J.A. concluded after reviewing the case law that the courts are justified in exercising such a discretion in cases involving abuse of process, frivolous proceedings, misconduct or dishonesty, or actions taken for ulterior motives, where the effect is to seriously undermine the authority of the courts or to seriously interfere with the administration of justice. She noted, however, that this power must not be exercised in an arbitrary and unlimited manner, but rather with restraint and caution. The motion judge in the case at bar properly relied on *Cronier*, and the Court of Appeal also endorsed the principles stated in it.

[27] Several courts across the country have adopted the requirement of conduct that represents a marked and unacceptable departure from the standard of reasonable conduct expected of a player in the judicial system: *Bisson*; *R. v. Ciarniello* (2006), 81 O.R. (3d) 561 (C.A.), at para. 31; *Leyshon-Hughes v. Ontario Review Board*, 2009 ONCA 16, 240 C.C.C. (3d) 181, at para. 62; *Fearn*, at para. 119; *Smith*, at para. 58. Also, as the House of Lords stated in a case that has been cited by Canadian courts, including in *Cronier*, a mere mistake or error of judgment will not be sufficient to justify awarding costs against a lawyer personally; there must at the very least be gross neglect or inaccuracy (*Myers*, at p. 319).

[28] There are in this Court's jurisprudence examples of conduct that has led to awards of costs being made against lawyers personally. In *Young*, the Court held that such a sanction is justified if "repetitive and irrelevant material, and excessive motions and applications, characterized" the conduct in question and if this was the result of a lawyer's acting

avocat aux dépens, vu l'obligation qui lui incombe de préserver la confidentialité de son mandat et de défendre avec courage même des causes impopulaires. Un avocat ne devrait pas être placé dans une situation où la peur d'être condamné aux dépens pourrait l'empêcher de remplir les devoirs fondamentaux de sa charge.

(*Young*, p. 136)

[26] Le type de conduites susceptibles d'entraîner une telle sanction a fait l'objet d'une analyse approfondie dans *Cronier*. Sur la foi de sa revue de la jurisprudence, la juge L'Heureux-Dubé conclut que les tribunaux sont justifiés d'exercer un tel pouvoir discrétionnaire en présence d'abus de procédures, de procédures frivoles, d'inconduites ou de malhonnêtetés, ou encore de mesures prises pour des motifs obliques, et ce, lorsqu'il en résulte une atteinte sérieuse à l'autorité des tribunaux ou une entrave grave à l'administration de la justice. Elle note que ce pouvoir ne doit pas, par contre, être exercé arbitrairement et de façon illimitée, mais plutôt avec retenue et circonspection. En l'espèce, le premier juge s'est appuyé avec raison sur cet arrêt. La Cour d'appel en a aussi retenu les enseignements.

[27] Plusieurs tribunaux à travers le pays ont par ailleurs retenu la nécessité d'une conduite dérogeant d'une manière marquée et inacceptable à la norme de conduite raisonnable et attendue d'un acteur du système judiciaire : *Bisson*; *R. c. Ciarniello* (2006), 81 O.R. (3d) 561 (C.A.), par. 31; *Leyshon-Hughes c. Ontario Review Board*, 2009 ONCA 16, 240 C.C.C. (3d) 181, par. 62; *Fearn*, par. 119; *Smith*, par. 58. Dans un arrêt repris par des décisions canadiennes, dont *Cronier*, la Chambre des lords mentionne elle aussi qu'une simple erreur de jugement ne suffit pas mais qu'il faut à tout le moins une négligence grave ou une erreur grossière pour justifier la condamnation personnelle de l'avocat aux dépens (*Myers*, p. 319).

[28] Notre jurisprudence offre des exemples de conduites qui ont mené à une condamnation personnelle de l'avocat au paiement de dépens. Dans *Young*, notre Cour reconnaît qu'une conduite « marqué[e] par la production de documents répétitifs et non pertinents, de requêtes et de motions excessives », et qui est le fruit d'un avocat agissant « de mauvaise

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"in bad faith in encouraging this abuse and delay" (pp. 135-36). In *Pacific Mobile*, the Court awarded costs against a company's solicitors personally in a bankruptcy case. The solicitors had been granted a number of adjournments and had instituted proceedings that were inconsistent with directions given by the trial judge. On the issue of costs, Pigeon J. stressed that he did "not consider it fair to make the debtor's creditors bear the cost of proceedings which were not instituted in their interest: quite the contrary". He added that such an award of costs, "far from appropriately discouraging unnecessary appeals occasioning costly delays, tends on the contrary to favour them" (p. 844). In the circumstances, he determined that "the Court should [therefore] make use of its power to order costs payable by solicitors personally" (p. 845).

foi en encourageant ces abus et ces délais », justifie une telle sanction (p. 135-136). Dans *Pacific Mobile*, notre Cour condamne personnellement les procureurs d'une société au paiement des dépens dans une affaire de faillite. Ces avocats avaient obtenu plusieurs ajournements et entamé des procédures allant à l'encontre des directives données par le juge de première instance. Appelé à statuer sur les dépens, le juge Pigeon souligne qu'il ne lui « paraît pas juste de faire supporter par les créanciers de la débitrice les [dépens] de procédures qui ne sont pas formées dans leur intérêt mais plutôt à leur encontre », et qu'une telle adjudication des dépens, « loin de décourager comme il convient les appels futiles source de retards préjudiciables, tend au contraire à les favoriser » (p. 844). Dans les circonstances, il décide qu'il y a donc « lieu pour la Cour d'user de son pouvoir de mettre les dépens à la charge des procureurs personnellement » (p. 845).

[29] In my opinion, therefore, an award of costs against a lawyer personally can be justified only on an exceptional basis where the lawyer's acts have seriously undermined the authority of the courts or seriously interfered with the administration of justice. This high threshold is met where a court has before it an unfounded, frivolous, dilatory or vexatious proceeding that denotes a serious abuse of the judicial system by the lawyer, or dishonest or malicious misconduct on his or her part, that is deliberate. Thus, a lawyer may not knowingly use judicial resources for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner.

[29] Il s'ensuit, à mon avis, qu'une condamnation personnelle de l'avocat aux dépens ne peut se justifier que de manière exceptionnelle, en présence d'une atteinte sérieuse à l'autorité des tribunaux ou d'une entrave grave à l'administration de la justice. Ce critère élevé est respecté lorsqu'un tribunal est en présence d'une procédure mal fondée, frivole, dilatoire ou vexatoire, qui dénote un abus grave du système judiciaire ou une inconduite malhonnête ou malveillante, commis de propos délibéré par l'avocat. Ainsi, un avocat ne peut sciemment utiliser les ressources judiciaires à une fin purement dilatoire, dans le seul but de faire obstruction de manière calculée au bon déroulement du processus judiciaire.

[30] This being said, however, it should be noted that there are two important guideposts that apply to the exercise of this discretion in a situation like the one in this appeal.

[30] Cela dit, il convient toutefois de rappeler que deux balises importantes encadrent l'exercice de ce pouvoir discrétionnaire dans une situation analogue à celle du présent pourvoi.

[31] The first guidepost relates to the specific context of criminal proceedings, in which the courts must show a certain flexibility toward the actions of defence lawyers. In considering the circumstances, the courts must bear in mind that the context of criminal proceedings differs from that of civil proceedings. In criminal cases, the rule is that costs are

[31] La première balise découle du contexte particulier des procédures en matière criminelle, lequel requiert une certaine souplesse de la part des tribunaux à l'égard des actions entreprises par les avocats de la défense. Dans l'analyse des circonstances, les tribunaux doivent en effet retenir que le contexte particulier des procédures criminelles diffère de celui

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not awarded; no provision is made, for example, for awards of costs where extraordinary remedies are sought (*Cronier*, at p. 447). Awards of costs made against lawyers personally are therefore purely punitive and do not include the compensatory aspect costs have in civil cases.

des procédures civiles. En matière criminelle, la règle est l'absence de dépens; par exemple, rien n'en prévoit l'octroi dans le cadre de l'exercice de recours extraordinaires (*Cronier*, p. 108). La condamnation personnelle de l'avocat au paiement des dépens a donc un caractère purement punitif et ne comprend pas la composante compensatrice qu'ont les dépens en matière civile.

[32] As well, the role of a defence lawyer is not comparable in every respect to that of a lawyer in a civil case. For example, the latter has an ethical duty to encourage compromise and agreement as much as possible. In contrast, a defence lawyer has no obligation to help the Crown in the conduct of its case. It is the very essence of the role of a defence lawyer to challenge, sometimes forcefully, the decisions and arguments of other players in the judicial system in light of the serious consequences they may have for the lawyer's client: *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, at paras. 64-66, citing *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, at para. 71. Indeed, committed and zealous advocacy for clients' rights and interests and a strong and independent defence bar are essential in an adversarial system of justice: *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1, at para. 129; P. J. Monahan, "The Independence of the Bar as a Constitutional Principle in Canada", in Law Society of Upper Canada, ed., *In the Public Interest: The Report and Research Papers of the Law Society of Upper Canada's Task Force on the Rule of Law & the Independence of the Bar* (2007), 117. If these conditions are not met, the reliability of the process and the fairness of the trial will suffer: *R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 25, quoting *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), at p. 57. In short, if costs are awarded against a lawyer personally in criminal proceedings, the purpose must not be to discourage the lawyer from defending his or her client's rights and interests, and in particular the client's right to make full answer and defence. From this point of view, the considerations to be taken into account in assessing the conduct of defence lawyers can be different from those that apply in the case of lawyers in civil proceedings.

[32] En outre, le rôle de l'avocat de la défense n'est pas comparable en tous points à celui de l'avocat en matière civile. Ce dernier a par exemple le devoir éthique de favoriser les compromis et les ententes dans la mesure du possible. À l'opposé, l'avocat de la défense n'a aucune obligation d'aider le ministère public dans la conduite de son dossier. Il est de l'essence même du rôle de l'avocat de la défense de remettre en cause, de manière parfois vigoureuse, les décisions et prétentions des autres acteurs du système judiciaire, vu les conséquences graves qu'elles peuvent avoir sur son client : *Doré c. Barreau du Québec*, 2012 CSC 12, [2012] 1 R.C.S. 395, par. 64-66, citant *Histed c. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, par. 71. Une défense dévouée et passionnée des droits et des intérêts des clients ainsi qu'une section de la défense forte et indépendante au sein du barreau sont d'ailleurs essentiels dans un système de justice contradictoire : *Groia c. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1, par. 129; P. J. Monahan, « L'indépendance du barreau en tant que principe constitutionnel au Canada », dans Barreau du Haut-Canada, dir., *Dans l'intérêt public : rapport et articles du groupe d'étude du barreau du Haut-Canada sur la règle de droit et l'indépendance du barreau* (2007), 127. Si ces conditions ne sont pas présentes, la fiabilité du processus et l'équité du procès en souffrent : *R. c. G.D.B.*, 2000 CSC 22, [2000] 1 R.C.S. 520, par. 25, citant *R. c. Joanisse* (1995), 102 C.C.C. (3d) 35 (C.A. Ont.), p. 57. Bref, en matière criminelle, la condamnation personnelle aux dépens ne doit pas viser à décourager l'avocat dans la défense des droits et intérêts de son client, notamment son droit à une défense pleine et entière. De ce point de vue, l'évaluation de la conduite de l'avocat de la défense doit tenir compte de considérations parfois différentes de celles de l'avocat en matière civile.

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[33] The second guidepost requires a court to confine itself to the facts of the case before it and to refrain from indirectly putting the lawyer's disciplinary record, or indeed his or her career, on trial. The facts that can be considered in awarding costs against a lawyer personally must generally be limited to those of the case before the court. In its analysis, the court must not conduct an ethics investigation or seek to assess the whole of the lawyer's practice. It is not a matter of punishing the lawyer "for his or her entire body of work". To consider facts external to the case before the court can be justified only for the limited purpose of determining, first, the intention behind the lawyer's actions and whether he or she was acting in bad faith, and, second, whether the lawyer knew, on bringing the impugned proceeding, that the courts do not approve of such proceedings and that this one was unfounded.

[33] Par ailleurs, la seconde balise exige que les tribunaux s'en tiennent aux faits propres à l'affaire dont ils sont saisis et qu'ils s'abstiennent de faire indirectement le procès du dossier disciplinaire de l'avocat, voire de sa carrière. Les faits qui peuvent être pris en compte dans la condamnation personnelle d'un avocat au paiement des dépens doivent généralement se limiter à ceux de l'affaire dont est saisi le juge. L'analyse menée par le tribunal ne doit pas se substituer à une enquête déontologique ni chercher à évaluer l'ensemble de la pratique de l'avocat visé. Il ne s'agit pas de sanctionner l'avocat « pour l'ensemble de son œuvre ». Recourir à des faits externes à l'instance concernée ne peut se justifier que dans l'objectif limité de déterminer, d'une part, l'intention et la mauvaise foi derrière les actions de l'avocat et, d'autre part, la connaissance par ce dernier, au moment où il a entrepris les procédures qu'on lui reproche, de la désapprobation de celles-ci par les tribunaux et de leur caractère mal fondé.

[34] In this regard, certain evidence that is external to the case before the court may sometimes be considered, because it is of high probative value and has a strong similarity to the alleged facts, in order to establish, for example, wilful intent and knowledge on the lawyer's part. However, it must be limited to the specific issue before the court, that is, the lawyer's conduct. It may not serve more broadly as proof of a general propensity or bad character (*R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908, at paras. 71-72 and 82).

[34] Sous ce rapport, certains éléments étrangers à l'affaire devant le juge peuvent à l'occasion être pris en compte en raison de leur forte valeur probante et de leur grande similitude avec les faits reprochés, afin par exemple d'établir l'intention délibérée et la connaissance de l'avocat. Ils doivent par contre se rapporter uniquement à la question précise en jeu, à savoir la conduite de l'avocat. Ils ne peuvent viser, plus largement, à prouver une propension générale ou la mauvaise moralité (*R. c. Handy*, 2002 CSC 56, [2002] 2 R.C.S. 908, par. 71-72 et 82).

(3) Process to Be Followed

(3) Le processus à suivre

[35] This being said, a court obviously cannot award costs against a lawyer personally without following a certain process and observing certain procedural safeguards (Y.-M. Morissette, "L'initiative judiciaire vouée à l'échec et la responsabilité de l'avocat ou de son mandant" (1984), 44 *R. du B.* 397, at p. 425). However, it is important that this process be flexible and that it enable the courts to adapt to the circumstances of each case.

[35] Cela dit, il va de soi qu'un tribunal ne peut condamner personnellement un avocat aux dépens sans respecter un certain processus et certaines garanties procédurales (Y.-M. Morissette, « L'initiative judiciaire vouée à l'échec et la responsabilité de l'avocat ou de son mandant » (1984), 44 *R. du B.* 397, p. 425). Il importe toutefois que ce processus demeure flexible et permette au tribunal de s'adapter aux circonstances de chaque affaire.

[36] Thus, a lawyer upon whom such a sanction may be imposed should be given prior notice of

[36] Ainsi, l'avocat passible d'une telle sanction devrait recevoir un avis préalable l'informant des

the allegations against him or her and the possible consequences. The notice should contain sufficient information about the alleged facts and the nature of the evidence in support of those facts. The notice should be sent far enough in advance to enable the lawyer to prepare adequately. The lawyer should, of course, have an opportunity to make separate submissions on costs and to adduce any relevant evidence in this regard. Ideally, the issue of awarding costs against the lawyer personally should be argued only after the proceeding has been resolved on its merits.

allégations formulées à son endroit et des conséquences qui pourraient en découler. Cet avis devrait contenir des informations suffisantes sur les faits reprochés et sur la teneur de la preuve à leur appui. L'avis devrait être transmis suffisamment à l'avance pour permettre à l'avocat de se préparer adéquatement. Ce dernier devrait bien sûr avoir l'occasion de présenter des observations distinctes au sujet des dépens, et, le cas échéant, des éléments de preuve pertinents à cet égard. Idéalement, le débat relatif à la condamnation personnelle de l'avocat aux dépens ne devrait avoir lieu qu'une fois la procédure visée tranchée sur le fond.

[37] However, these protections differ from the ones conferred by ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*. Where an award of costs is sought against a lawyer personally, the lawyer is not a "person charged with an offence" and the proceeding is not a criminal one *per se*. Although the applicable criteria are strict, the standard of proof is the balance of probabilities.

[37] Ces protections se distinguent cependant de celles conférées par la *Charte canadienne des droits et libertés* à ses art. 7 et 11. En ce qui touche la condamnation personnelle aux dépens recherchée contre lui, l'avocat n'est pas un « inculpé » et il ne s'agit pas d'une matière criminelle comme telle. Quoique les critères applicables soient exigeants, la norme de preuve qui s'impose reste la preuve prépondérante.

[38] In closing, I note that the Crown's role on this specific issue must be limited in criminal proceedings. In such a situation, it is of course up to the parties as well as the court to raise a problem posed by a lawyer's conduct. However, the Crown's role is to objectively present the evidence and the relevant arguments on this point. It is the court that is responsible for determining whether a sanction should be imposed, and that has the power to impose one, in its role as guardian of the integrity of the administration of justice. The Crown must confine itself to its role as prosecutor of the accused. It must not also become the prosecutor of the defence lawyer.

[38] En terminant, je note que dans les instances criminelles, le rôle du ministère public sur cette question précise doit demeurer limité. Certes, dans une telle situation, il appartient autant aux parties qu'au tribunal de soulever le problème que pose la conduite d'un avocat. Toutefois, le rôle du ministère public est de présenter objectivement la preuve et les arguments pertinents sur ce point. L'opportunité et le pouvoir d'imposer une sanction appartiennent au tribunal en vertu de son rôle de gardien de l'intégrité de l'administration de la justice. Le ministère public doit se confiner à son rôle de poursuivant de l'accusé. Il ne doit pas devenir en plus le poursuivant de l'avocat de la défense.

B. *Application to the Facts of the Instant Case*

B. *L'application aux faits de l'espèce*

(1) Judgment of the Superior Court

(1) Le jugement de la Cour supérieure

[39] In light of the foregoing, I am of the view that the motion judge properly exercised his discretion in awarding costs against the respondent personally.

[39] À la lumière de ce qui précède, je considère que le juge de première instance a bien exercé la discrétion qui est la sienne en condamnant personnellement l'intimé au paiement des dépens.

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[40] The motion judge first correctly identified the standard of conduct on which such an award is based and correctly summed up the law in requiring that there be a [TRANSLATION] "frivolous proceeding that denotes a serious abuse of the judicial system" and a "deliberate strategy" (para. 117).

[40] Le premier juge a d'abord correctement identifié la norme de conduite donnant ouverture à une telle condamnation et bien résumé le droit en exigeant la présence d'une « procédure frivole qui dénote un abus grave du système judiciaire » et d'une « stratégie de propos délibéré » (par. 117).

[41] Next, he properly analyzed the facts to find that the respondent's acts constituted abusive conduct that was designed to indirectly obtain a postponement and had led to [TRANSLATION] "paralysis of the legitimate work of the Court of Québec" and "disruption of its local judges' case management work" (para. 119). He correctly distinguished an "unintended result" from a "deliberate strategy" (para. 117). The judge cannot be faulted for choosing to exercise his discretion in respect of a defence lawyer here.

[41] Il a ensuite bien analysé les faits en reconnaissant dans les actes de l'intimé une conduite abusive visant à obtenir de manière détournée une remise, ayant entraîné « la paralysie des travaux légitimes de la Cour du Québec » ainsi que « la perturbation du travail de gestion de ses juges locaux » (par. 119). Il a bien su distinguer l'« accident de parcours » de la « stratégie de propos délibéré » (par. 117). On ne peut reprocher au juge d'avoir choisi d'user ici de ce pouvoir discrétionnaire envers un avocat de la défense.

[42] As the judge noted, the respondent's conduct in the cases in question was particularly reprehensible. Its purpose was unrelated to the motions he brought. The respondent was motivated by a desire to have the hearing postponed rather than by a sincere belief that the judges targeted by his motions were hostile. His subsequent conduct was consistent with this finding. It is quite odd, if not unprecedented, for a lawyer to file, on the same day and in the same cases, two series of motions for writs of prohibition against two different judges on the same ground of bias. The respondent thus used the extraordinary remedies for a purely dilatory purpose with the sole objective of obstructing the orderly conduct of the judicial process in a calculated manner. It was therefore reasonable for the judge to conclude that the respondent had acted in bad faith and in a way that amounted to abuse of process, thereby seriously interfering with the administration of justice.

[42] En effet, comme le souligne le juge, la conduite de l'intimé dans ces dossiers était particulièrement répréhensible. Elle visait un but étranger aux requêtes entreprises. L'intimé était animé par une volonté d'obtenir une remise de l'audience plutôt que par une croyance sincère dans l'inimitié des juges qui étaient la cible de ses requêtes. Son comportement subséquent est compatible avec cette conclusion. Il est assez incongru, sinon inédit, de voir un avocat déposer le même jour, dans les mêmes dossiers, deux séries de requêtes sollicitant la délivrance de brefs de prohibition, alléguant un même motif de partialité, à l'encontre de deux juges différents. L'intimé a ainsi utilisé les recours extraordinaires à une fin purement dilatoire dans le seul but d'entraver de manière calculée le bon déroulement du processus judiciaire. Devant cela, le juge pouvait raisonnablement conclure que l'intimé a fait preuve de mauvaise foi et a abusé des procédures, portant ainsi sérieusement atteinte à l'administration de la justice.

[43] Finally, the procedural safeguards were observed in this case. The Crown sent the respondent two prior notices of its intention to seek an award of costs against him personally. The respondent had more than three months to prepare. The prosecution's role was limited to notifying the respondent of its intention to seek an award of costs against him personally and presenting the relevant evidence to the

[43] Finalement, les garanties procédurales ont été respectées en l'espèce. Le ministère public a fait parvenir à l'intimé deux avis préalables de son intention de demander sa condamnation personnelle aux dépens. Ce dernier a pu bénéficier de plus de trois mois de préparation. Le rôle du poursuivant s'est limité à aviser l'intimé de son intention de demander sa condamnation personnelle aux dépens et

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judge. The respondent had an opportunity to make submissions to the judge in this regard. Moreover, he raised no objection to the process or to the evidence adduced on the issue of costs. Nor did he insist on being represented by counsel or ask that the issue of costs be dealt with separately from the merits of the motions.

[44] That being the case, I do not accept the respondent's criticisms to the effect that the judge improperly relied on inadmissible similar fact evidence. On the contrary, I note that the judge's findings were based on admissible evidence that supported his analysis on the respondent's intention and knowledge:

> [TRANSLATION] His preparation, at lunchtime on April 23, 2013, of a series of motions for writs of prohibition in a legal situation that did not call for such a proceeding, and the continued presentation of those proceedings, were two calculated acts that did not result from ignorance of the law on the part of Mr. Jodoin, an able tactician who defends his clients forcefully when he is before the Court. [Emphasis added; para. 118.]

[45] For this purpose, the judge focused primarily on evidence specific to the cases before him. He discussed the specific circumstances that led to the preparation of the motions for writs of prohibition. He reviewed in detail the transcript of the hearing that had culminated in the postponement being granted by the Court of Québec judge. And he considered the respondent's conduct in the broader context of the motions for which he was ordered to pay costs personally.

[46] It is true that the judge took note of certain facts from other cases in which the respondent had been involved, as the Crown had invited him to do with no objection from the respondent. However, the judge considered those facts to be [TRANSLATION] "relevant to the determination of whether [the respondent's] motions are frivolous and dilatory and whether an award of costs must be made against him personally, and in what amount" (para. 109). He found that this evidence was relevant to his analysis on whether the respondent had had culpable intent to

à présenter la preuve pertinente au juge. L'intimé a eu l'occasion de présenter des observations sur ce sujet devant le juge. Il n'a d'ailleurs soulevé aucune objection quant au processus ou quant à la preuve offerte sur la question des dépens. Il n'a pas davantage exigé d'être représenté par avocat, ni demandé que le sujet des dépens soit traité séparément du fond des requêtes.

[44] Cela étant, je ne retiens pas les critiques que soulève l'intimé sur le recours prétendument inopportun du juge à une preuve inadmissible de faits similaires. Je note au contraire que les conclusions du juge se basent sur des faits admissibles, qui appuient son analyse de l'intention et de la connaissance de l'intimé :

> Sa préparation, sur l'heure du dîner du 23 avril 2013, d'une série de requêtes en émission d'un bref de prohibition, dans une situation juridique qui ne commandait nullement une telle procédure, tout autant que le maintien de la présentation de ces procédures, constituent deux gestes réfléchis et ne résultent pas de l'ignorance des règles de droit par Me Jodoin, un habile stratège qui défend ses clients avec vigueur, quand il est présent à la Cour. [Je souligne; par. 118.]

[45] À cette fin, le juge s'est principalement concentré sur les éléments propres aux affaires dont il était saisi. Il s'est attardé au contexte même qui a mené à la préparation des requêtes sollicitant la délivrance de brefs de prohibition. Il a revu en détails la transcription de l'audience qui a culminé dans la remise octroyée par le juge de la Cour du Québec. Il a examiné le comportement de l'intimé dans le cadre plus global des requêtes qui ont fait l'objet de la condamnation personnelle de celui-ci aux dépens.

[46] Il est vrai que le juge a fait état de certains faits qui se sont produits dans des dossiers distincts dans lesquels avait agi l'intimé, comme l'avait invité à le faire le ministère public sans objection de ce dernier. Le juge a toutefois considéré ces faits « pertinent[s] pour décider si les requêtes de [l'intimé] sont frivoles et dilatoires et s'il doit être condamné personnellement aux dépens et pour quel montant » (par. 109). Il a estimé cette preuve pertinente pour son analyse de l'intention coupable de l'intimé de déposer et de présenter une procédure qu'il savait

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file and present a proceeding that he knew to be frivolous and abusive. The judge referred to it in determining, among other things, that the impugned conduct was a deliberate strategy on the respondent's part and not an unintended result.

frivole et abusive. Il s'y est référé pour déterminer notamment que la conduite reprochée se voulait une stratégie délibérée de l'intimé, et non un simple accident de parcours.

[47] In this regard, the judge was justified in referring to motions for writs of prohibition that had been filed in 2011 against one of the two Court of Québec judges concerned in the 2013 motions. The motions from 2011 were all dismissed in a judgment that was subsequently affirmed by the Court of Appeal (*R. v. Carrier*, 2012 QCCA 594). In that case, the respondent had sought writs of prohibition in relation to a refusal by the judge in question to allow the withdrawal of a motion for the disclosure of evidence. In its judgment, the Court of Appeal mentioned that a court can review a party's decision to withdraw a proceeding, especially where the goal is to obtain a postponement. It concluded that the alleged apprehension of bias on the judge's part was without merit, because [TRANSLATION] "although the judge was overly interventionist, the fact remains that there is no reason to doubt his impartiality" (para. 4 (CanLII)).

[47] À ce chapitre, le juge était justifié de mentionner les requêtes sollicitant la délivrance de brefs de prohibition déposées en 2011 contre l'un des deux juges de la Cour du Québec visés par les requêtes déposées en 2013. Les requêtes de 2011 furent toutes rejetées par un jugement confirmé en appel (*R. c. Carrier*, 2012 QCCA 594). L'intimé avait alors procédé au moyen de brefs de prohibition, sur la base du refus du juge visé d'accepter le désistement d'une requête en communication de la preuve. Dans son arrêt, la Cour d'appel mentionne qu'un tribunal peut contrôler la décision d'une partie de retirer une procédure, notamment lorsque c'est l'obtention d'une remise qui est recherchée. Elle conclut que l'allégation de crainte de partialité du juge était non fondée puisque, « si la conduite du juge a été trop dirigiste, il demeure que rien ne laisse craindre quant à son impartialité » (par. 4 (CanLII)).

[48] As the motion judge observed, there is a strong similarity between those motions from 2011 and the 2013 motions in terms of the facts, the decisions being challenged, the procedures that were chosen and the nature of the exchanges between the respondent and the judge in question. This could support findings that the respondent's actions were calculated and intentional and that he had knowledge of the applicable legal rules and had deliberately ignored them. It could be concluded from this relevant evidence that the respondent was well aware of the invalidity of the extraordinary remedy he had chosen to seek and of the foreseeable consequences of his actions, the *modus operandi* of which was similar to that of 2011. This was not improper evidence of a general propensity or bad character, but admissible evidence of the respondent's state of mind when he filed the proceedings.

[48] Comme l'a constaté le juge de première instance, une grande similitude existait entre ces requêtes de 2011 et celles de 2013 quant aux faits, quant aux décisions contestées, quant aux procédures choisies et quant à la teneur des échanges entre l'intimé et le juge visé. Le caractère réfléchi et intentionnel des gestes, ainsi que la connaissance des règles de droit applicables dont l'intimé a sciemment fait fi, pouvaient y prendre appui. Cette preuve pertinente permettait de conclure que l'intimé était bien au fait du caractère mal fondé du recours extraordinaire choisi et des conséquences prévisibles de ses gestes qui suivaient le même *modus operandi* qu'en 2011. Il ne s'agissait pas là d'une preuve inappropriée de propension générale ou de mauvaise moralité, mais bien d'une preuve admissible de l'état d'esprit de l'intimé au moment où il a déposé les procédures.

[49] As regards the respondent's argument that the judge wanted to make an example of his case in the district in question, I am of the view that there is not really any support for it. That is certainly not what

[49] Quant à la thèse de l'intimé selon laquelle le juge visait à faire de lui un cas exemplaire dans le district concerné, je suis d'avis qu'elle rime en définitive à peu de choses. Ce n'est certes pas ce que le

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the judge said at para. 11 of his reasons. Moreover, it is clear from his reasons as a whole that he did not rely either on that factor or on the specific context of the district to support his conclusions. As can be seen from his analysis, he objectively had enough evidence to justify awarding costs against the respondent personally on the basis of the specific facts of the case before him.

juge affirme au par. 11 de ses motifs. La lecture de l'ensemble de ces motifs montre d'ailleurs bien que ce n'est ni cet élément ni le contexte particulier de ce district qu'il a retenu pour étayer ses conclusions. Comme son analyse en témoigne, il disposait objectivement de suffisamment d'éléments pour justifier la condamnation personnelle de l'intimé aux dépens eu égard aux faits particuliers de l'affaire devant lui.

(2) Judgment of the Court of Appeal

(2) L'arrêt de la Cour d'appel

[50] In this context, the Court of Appeal was in my view wrong to choose to substitute its own opinion for that of the Superior Court on this issue. In fact, the Court of Appeal reassessed the facts before concluding that the situation before the Superior Court did not have the exceptional character required in the case law. And it did so despite having acknowledged that the motion judge had, after thoroughly analyzing the facts, been right to dismiss the motions for writs of prohibition he had found to be frivolous, unfounded and abusive.

[50] Dans ce contexte, la Cour d'appel a selon moi erronément choisi de substituer son opinion à celle de la Cour supérieure sur cette question. La Cour d'appel a en réalité procédé à une nouvelle évaluation des faits, avant de conclure que, à ses yeux, la situation qui prévalait devant la Cour supérieure ne révélait pas le caractère exceptionnel requis par la jurisprudence. Elle l'a fait après avoir pourtant convenu qu'à la suite de son analyse fouillée des faits, le premier juge avait eu raison de rejeter les requêtes sollicitant la délivrance de brefs de prohibition qu'il estimait frivoles, mal fondées et abusives.

[51] It was not open to the Court of Appeal to intervene without first identifying an error of law, a palpable and overriding error in the motion judge's analysis of the facts, or an unreasonable or clearly wrong exercise of his discretion. It did not identify such an error. This Court, too, is subject to this standard for intervention (*St-Jean v. Mercier*, 2002 SCC 15, [2002] 1 S.C.R. 491, at para. 46). Furthermore, given its position at the second level of appeal, this Court's role is not to reassess the findings of fact of a judge at the trial level that an appellate court has not questioned: ". . . the principle of non-intervention 'is all the stronger in the face of concurrent findings of both courts below' . . ." (*ibid.*, at para. 45, quoting *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, at p. 574 (emphasis deleted)).

[51] La Cour d'appel ne pouvait intervenir sans d'abord identifier soit une erreur de droit, soit une erreur manifeste et déterminante dans l'analyse des faits par le premier juge, soit un exercice déraisonnable ou manifestement erroné par celui-ci de sa discrétion. Elle ne l'a pas fait. Notre Cour est elle aussi assujettie à cette norme d'intervention (*St-Jean c. Mercier*, 2002 CSC 15, [2002] 1 R.C.S. 491, par. 46). En outre, comme deuxième palier d'appel, son rôle n'est pas de réévaluer les constats de faits des juges d'instance que les cours d'appel n'ont pas remis en question : « . . . le principe de non-intervention "a d'autant plus de force en présence de conclusions concourantes des deux cours d'instance inférieure" . . . » (*ibid.*, par. 45, citant *Ontario (Procureur général) c. Bear Island Foundation*, [1991] 2 R.C.S. 570, p. 574-575 (soulignement omis)).

[52] It is well established that costs are awarded on a discretionary basis: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at

[52] Il est acquis que l'octroi des dépens reste une décision discrétionnaire : *Hamilton c. Open Window Bakery Ltd.*, 2004 CSC 9, [2004] 1 R.C.S.

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para. 27; *Galganov v. Russell (Township)*, 2012 ONCA 410, 294 O.A.C. 13, at paras. 23-25. In a case involving an exercise of discretion, an appellate court must show great deference and must be cautious in intervening, doing so only where it is established that the discretion was exercised in an abusive, unreasonable or non-judicial manner: *Trackcom Systems International Inc. v. Trackcom Systems Inc.*, 2014 QCCA 1136, at para. 36 (CanLII); *Québec (Procureur général) v. Bélanger*, 2012 QCCA 1669, 4 M.P.L.R. (5th) 21. In its brief judgment, the Court of Appeal did not specify an error of any kind whatsoever in the motion judge's reasons that would justify its intervention.

[53] As for the comment that the Superior Court should not have exercised its jurisdiction in relation to facts or conduct that had occurred in a court that itself had the power to punish the respondent for contempt of court, I believe that it reflects a misunderstanding of the situation. Costs are in order in this case because of the frivolous and abusive nature of the motions for writs of prohibition that were heard and dismissed by the Superior Court. It was the Superior Court that had the discretion to determine whether the costs of those motions should be awarded against the respondent.

VI. Conclusion

[54] In the final analysis, the Superior Court judge addressed the valid concerns voiced by the Crown, which he summarized as follows:

> [TRANSLATION] Take a more rigorous approach to the criminal law, fight tooth and nail for your clients, be demanding of the prosecution so that it makes its entire case competently, but face the music so that, in an overburdened judicial system in which each person's time must be used sparingly and efficiently, cases move forward. [Emphasis deleted; para. 11.]

[55] The judge sent a clear message to the players in the judicial system, in terms that were once again unequivocal, by denouncing actions and decisions that had led to an unjustified paralysis of the legitimate work of courts sitting in criminal proceedings

303, par. 27; *Galganov c. Russell (Township)*, 2012 ONCA 410, 294 O.A.C. 13, par. 23-25. Dans une affaire portant sur l'exercice d'un pouvoir discrétionnaire, les cours d'appel doivent faire preuve d'un haut degré de déférence et n'intervenir qu'avec circonspection, lorsqu'il est établi que le pouvoir a été exercé de manière abusive, déraisonnable ou non judiciaire : *Trackcom Systems International Inc. c. Trackcom Systems Inc.*, 2014 QCCA 1136, par. 36 (CanLII); *Québec (Procureur général) c. Bélanger*, 2012 QCCA 1669, 4 M.P.L.R. (5th) 21. Dans son court arrêt, la Cour d'appel n'expose aucune erreur de quelque nature que ce soit dans les motifs du premier juge pour justifier son intervention.

[53] Quant au commentaire voulant que la Cour supérieure n'aurait pas dû exercer sa compétence à l'égard de faits ou de comportements survenus devant une juridiction qui jouissait elle-même du pouvoir de condamner l'intimé pour outrage au tribunal, je considère que cette affirmation témoigne d'une compréhension erronée de la situation. Les dépens s'imposent en l'espèce au regard du caractère frivole et abusif des requêtes sollicitant la délivrance de brefs de prohibition que la Cour supérieure a entendues et rejetées. C'est à elle qu'appartenait la discrétion de décider de l'opportunité de condamner ou non l'intimé au paiement des dépens qui s'y rattachent.

VI. Conclusion

[54] En définitive, le juge de la Cour supérieure a répondu aux préoccupations valables exprimées par le ministère public, qu'il a résumées en ces termes :

> Abordez le droit criminel avec plus de rigueur, défendez vos clients bec et ongles, soyez exigeant envers la poursuite pour qu'elle fasse toute sa preuve avec compétence, mais faites face à la musique pour que, dans un système judiciaire surchargé où le temps de tous et chacun doit être utilisé avec économie et efficacité, les dossiers avancent. [Soulignement omis; par. 11.]

[55] Le juge a envoyé un message clair aux acteurs du système judiciaire, en des termes une fois de plus non équivoques, en dénonçant les gestes et décisions qui entraînent la paralysie injustifiée des travaux légitimes des tribunaux siégeant en matière

and to the disruption of the management of cases by their judges, and by sanctioning an abuse of process whose sole purpose had been to obtain a postponement and delay cases.

[56] The judge's comments were consistent with the principles recently enunciated by this Court in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, in which the majority denounced, among other things, the culture of complacency toward delay that impairs the efficiency of the criminal justice system. In *Jordan*, the Court emphasized the importance of timely justice and noted that all participants in the criminal justice system must co-operate in achieving reasonably prompt justice. From this perspective, it is essential to allow the courts to play their role as guardians of the integrity of the administration of justice by controlling proceedings and eliminating unnecessary delay. That is what the Superior Court did here.

[57] I would therefore allow the appeal and restore the award of costs against the respondent.

The following are the reasons delivered by

[58] ABELLA AND CÔTÉ JJ. (dissenting) — We agree that superior courts have, in theory, the power to award costs personally against counsel in the criminal context in exceptional circumstances. Justice Gascon, drawing on caselaw from both the civil and criminal context, has set out an excellent summary of the relevant principles. In our respectful view, however, the test was not met in this case. As noted by the Quebec Court of Appeal:

> [TRANSLATION] The situation in the Quebec Superior Court . . ., as regards the conduct of the appellant . . ., *does not have the exceptional and rare quality of an act that seriously undermines the authority of that court or that seriously interferes with the administration of justice.* [Emphasis added; footnote omitted.]

(2015 QCCA 847, at para. 11 (CanLII))

criminelle et la perturbation du travail de gestion de leurs juges, et en sanctionnant un abus de procédure fait uniquement pour obtenir une remise et retarder les dossiers.

[56] Les propos du juge s'accordent avec les enseignements récents de notre Cour dans l'arrêt *R. c. Jordan*, 2016 CSC 27, [2016] 1 R.C.S. 631, où la majorité dénonce notamment la culture de complaisance vis-à-vis des délais qui nuit à l'efficacité du système de justice criminelle. Dans *Jordan*, la Cour insiste sur l'importance de rendre justice en temps utile et rappelle que tous les participants au système de justice criminelle doivent collaborer pour que l'administration de la justice soit raisonnablement prompte. Dans cette perspective, il est essentiel de permettre aux tribunaux de jouer leur rôle de gardien de l'intégrité de l'administration de la justice en contrôlant les procédures et en éradiquant les délais inutiles. C'est ce que la Cour supérieure a fait ici.

[57] Je suis donc d'avis d'accueillir le pourvoi et de rétablir la condamnation de l'intimé aux dépens.

Version française des motifs rendus par

[58] LES JUGES ABELLA ET CÔTÉ (dissidentes) — Nous sommes d'accord pour dire que les cours supérieures possèdent, en théorie, le pouvoir de condamner personnellement un avocat aux dépens dans des circonstances exceptionnelles lors de procédures criminelles. Se fondant sur la jurisprudence à cet égard, tant en matière civile qu'en matière criminelle, le juge Gascon a dressé un excellent résumé des principes pertinents. À notre avis cependant, les critères applicables ne sont pas réunis en l'espèce. Comme l'a indiqué la Cour d'appel du Québec :

> La situation qui a prévalu devant la Cour supérieure [. . .], en regard du comportement de l'appelant [. . .], *ne révèle pas le caractère exceptionnel et rare que sont une atteinte sérieuse à l'autorité de ce tribunal ou une atteinte grave à l'administration de la justice*. [Italiques ajoutés; note en bas de page omise.]

(2015 QCCA 847, par. 11 (CanLII))

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[59] The exceptional nature of personal costs orders was emphasized by this Court in *Young v. Young*, [1993] 4 S.C.R. 3:

. . . courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling. [p. 136]

[60] These concerns are magnified in the criminal context. In *R. v. Gunn*, 2003 ABQB 314, 335 A.R. 137, the Court of Queen's Bench of Alberta highlighted the chilling effect that personal costs orders could have on criminal defence counsel, where Langston J. observed:

. . . to sanction defence counsel in the course of their duties of protecting the criminally accused could have a chilling effect on counsel's ability to properly and zealously defend their client against all the powers that a state has to wield against them. [para. 50]

[61] The more appropriate response, if any, is to seek a remedy from the law society in question. As Michael Code observed, disciplinary processes present advantages over awards of costs:

A useful intermediate remedy, when repeated injunctions and reprimands have failed to put an end to counsel's "incivility," is for the trial judge to report the offending counsel to the Law Society. This is the remedy that was adopted by the B.C. Court of Appeal in *R. v. Dunbar et al.* and it was only exercised at the end of the hearing, when the Court delivered its Judgment. *The great value of this remedy, before resorting to more punitive sanctions such as costs orders and contempt citations, is that it does not disrupt the trial and it does not cause prejudice to the client of the offending counsel.* When the misconduct escalates to the point that costs and contempt remedies are under consideration, the

[59] Dans l'arrêt *Young c. Young*, [1993] 4 R.C.S. 3, notre Cour a insisté sur la nature exceptionnelle des ordonnances condamnant personnellement un avocat aux dépens :

. . . les tribunaux doivent faire montre de la plus grande prudence en condamnant personnellement un avocat aux dépens, vu l'obligation qui lui incombe de préserver la confidentialité de son mandat et de défendre avec courage même des causes impopulaires. Un avocat ne devrait pas être placé dans une situation où la peur d'être condamné aux dépens pourrait l'empêcher de remplir les devoirs fondamentaux de sa charge. [p. 136]

[60] L'importance de ces considérations est amplifiée dans le contexte de procédures criminelles. Dans *R. c. Gunn*, 2003 ABQB 314, 335 A.R. 137, la Cour du Banc de la Reine de l'Alberta soulignait l'effet paralysant que sont susceptibles d'avoir sur les avocats de la défense au criminel des condamnations personnelles aux dépens, le juge Langston faisant observer ce qui suit à cet égard :

[TRADUCTION] . . . le fait de sanctionner des avocats de la défense pendant qu'ils s'acquittent de leur devoir — à savoir la protection des intérêts des personnes visée par des accusations criminelles — pourrait avoir un effet paralysant sur leur capacité à défendre adéquatement et avec zèle leurs clients contre tous les pouvoirs que l'État est à même d'exercer contre ceux-ci. [par. 50]

[61] La mesure la plus appropriée, le cas échéant, est de solliciter l'intervention du barreau concerné. Comme l'explique Michael Code, le recours au processus disciplinaire présente des avantages par rapport à une condamnation aux dépens :

[TRADUCTION] Lorsque des injonctions et réprimandes répétées ne parviennent pas à mettre fin à l'« incivilité » d'un avocat, une solution intermédiaire utile dont dispose le juge du procès consiste à signaler l'avocat fautif au barreau concerné. C'est la solution qu'a adoptée la Cour d'appel de la C.-B. dans *R. c. Dunbar et autres*, et qu'elle n'a mise à exécution qu'à la toute fin de l'audience, au moment où elle a rendu jugement. *L'avantage considérable que présente l'utilisation de cette mesure, préalablement au recours à des sanctions plus punitives comme la condamnation aux dépens et la citation à comparaître pour répondre à une accusation d'outrage au tribunal, est que cette mesure ne perturbe*

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lawyer is entitled to a hearing and the trial will inevitably be disrupted. By simply reporting the lawyer's misconduct to the Law Society, the court is able to escalate the available remedies without the need to conduct its own hearing into the alleged "incivility." Furthermore, the client may not be complicit in the lawyer's "incivility" and should not bear the cost or the prejudice of a hearing to consider sanctions against the lawyer. [Footnote omitted; emphasis added.]

(Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 119)

[62] This forms the policy basis for why the threshold is so high before ordering costs against criminal defence counsel. Only in the most exceptional of circumstances should they be ordered. Given the policy concerns and the exceptional nature of costs orders against defence counsel, it is worth emphasizing that the Crown should be very hesitant about pursuing them.

[63] We do not challenge the motion judge's finding that the writs of prohibition were requested for the purpose of postponing the proceedings and that the motions seeking the writs may not have had a solid legal foundation. Like the Court of Appeal, however, we are of the view that Mr. Jodoin's behaviour did not warrant the exceptional remedy of a personal costs order.

[64] It appears that Mr. Jodoin's conduct in this case was not unique in the district of Bedford, as reflected in the motion judge's comment that: [TRANSLATION] "In seeking a personal costs order against

pas le déroulement du procès et ne cause aucun préjudice au client de l'avocat fautif. Lorsque la conduite répréhensible s'aggrave au point où le tribunal envisage la condamnation aux dépens et l'outrage au tribunal, l'avocat a droit à une audience, ce qui perturbera inévitablement le procès. En signalant simplement au barreau la conduite répréhensible de l'avocat, le tribunal est ainsi en mesure de graduer l'intensité des procédures possibles sans devoir tenir sa propre audience sur l'« incivilité » reprochée. De plus, il est possible que le client de l'avocat ne soit pas complice de l'« incivilité » de ce dernier, et il ne devrait pas avoir à assumer les coûts ou inconvénients d'une audience visant l'examen de sanctions susceptibles d'être infligées à ce dernier. [Note en bas de page omise; italiques ajoutés.]

(Michael Code, « Counsel's Duty of Civility : An Essential Component of Fair Trials and an Effective Justice System » (2007), 11 *Rev. can. D.P.* 97, p. 119)

[62] Ces considérations constituent la justification pour laquelle le critère à respecter pour qu'un avocat de la défense au criminel puisse être condamné aux dépens est si exigeant. Une telle sanction ne devrait en effet être infligée que dans les circonstances les plus exceptionnelles. Compte tenu de ces considérations de principe et de la nature exceptionnelle d'une condamnation aux dépens prononcée contre un avocat de la défense, il importe de souligner que le ministère public devrait faire montre de beaucoup de circonspection avant de demander une telle sanction.

[63] Nous ne contestons pas la conclusion du juge des requêtes portant que les brefs de prohibition avaient été demandés en vue d'obtenir la suspension des procédures et que les requêtes les sollicitant ne reposaient pas sur les assises les plus solides en droit. Toutefois, à l'instar de la Cour d'appel, nous estimons que la conduite de Me Jodoin ne justifiait pas l'imposition de la sanction exceptionnelle que représente la condamnation personnelle d'un avocat aux dépens.

[64] Il semble que la conduite de Me Jodoin dans la présente affaire ne présentait pas un caractère exceptionnel dans le district de Bedford, comme en témoigne la remarque suivante du juge des requêtes :

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Mr. Jodoin, the prosecution wants to send a message to certain defence lawyers" (2013 QCCS 4661, at para. 11 (CanLII)). This suggests that Mr. Jodoin was being punished as a warning to other lawyers engaged in similar tactics. The court ordered costs against Mr. Jodoin personally for a total of $3,000.

« En demandant la condamnation personnelle de Me Jodoin, la poursuite veut envoyer un message à certains procureurs de la défense » (2013 QCCS 4661, par. 11 (CanLII)). Cela tend à indiquer que la sanction qui lui était infligée se voulait un avertissement aux autres avocats ayant recours à des tactiques similaires. Le tribunal a condamné personnellement Me Jodoin à verser des dépens de 3 000 $.

[65] The desire to make an "example" of Mr. Jodoin's behaviour does not justify straying from the legal requirement that his conduct be "rare and exceptional" before costs are ordered personally against him.

[65] Le désir de faire un « exemple » de Me Jodoin en sanctionnant sa conduite ne saurait justifier de déroger à la règle de droit exigeant que la conduite qu'on lui reproche présente un caractère « rare et exceptionnel » afin que le tribunal puisse le condamner personnellement aux dépens.

[66] Logically, the idea that costs should only be ordered against a lawyer personally in rare and exceptional circumstances cannot be reconciled with the fact that other defence counsel appear to have engaged in similar conduct.

[66] Logiquement, l'idée qu'un avocat ne devrait être condamné personnellement aux dépens que dans des circonstances rares et exceptionnelles est inconciliable avec le fait que d'autres avocats de la défense semblent avoir eu une conduite similaire.

[67] Mr. Jodoin has certainly not engaged in conduct we would commend. But to the extent that his behaviour was not unique in the district of Bedford, it is hard to see how it would amount to "dishonest or malicious misconduct" that would justify awarding costs personally against him (reasons of Gascon J., at para. 29).

[67] Maître Jodoin n'a certes pas eu une conduite méritant nos éloges. Toutefois, dans la mesure où cette conduite ne présentait pas un caractère exceptionnel dans le district de Bedford, il est difficile de voir comment elle pourrait constituer « une inconduite malhonnête ou malveillante » justifiant de le condamner personnellement aux dépens (motifs du juge Gascon, par. 29).

[68] Moreover, we are not persuaded that Mr. Jodoin's motions for writs of prohibition were unfounded to a sufficient degree to attract a personal costs order. The Superior Court concluded that Mr. Jodoin had filed those motions only for the purpose of obtaining an adjournment. This, however, does not take full account of the context of the proceedings, where one of the grounds raised involved the application of s. 657.3(3) of the *Criminal Code*, R.S.C. 1985, c. C-46.

[68] De plus, nous ne sommes pas persuadées que les requêtes sollicitant la délivrance de brefs de prohibition présentées par Me Jodoin étaient mal fondées au point de commander une condamnation personnelle aux dépens. La Cour supérieure a conclu que Me Jodoin avait déposé ces requêtes uniquement afin d'obtenir un ajournement. Cependant, cette conclusion ne tient pas entièrement compte du contexte des procédures en question, dans le cadre desquelles un des moyens soulevés concernait l'application du par. 657.3(3) du *Code criminel*, L.R.C. 1985, c. C-46.

[69] This provision states that "a party who intends to call a person as an expert witness shall, at least thirty days before the commencement of the trial or within any other period fixed by the justice or

[69] Aux termes de cette disposition, « la partie qui veut appeler un témoin expert donne à toute autre partie, au moins trente jours avant le début du procès ou dans le délai que fixe le juge de paix ou

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judge, give notice to the other party or parties of his or her intention to do so". Crown counsel intending to call an expert witness also has to provide a copy of the expert witness's report or a summary of the opinion anticipated to be given by the expert witness to the other party within a reasonable period before trial (s. 657.3(3)(b)).

[70] If notice is not given, s. 657.3(4) states that

(4) . . . the court shall, at the request of any other party,

(a) grant an adjournment of the proceedings to the party who requests it to allow him or her to prepare for cross-examination of the expert witness;

(b) order the party who called the expert witness to provide that other party and any other party with the material referred to in paragraph (3)(b); and

(c) order the calling or recalling of any witness for the purpose of giving testimony on matters related to those raised in the expert witness's testimony, unless the court considers it inappropriate to do so.

[71] The Crown had not provided Mr. Jodoin with the required notice. When Mr. Jodoin sought the adjournment to which he was entitled under s. 657.3(4), the judge presiding in the Court of Québec granted him a brief one over the lunch break. And, in refusing the requested adjournment, the judge mistakenly said that Mr. Jodoin had already cross-examined the Crown's expert witness in other matters.

[72] This is the context in which Mr. Jodoin filed his motions for writs of prohibition after the lunch hour.

[73] Mr. Jodoin now concedes, based on other decisions rendered subsequently in similar matters, that he ought not to have used motions for writs of prohibition in response to the court's refusal to grant the requested adjournment. But it is also undisputed that the Crown did not in fact give proper notice and that Mr. Jodoin was, as a result, entitled to an adjournment.

le juge, un préavis de son intention ». Le procureur de la Couronne qui entend appeler un témoin expert doit également fournir à l'autre partie, dans un délai raisonnable avant le procès, une copie du rapport rédigé par cet expert ou un sommaire énonçant la nature de son témoignage (al. 657.3(3)b)).

[70] Suivant le par. 657.3(4), en l'absence de préavis :

(4) . . . le tribunal, sur demande d'une autre partie :

a) ajourne la procédure afin de permettre à celle-ci de se préparer en vue du contre-interrogatoire de l'expert;

b) ordonne à la partie qui a appelé le témoin de fournir aux autres parties les documents visés à l'alinéa (3)b);

c) ordonne la convocation ou la reconvocation de tout témoin pour qu'il témoigne sur des questions relatives à celles traitées par l'expert, sauf s'il ne l'estime pas indiqué.

[71] Le ministère public n'a pas donné à Me Jodoin le préavis requis. Lorsque ce dernier a sollicité l'ajournement auquel il avait droit en vertu du par. 657.3(4), la Cour du Québec lui a accordé une brève suspension pendant la pause du midi. De plus, lorsqu'elle lui a refusé l'ajournement qu'il demandait, la Cour du Québec a affirmé, à tort, que Me Jodoin avait déjà contre-interrogé le témoin expert du ministère public dans d'autres instances.

[72] C'est dans ce contexte que Me Jodoin a déposé ses requêtes sollicitant la délivrance de brefs de prohibition après la pause du midi.

[73] Maître Jodoin concède maintenant, à la lumière d'autres décisions rendues subséquemment dans des affaires analogues, qu'il n'aurait pas dû recourir à des requêtes sollicitant la délivrance de brefs de prohibition à la suite du refus du tribunal de lui accorder l'ajournement qu'il demandait. Toutefois, il est également incontesté que le ministère public n'a pas donné à Me Jodoin le préavis requis, et qu'en conséquence celui-ci avait droit à l'ajournement des procédures.

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[74] In the circumstances, Mr. Jodoin's filing of motions for writs of prohibition for the purpose of suspending the proceedings can easily be seen as an error of judgment, but hardly one justifying a personal costs order.

[74] Dans les circonstances, le dépôt par Me Jodoin des requêtes sollicitant la délivrance de brefs de prohibition en vue d'obtenir la suspension des procédures peut aisément être considéré comme une erreur de jugement, mais difficilement comme une erreur justifiant une condamnation personnelle aux dépens.

[75] For these reasons, we would dismiss the appeal.

[75] Pour ces motifs, nous rejetterions le pourvoi.

Appeal allowed, ABELLA *and* CÔTÉ JJ. *dissenting.*

Pourvoi accueilli, les juges ABELLA *et* CÔTÉ *sont dissidentes.*

Solicitor for the appellant: Director of Criminal and Penal Prosecutions, Québec.

Procureur de l'appelant : Directeur des poursuites criminelles et pénales, Québec.

Solicitors for the respondent: Jodoin & Associés, Granby.

Procureurs de l'intimé : Jodoin & Associés, Granby.

Solicitor for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Montréal.

Procureur de l'intervenant le directeur des poursuites pénales : Service des poursuites pénales du Canada, Montréal.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Schurman Longo Grenier, Montréal; Goldblatt Partners, Toronto.

Procureurs de l'intervenante Criminal Lawyers' Association (Ontario) : Schurman Longo Grenier, Montréal; Goldblatt Partners, Toronto.

Solicitors for the intervener Association des avocats de la défense de Montréal: Walid Hijazi, Montréal; Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Procureurs de l'intervenante l'Association des avocats de la défense de Montréal : Walid Hijazi, Montréal; Desrosiers, Joncas, Nouraie, Massicotte, Montréal.

Solicitors for the intervener the Trial Lawyers Association of British Columbia: Blake, Cassels & Graydon, Vancouver.

Procureurs de l'intervenante l'Association des avocats plaideurs de la Colombie-Britannique : Blake, Cassels & Graydon, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Addario Law Group, Toronto; Stockwoods, Toronto.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Addario Law Group, Toronto; Stockwoods, Toronto.

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Re UNITED STATES OF AMERICA v. MAMMOTH OIL Co.

Ontario Supreme Court, Appellate Division, Mulock, C.J.O., Hodgins, Ferguson and Smith, JJ.A. March 11, 1925.

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A. W. Anglin, K.C., and *G. R. Munnoch,* for appellants.
N. W. Rowell, K.C., and *E. G. McMillan,* for respondents.

MULOCK, C.J.O., agrees with FERGUSON, J.A.

HODGINS, J.A. (dissenting):—Appeal from an order of Riddell, J., [1925] 2 D.L.R. 66, directing the appellant to answer certain questions on his examination as a witness in this action, which is one depending in a Federal Court in the U.S.

Broadly speaking, only two main contentions were presented. These were that the appellant was not obliged to disclose (1) the name of his client, nor (2) the affairs of the Continental Trading Company, so far as to state what persons, being its shareholders or others, received certain share-warrants representing profits.

The facts are sufficiently set forth in the judgment appealed from. Professional privilege is pleaded.

If an Ontario solicitor is consulted in New York by an American citizen with regard to business to be transacted, which, or part of which, is thereafter done here, he may be compelled in the Courts here, under proper procedure, to answer questions as a witness in an action in the U.S. This would not be questioned, but it seems to follow that he is entitled to set up the professional privilege which is granted to him under our system of law. This privilege is a matter of public policy adopted in the interests of justice in this Province: *Bullivant* v. *Att'y-Gen'l,* [1901] A.C. 196; *Lyell* v. *Kennedy* (1883), 9 App. Cas. 81; *Greenough* v. *Gaskell* (1833), 1 My. & K. 98, 39 E.R. 618. Consequently, it must attach to an Ontario solicitor, and be given effect to in an Ontario Court, whatever his client's nationality and wherever he was consulted. It is be-

cause the solicitor is being interrogated here, and because his confidential relation is established to the satisfaction of our Courts, that he can claim from them the protection arising from his professional status.

But there is a matter to be considered before dealing with the points raised.

I have read with care the bill of complaint upon which this case has been brought before the U.S. Court, as well as the affidavit of the eminent counsel conducting it, upon which the appellant's examination, as a witness called for the complainant, was directed. I have also perused attentively the information already given by the appellant in his examination.

It is quite apparent that counsel for the complainant have, in the bill of complaint and in their affidavit, studiously refrained from any allegation that the $90,000 of United States 3½% bonds which it is said were found to be in Fall's possession in June, 1922, were paid or given to him as a bribe, or that the alleged fraudulent conspiracy between Fall and Sinclair, in regard to the oil-leases in question, involved in any way the transfer of these bonds to Fall. The studious absence of any allegation involving such an inference is rather remarkable. And it is even more striking when the information actually given by the appellant, and that evidently previously possessed by the complainant's counsel, is considered. It may be that the Government of the U.S. is reluctant to charge a former Cabinet Minister with receiving a bribe; but, on the present state of the record, and under the conditions disclosed by the appellant, evidence regarding the distribution of the profits of the Continental Trading Co. and cognate facts would not be admitted in any Court, unless counsel undertook to connect it relevantly to the charges in that record. This they have had an opportunity of doing, or offering to do, in their original application and on the motions for and dealing with the commission herein, as well as before the Judge whose decision is appealed from. But they have not done so. This objection is taken by the appellant, and I think the Court is bound, before it deals with the solicitor's privilege, to consider and decide whether, in view of the allegations made, his information has such relation to the subject-matter of the proceeding that it should ordinarily be disclosed. If it could not be given in evidence, then privilege is not needed by the witness. It is suggested that we have nothing to do with the question of relevancy. That may be so as to the Commissioner, who has merely to report the evidence given before him. But when this Court is asked to commit one of its own officers, it is surely its duty to

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decide whether or not the questions are such as he should answer having regard to the matters actually alleged, and not to those which indicate merely an inquiring mind. Our laws of evidence must govern this Court in a proceeding to compel a resident here to give evidence. If he were in Wyoming he would be subject to the direction of the Court there in accordance with its laws. If, however, any indication had been given which would show that the questions referred to were or could be relevant to the issues to be tried, I would not be desirous of throwing any obstacle in the way of the complainant. But I find nothing of that kind in the material before us.

In *Parkhurst* v. *Lowten* (1819), 2 Swan. 194, 36 E.R. 589, at p. 592, Lord Chancellor Eldon, dealing with the taking of evidence under a commission said:—

"it is too much to say, that if he declines, he must not have some mode of bringing before the Court the question, whether the judgment of the commissioners or the examiner is such as it will approve; and it is impossible for the Court to know whether the witness is right or wrong in his demurrer, unless he states the reasons of it."

In *Bullivant* v. *Att'y-Gen'l for Victoria,* [1901] A.C. 196, also a case of evidence on commission, the House of Lords ultimately decided what questions were proper. In that case, dealing with disclosure where communications were said to be themselves parts of a criminal or unlawful proceeding, but where on specific charge was asserted, the Earl of Halsbury, L.C., said, at p. 201:—

"The line which the Courts have hitherto taken, and I hope will preserve, is this—that in order to displace the prima facie right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not. I do not at present go into the modes by which that can be made out, but there must be some definite charge of something which displaces the privilege."

In *O'Rourke* v. *Darbishire,* [1920] A.C. 581, the headnote is fully borne out by the judgments. It reads:—

"Professional privilege does not attach to communications made by or to a solicitor for the purpose of carrying out a fraud; but in order to displace the privilege on this ground, a mere allegation of fraud in a pleading is not sufficient; a prima facie case of fraud must be made out in fact."

In a letter dated August 2, 1924 (appearing in the certified proceeding before the Commission here), from counsel for the

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United States of America to the appellant, the following statement is made:—

"As we told you, we simply want to trace the bonds which were delivered to you from the time they left your hands until they reached the party we are investigating."

The appellant in his statement before the Commission, following the production of this letter, characterizes the position in the same way as I view it:—

"It is not alleged that the matter in my hands is connected in any way with the issues in the action in the foreign Court, but it is apparent that the only purpose of the examination now sought to be had must be to obtain information for use as a starting-point for further investigation which may lead to the discovery of the existence of evidence relative to the issues in said action."

To any one who has not read the examination of the appellant, it would be a surprise to learn what an amount of information has already been given by him.

It would be interesting to quote extracts from it, but it is not necessary. Apart from the name of the client and of those who shared in the profits of the Canadian company, everything that was needed to explain the course of the transaction under inquiry was given. As the profits, in bonds, were claimable by the holders of share-warrants, transferable by delivery, it is not to be wondered at that the appellant has said that he certainly did not know at the time of the distribution of bonds in the early part of 1922, who were the owners of these share-warrants, his own share in the profits being only 2%.

Those who took part in the earlier transactions in the U.S. were all named by counsel for the complainant in the questions put by them, so that if they do not know the name of the client they must have a very shrewd suspicion of his identity.

And those counsel knew, independently, that the actual bonds making up the $90,000 formed part of the distributed profit of the Continental Trading Co. This appears from their own affidavit in para. (q):—

"(q) That on April 13th, 1922, three brokerage firms in New York sold and delivered to the Dominion Bank $250,000 par value of said bonds; that on April 17th one of said firms sold and delivered to said bank $50,000 par value of said bonds. We have ascertained the serial numbers of all of said bonds. Said bank, while shewing said transactions on its books, has no record of said numbers. Said bank, however, has records shewing the delivery by it of said $300,000 of bonds on May 8th, 1922, to said H. S. Osler as president of Continental; that said

bonds so delivered were taken by said H. S. Osler in order to divide amongst the stockholders of Continental as dividends; that he did so divide them, and that they were delivered against stock warrant coupons; that this was done after May 8th, 1922; that on or about June 15th, 1922, $90,000 of said $300,000 bonds, identified by their numbers, were in the possession of the said Albert B. Fall, the person who it is alleged in this case conspired with said Sinclair to defraud the United States in the matter of said lease, which said lease was executed in the month of April, 1922. That now produced and shewn to us, marked exhibit E to this affidavit, is a photostatic copy of the ledger account of said Continental with said Dominion Bank, New York agency, a like copy of the bond account of Continental with the same agency, a like copy of the personal bond account of said H. S. Osler with said agency, and a like copy of a letter of said H. S. Osler to said agency ordering the purchase of said $300,000 of bonds.''

The above information is sworn to by counsel for the complainant as being obtained from Mr. P. Bolan of New York, an investigator employed by them to investigate the matters referred to above, and from a personal inspection by counsel of the books and records of the Dominion Bank, New York.

The Continental Trading Co.'s profits, except the share of the appellant, and perhaps some others in his office, belonged either to the companies known as the Prairie Oil & Gas Co. and the Sinclair Crude Oil Purchasing Co., who had agreed to purchase from Humphreys, and whose place the Continental Trading Co. took at the instance of the client of the appellant, or belonged to that client personally.

It would appear to me that the appellant has given more information than I think he was bound to do, and that further inquiry might well be made in the U.S. The appellant has further testified that he has no knowledge as to the holders or distributees of the share-warrants of the Continental Trading Co. But I base my judgment upon the fact that no allegation is put forward sufficient to require this Court to compel further discovery by the appellant.

As, however, the other questions have been very strenuously argued, I have no objection to state my opinion thereon, subject to the conclusion I have arrived at.

As to the name of the client, I am quite unable to see that a solicitor and his client can make that confidential which is not so in fact. The appellant admits that his client was known to him before he was consulted by him. That client's name, therefore, was a fact of which he acquired knowledge before pro-

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fessional relations began and not as part thereof. The solicitor and client cannot make a convention by which what is already known to the solicitor will form part of the confidential matters between them, if in fact that is not so. To permit this would extend the privilege far beyond what has hitherto been recognized in our Courts: *Bursill* v. *Tanner* (1885), 16 Q.B.D. 1.

As to the affairs of the company, I have already shown that its purpose and object, its transactions and its profits, are known and have been disclosed, except the names of its shareholders and the facts connected with the distribution of its profits. The appellant has already sworn that he can throw no light upon the latter subject.

It is clear, however, on the evidence, that the Continental Trading Co. was organized to buy and sell oil or to act as an intermediary representing the client in his dealings with the vendor, or the 2 foreign companies who were the real purchasers. The company did so act, and made a contract with the vendor to buy and then with the purchasers to sell to them, and the performance of the contract with the vendor was guaranteed by the 2 companies.

Its business, though suggested by the client, was accomplished by it as a corporation under the laws of Canada, and I can see no foundation for the idea that the client can set up privilege with regard to its affairs as existing because he, in concert with his solicitor, projected it.

Necessarily a solicitor has to employ clerks and others in the conduct of his office business, and they come under the same cloak of privilege as he does. But when a joint stock company is formed the fact that it is controlled by the solicitor and used by him to do certain of his client's business does not take away the quality and effect given to a corporation by statute and common law.

It must be composed of shareholders, who elect directors to act as its agents, and they have certain rights, powers, and duties as shareholders. The assets of the company belong to them and must be managed for their benefit. They can, if they all consent, give away or sell its assets just as the directors can, if properly authorized. But these are the shareholders' property, and they are in no sense agents for the client, though the company itself may so act.

There is in consequence a break in the chain of privilege, as the company's actions must be such as the shareholders direct in their own right; and, if they decide that the company shall become the mandatory of the client, they do so of their own volition and not at his. They are not his agents and their ac-

tions cannot be controlled by him, as his solicitors may and must be.

There is another difference between them and the client's solicitor. Once it steps outside and agrees that as a company it shall enter into contracts for the client's benefit, the company when it does so assumes relations with those with whom it contracts, and to those relations and the resulting agreements there is no privilege attached which the client can assert. The company is not a solicitor nor are its officers the agents, clerks, or servants of the solicitor, but it is a corporation engaged in another business, namely that of contracting with outsiders. They deal with it not as an agent of the solicitor but of his client. Hence privilege ceases to operate for his benefit.

In view, however, of the opinion I have expressed as to the effect of the absence of proper allegations, I would allow the appeal and set aside the order appealed from with costs here and below. I may perhaps add that I think the complainant and its counsel have had all the discovery they are entitled to on the present record, and indeed more perhaps than was their legal right.

If, however, in the course of the case in the Federal Court, the complainant amends by making some definite charge sufficient in law to render the questions relevant, I would reserve to it the right to apply again for such an order as it may then be entitled to.

FERGUSON, J.A.:—Appeal by Mr. H. O. Osler and other officers and directors of the Continental Trading Co. Ltd., called as witnesses at the trial of this action pending in the U.S. Federal Court (Wyoming District), from an order of Riddell, J., [1925] 2 D.L.R. 66, directing them to answer certain questions which they refused to answer before a Commissioner appointed by the U.S. Court to take evidence here, and cross-appeal by the U.S. from a refusal by Riddell, J., to direct the witnesses to answer questions which the Commissioner had ruled they need not answer.

The questions the witnesses seek to be excused from answering divide themselves into 2 classes, or under 2 heads:—(1) Those seeking information as to the acts of the Continental Trading Co. Ltd., and in reference to the information on which the corporation and its agents acted in the transactions referred to in the affidavits and evidence and in reference to the distribution of the assets of the corporation. (2) The name of the person who, Mr. Osler says, retained him in New York to prepare, revise, and settle contracts for the purchase and resale of oil, and

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to act as agent of his client in reference to the performance of such contracts.

The appellants contend:—(1) That the information sought was communicated to Mr. Osler as the professional legal adviser of his employer, or was obtained by Mr. Osler in the course of his employment as such professional legal adviser. (2) That the Continental Trading Co. and its officers were merely confidential agents and employees of Mr. Osler, used and directed by him as professional legal adviser of his client for the better performing of his duties to his client, and that therefore all communications he made to the corporation or its officers and all transactions of the corporation and all the acts of its directors and officers are privileged.

The respondents contend:—(1) That the Continental Trading Co. was an agent or employee of Mr. Osler or of his client, and did not act as such. (2) That Mr. Osler was not employed or retained as professional legal adviser of his employer, but as his commercial agent. (3) That, even if Mr. Osler was retained and employed as professional legal adviser of his employer, yet in acting as president of the Continental Trading Co. he must be regarded as agent of that corporation rather than as either agent or counsel of his client; and that, if the corporation was neither the agent nor employee of Mr. Osler or of his client, Mr. Osler and his co-officers must disclose the business of the corporation and the information on which he and they acted in carrying on the business of the corporation and in the distribution of its assets. (4) That the name of Mr. Osler's client was known to Mr. Osler before the alleged retainer, and was therefore not made known to Mr. Osler in confidence. (5) That, if the name of Mr. Osler's client was knowledge on which the corporation as such acted in the distribution of its shares, share-warrants, or moneys, Mr. Osler must disclose that name. (6) That the names of those associated with Mr. Osler's client were not made known or communicated to Mr. Osler as professional legal adviser of his client, but as president of the Continental Trading Co., in order that the persons named might receive shares and share-warrants, and as such a portion of the company's assets. (7) That communications made to Mr. Osler or the other officers of the Continental Trading Co. to enable the corporation to act or to enable them to act as agents of the corporation are not privileged. (8) That the identity of the client claiming privilege must in all cases be made known to the Court. (9) That in a foreign country, advising there a person neither a resident nor a citizen of Canada, in reference to business in no way connected with this country or its laws,

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Mr. Osler had, neither in this country nor in the foreign country, the status of a professional legal adviser.

I am of opinion that, if the Continental Trading Co. was not either the clerk or employee of Mr. Osler or the agent of his employer, its acts and the information communicated to it and its officers for the purpose of carrying on its business and distributing its assets cannot be privileged as being the acts of either Mr. Osler or of his employer, or as being information communicated by Mr. Osler to his clerk or agent for the purpose of carrying out the confidential business which he claims he was employed by an unnamed client to perform.

I have carefully perused and considered the affidavits, the oral testimony, and the documentary exhibits therein referred to, in the light of the arguments of counsel, and am of opinion that agency on the part of the corporate entity known as the Continental Trading Co. Ltd., in making the contracts referred to in the evidence, and in distributing the profits arising therefrom, is not made out.

The written contracts of purchase and resale drawn by Mr. Osler and executed by the corporation under its corporate seal and by the hand of its president, Mr. Osler, take the form of contracts between principals; and that it was intended and understood that the corporation contracted as principal, and not as agent, is, I think, indicated by the following circumstances:—

(1) It is not alleged that the Continental Trading Co. Ltd. made any express contract with Osler or with his employer to act as agent in the purchase and resale of the oil, or to account to them or either of them for the profits on such sale and resale. In the absence of such express contract, the contract of agency or employment relied on by Mr. Osler and his employer must be one implied from the facts and circumstances surrounding the transaction and the acts and conduct of the parties. (2) The corporation known as the Continental Trading Co. Ltd., of which Mr. Osler was a director and president, and of which the other witnesses were directors, admittedly dealt with the profits as if they were the property of the corporation and distributed them among its shareholders as such, and by reference to the shares and share-warrants of the corporation outstanding. (3) The corporation did not purport to receive or in fact receive and distribute the profits arising from such purchase and resale as money or property belonging to another. (4) Humphreys would not accept the corporation as a purchaser in the place and stead of the original purchaser (presumably Mr. Osler's employer), unless performance of the contract by

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the corporation was guaranteed. (5) In the contract of purchase and resale the corporation is described as vendee and vendor, and not as agent.

This is a case where actions should, I think, speak louder than arguments as to what was the relationship of this corporation to Mr. Osler and his client. The form of the contracts of purchase and sale and the circumstances surrounding the giving and making of the guarantee and the fact that Mr. Osler and his employer had, through the shareholders nominated by them or either of them, absolute control of the acts of the corporation, and that Mr. Osler and these shareholders permitted and directed the corporation to distribute the profits arising from the contracts among the shareholders of the company as if the profits were the property and moneys of the corporation rather than the property and moneys of Mr. Osler, are not facts or circumstances from which it should be implied that the corporation was a mere clerk, employee, or agent, but are facts and circumstances that at least indicate that the corporation was not and was never intended to be and act as a mere agent.

However, whatever the fact may be, I am unable to imply a contract of employment or agency on the part of the corporation from the facts, acts, and circumstances disclosed in the evidence; and, as such a relationship is, in my opinion, the basis of the claim of privilege in reference to the first class or series of questions, it seems to follow that the appeal in reference to these questions must fail.

No evidence was given as to the circumstances surrounding the issue and allotment of shares or the consideration given to the company therefor, and the presumption is that such shareholders personally purchased the same on their own account, and it is just possible, though I cannot think it probable, that further evidence may make out agency on the part of the corporation, which, in my opinion, is neither indicated nor established by the evidence now before the Court.

That brings me to the series of questions by which it is sought to obtain the name of the person who employed Mr. Osler in New York to act as his agent in performing 2 contracts for the purchase and resale of oil, and to prepare, revise, and settle the proposed contracts.

Riddell, J., was of opinion that because Mr. Osler knew his employer before they met in New York in reference to the business which it is now sought to investigate, the name could not be taken to have been communicated to Mr. Osler in confidence for the purpose of the business. Mr. Osler testified that at the opening of the interview which took place in New York, and at

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which he says he was retained, his employer stipulated that his name should not be made known in connection with the business. With deference, I am unable to agree in this opinion of the Judge appealed from. It seems to me the essence of the question is not, whether Mr. Osler knew the name of the client before or when Mr. Osler accepted the retainer, but the identification of Mr. Osler's client with the confidential legal business in reference to which Mr. Osler was retained. Nor am I prepared to say that the result of the authorities is that privilege cannot be claimed without disclosing to the Court the name of the client or person on whose behalf it is claimed. I have read and considered the cases cited by counsel, and, in my opinion, they do not carry the law that far, and it seems to me it should not be so held on principle. The principle is that mankind should be able and free to consult professional legal advisers without fear that their confidential communications to such professional legal advisers shall be disclosed.

Let us stop to consider the now too common automobile accident in which some one is killed by a car driven by an unknown person, after which the unknown driver goes to counsel, and, after communicating the facts for advice, directs the counsel to attend the inquest, watch the proceedings, and keep him advised. What would become of the principle enunciated if the counsel attending such inquest may be put in the witness-box and questioned as to why and for whom he is attending and watching the proceedings? I am clearly of opinion that counsel so employed could and should refuse to answer such questions. Therefore, if it were clear that Mr. Osler was retained to advise and give counsel in reference to legal business at a place and in circumstances which clothed him with the status of professional legal adviser to his employer, I would allow the appeal on this branch.

But I am not satisfied that Mr. Osler was retained at a place or under circumstances or for a purpose that gave or entitled him or his client to claim that in reference to the business in hand Mr. Osler had the status of professional legal adviser to his employer until some time after Mr. Osler's client had disclosed to him the business on which he wished to consult, and his name in connection with such business. It is, I think, clear that at the opening of the interview in New York at which Mr. Osler was retained, and the nature of his client's business was disclosed, Mr. Osler was not asked to advise a Canadian, nor to advise his employer in reference to Canadian business or Canadian laws; also that Mr. Osler was not then or now a member of the New York Bar or practising or entitled to

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practise his profession in the U.S. or even residing in New York.

The formation of the Canadian corporation known as the Continental Trading Co. Ltd., was an afterthought of Mr. Osler's, suggested for his own rather than his client's protection, and was not thought of until some time after the client had made known to Mr. Osler his name in connection with the confidential business in respect of which he sought Mr. Osler's advice, assistance, and co-operation.

The proposition then is that if a resident and citizen of the U.S. brings a Canadian counsel to the U.S. or meets him there, and there consults the Canadian counsel in reference to purely U.S. business, this Court should regard communications made to that counsel in the course of the interview in New York in reference to such foreign business as being made to such Canadian counsel in his capacity of barrister or solicitor in this Court, or as made by his client to a professional legal adviser, and as such protected from disclosure not only in proceedings in this Court but in litigation prosecuted by the U.S. in its own Courts against its own citizens, and for that reason refuse its assistance to the U.S. Court in efforts directed to making such foreign counsel disclose what was communicated to him in the U.S. in connection with purely U.S. business.

In *Lawrence* v. *Campbell* (1859), 4 Drew. 485, at p. 489, 62 E.R. 186, Kindersley, V.C., said:—

"The question is new in specie, but the cases have settled the general principle . . . The general principle is founded upon this, that the exigencies of mankind require that in matters of business, which may lead to litigation, men should be enabled to communicate freely with their professional advisers, and their communications should be held confidential and sacred . . ."

In the *Lawrence* case the protection of privilege was by an English Court extended to Scotch solicitors and law agents practising their profession in London. But it was there pointed out that the Scotch solicitors had in London the status of legal advisers because they were entitled to appear before the House of Lords and to practise as Parliamentary agents and that they were consulted by a Scotchman. It seems to me that the *Lawrence* case falls far short of establishing a protection to Mr. Osler in the circumstances surrounding his retainer as outlined in the evidence.

Here Mr. Osler was not consulted by a Canadian; in the *Lawrence* case the Scotch solicitors were consulted by a Scotchman. In this case Mr. Osler had, in the State of N.Y., no status as a

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professional legal adviser, while in the *Lawrence* case the Scotch solicitors had a well-recognized status in England.

The facts and circumstances of the *Lawrence* case are so different from the facts and circumstances surrounding the retainer here in question that we are, I think, left to determine this case on principle, and the question seems to be: Are the exigencies of mankind such as to require that the man may import from a foreign country a counsel and entrust him with business to be conducted in the country of the client, such business having no connection with the laws of the country which has alone given the counsel legal status? If not, it should, I think, be held that in this case Mr. Osler did not have the status of a professional legal adviser at the time his client disclosed his name to him in connection with the business in reference to which Mr. Osler was consulted and retained. In the absence of binding authority, I am not prepared to hold that the exigencies of mankind require us to hold that Mr. Osler had, in the circumstances disclosed and at the time the name was made known in connection with the business, any such status as is claimed for him. It should not be overlooked that the client is claiming this status for Mr. Osler in a U.S. Court in reference to acts of Mr. Osler in the U.S., and in reference to communications made to him in connection with U.S. business, and that the U.S. Courts have ruled that the questions should be answered and that the question before us is: Must we refuse to enforce that ruling simply because Mr. Osler is a solicitor of this Court? My opinion is that we should not refuse to enforce the rulings of the U.S. Courts unless they require us to order something to be done which is clearly contrary to natural justice, public policy, or our laws, none of which is, in my opinion, made out.

I would, for these reasons, dismiss the appeal.

I am also of opinion that the cross-appeal must be dismissed. It seems to me that all we can be asked to do in these proceedings is to aid the U.S. Court by requiring the witnesses to attend and answer questions which the U.S. Court has determined should be answered. True we can, on an application for our aid, refuse that aid for reasons which seem good to us—but I am unable to find any ground or reason for saying that we may sit in review and reverse the rulings of the U.S. Court, and direct the witnesses to answer questions which the U.S. Court has ruled need not be answered.

I do not think I should leave this case without saying that in disclosing the facts and submitting them to this Court for consideration and direction, before answering the questions in

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dispute, Mr. Osler only performed what his duty to the Court and to his client required him to do, and that the conclusion at which I have arrived should not be interpreted as indicating that I doubt the propriety of Mr. Oslers' conduct in the transactions sought to be investigated or the propriety of his claim of privilege or the propriety of his conduct in prosecuting this appeal. It was not in argument suggested that Mr. Osler had been a party to any wrongdoing; and, in my opinion, his duty to the Court and to his client required that he raise the question of privilege and not abandon it until thoroughly satisfied that he had been rightly directed by the Court. For, as I understand it, the rule is a rule of public policy established in the interest of justice rather than a rule established for the protection of particular persons such as the solicitor or his client, and rather than as a rule granting the solicitor or his client the right to claim some privilege or protection, and therefore is a rule which the Court must enforce unless its enforcement be waived by the client: see *Greenough* v. *Gaskell,* 1 My. & K. 98, 39 E.R. 618, 620.

SMITH, J.A., agrees with FERGUSON, J.A.

Appeal and cross-appeal dismissed.

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Wastech Services Ltd. *Appellant*

v.

Greater Vancouver Sewerage and Drainage District *Respondent*

and

Attorney General of British Columbia and Canadian Chamber of Commerce *Interveners*

Indexed as: Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District

2021 SCC 7

File No.: 38601.

2019: December 6; 2021: February 5.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts — Breach — Performance — Duty to exercise contractual discretion in good faith — Waste removal contract providing municipal district with absolute discretion to allocate waste to various disposal facilities — Municipal district's reallocation of waste resulting in reduction of waste company's profit — Waste company alleging breach of contract due to reallocation of waste depriving it of possibility of achieving target profit — Whether reallocation of waste constitutes breach of duty to exercise contractual discretion in good faith.

Wastech, a waste transportation and disposal company, and Metro, a statutory corporation responsible for the administration of waste disposal for the Metro Vancouver Regional District, had a long-standing contractual relationship which contemplated the removal and transportation of waste by Wastech to three disposal facilities. Wastech was to be paid at a differing rate depending on which disposal

Wastech Services Ltd. *Appelante*

c.

Greater Vancouver Sewerage and Drainage District *Intimée*

et

Procureur général de la Colombie-Britannique et Chambre de commerce du Canada *Intervenants*

Répertorié : Wastech Services Ltd. c. Greater Vancouver Sewerage and Drainage District

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N^o du greffe : 38601.

2019 : 6 décembre; 2021 : 5 février.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin et Kasirer.

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

Contrats — Violation — Exécution — Obligation d'exercer un pouvoir discrétionnaire contractuel de bonne foi — Contrat d'enlèvement de déchets conférant au district municipal le pouvoir discrétionnaire absolu concernant la répartition des déchets entre diverses installations d'élimination — Nouvelle répartition des déchets par le district municipal donnant lieu à une réduction du profit de l'entreprise de transport des déchets — Entreprise de transport des déchets alléguant une violation de contrat en raison de la nouvelle répartition des déchets la privant de la possibilité d'atteindre son profit cible — La nouvelle répartition des déchets constitue-t-elle une violation de l'obligation d'exercer le pouvoir discrétionnaire contractuel de bonne foi?

Wastech, une entreprise qui s'occupe du transport et de l'élimination des déchets, et Metro, une société constituée en vertu d'une loi et chargée de gérer l'élimination des déchets dans le district régional du Grand Vancouver, entretiennent depuis longtemps une relation contractuelle visant l'enlèvement et le transport des déchets par Wastech vers trois installations d'élimination des déchets. Wastech

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facility the waste was directed to and how far away the facility was located. The contract did not guarantee that Wastech would achieve a certain profit in any given year and it gave Metro absolute discretion to allocate waste as it so chose.

In 2011, Metro reallocated waste from a disposal facility further away to one that was closer, resulting in Wastech recording an operating profit well shy of its target. Wastech alleged that Metro breached the contract by allocating waste among the facilities in a manner that deprived Wastech of the possibility of achieving the target profit for 2011. Wastech referred the dispute to arbitration and sought compensatory damages. The arbitrator found that a duty of good faith applied, that Metro had breached that duty, and that Wastech was therefore entitled to compensation. The Supreme Court of British Columbia allowed Metro's appeal, and set aside the arbitrator's award on the basis that the imposition of a contractual duty to have appropriate regard for the interests of another contracting party must be based on the terms of the contract itself, and that in this case the parties had deliberately rejected a term constraining the exercise of discretionary power to allocate waste. The Court of Appeal dismissed Wastech's appeal.

Held: The appeal should be dismissed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ.: Where a party to a contract exercises its discretion unreasonably, that is, in a manner not connected to the underlying purposes of the discretion granted by the contract, its conduct amounts to a breach of the duty to exercise contractual discretionary powers in good faith. Metro's exercise of discretion was not unreasonable with regard to the purposes for which the discretion was granted and was therefore not a breach of the duty. Accordingly, the arbitrator's award cannot stand, whether the standard of review is correctness or reasonableness.

The duty to exercise contractual discretion in good faith is well-established in the common law. It was expressly recognized by the Court in its account of the organizing principle of good faith in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494. However, it was not necessary in *Bhasin* to spell out the contours of this duty. In order to

devait être payée à un taux différent selon l'installation vers laquelle les déchets étaient envoyés et la distance pour s'y rendre. Le contrat ne garantissait pas que Wastech réaliserait un certain profit chaque année et il conférait à Metro le pouvoir discrétionnaire absolu de décider où les déchets seraient envoyés.

En 2011, Metro a décidé de modifier la répartition des déchets pour que les déchets qui étaient envoyés à une installation d'élimination des déchets plus éloignée soient envoyés à une installation plus rapprochée, de sorte que Wastech a enregistré un bénéfice d'exploitation bien inférieur à son objectif. Wastech a allégué que Metro avait violé le contrat en répartissant les déchets entre les installations d'une manière qui la privait de la possibilité d'atteindre les profits ciblés pour 2011. Wastech a renvoyé le différend à l'arbitrage et a réclamé des dommages-intérêts compensatoires. L'arbitre était d'avis qu'une obligation d'agir de bonne foi s'appliquait, que Metro avait manqué à cette obligation et que Wastech avait donc droit à une indemnisation. La Cour suprême de la Colombie-Britannique a accueilli l'appel de Metro, et a annulé la décision de l'arbitre au motif que l'imposition d'une obligation contractuelle de prendre en compte comme il se doit les intérêts d'une autre partie contractante doit être fondée sur les conditions du contrat en tant que tel, et qu'en l'espèce, les parties ont délibérément rejeté l'inclusion d'une condition limitant l'exercice du pouvoir discrétionnaire relatif à la répartition des déchets. La Cour d'appel a rejeté l'appel interjeté par Wastech.

Arrêt : Le pourvoi est rejeté.

Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Martin et Kasirer : Lorsqu'une partie à un contrat exerce son pouvoir discrétionnaire de façon déraisonnable, c'est-à-dire d'une manière étrangère aux objectifs qui sous-tendent le pouvoir discrétionnaire conféré par le contrat, sa conduite constitue un manquement à l'obligation d'exercer ses pouvoirs discrétionnaires contractuels de bonne foi. L'exercice par Metro de son pouvoir discrétionnaire n'était pas déraisonnable eu égard aux objectifs pour lesquels le pouvoir discrétionnaire a été conféré et ne constituait donc pas un manquement à l'obligation. Par conséquent, la sentence arbitrale ne peut être maintenue, que la norme de contrôle applicable soit celle de la décision correcte ou celle de la décision raisonnable.

L'obligation d'exercer les pouvoirs discrétionnaires contractuels de bonne foi est bien établie en common law. Elle a été expressément reconnue par la Cour lorsqu'elle a énoncé le principe directeur de bonne foi dans l'arrêt *Bhasin c. Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494. Toutefois, il n'était pas nécessaire dans l'arrêt *Bhasin* de

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answer Wastech's claim then, the Court must determine what constraints the duty to exercise contractual discretion in good faith imposes on the holder of that discretion.

The duty to exercise contractual discretion in good faith requires the parties to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract, or, in the terminology of the organizing principle in *Bhasin*, to exercise their discretion reasonably. The duty to exercise contractual discretion is breached only where the discretion is exercised unreasonably, in a manner unconnected to the purposes underlying the discretion. Where discretion is exercised in a manner consonant with the purpose, that exercise may be characterized as reasonable according to the bargain the parties had chosen to put in place. But where the exercise stands outside the compass set by contractual purpose, the exercise is unreasonable in light of the agreement for which the parties bargained and may be thought of as unfair and contrary to the requirements of good faith.

The measure of fairness is what is reasonable according to the parties' own bargain. It is not what a court sees as fair according to its own view of the proper exercise of the discretion. Where the exercise of discretionary power falls outside of the range of choices connected to its underlying purpose — outside the purpose for which the agreement the parties themselves crafted provides discretion — it is thus contrary to the requirements of good faith. Courts can intervene where the exercise of the power is arbitrary or capricious in light of its purpose as set by the parties; however, their role is not to ask whether the discretion was exercised in a morally opportune or wise fashion from a business perspective. Courts must only ensure parties have not exercised their discretion in ways unconnected to the purposes for which the parties themselves grant that power. In a contractual context, these choices are ascertained principally by reference to the contract, interpreted as a whole — the first source of justice between the parties.

What a court considers unreasonable is highly context-specific, and ultimately depends upon the intention of the parties as disclosed by their contract. Generally, however, for contracts that grant discretionary power in which the matter to be decided is readily susceptible of objective measurement, the range of reasonable outcomes will be

détailler la portée de cette obligation. Afin de répondre à la prétention de Wastech, la Cour doit alors déterminer quelles contraintes impose l'obligation d'exercer le pouvoir discrétionnaire contractuel de bonne foi à son titulaire.

L'obligation d'exercer un pouvoir discrétionnaire contractuel de bonne foi exige des parties qu'elles exercent celui-ci d'une manière conforme aux objectifs pour lesquels il est conféré par le contrat, ou, pour reprendre la terminologie du principe directeur dans l'arrêt *Bhasin*, qu'elles exercent leur pouvoir discrétionnaire de manière raisonnable. Il y a manquement à l'obligation d'exercer le pouvoir discrétionnaire contractuel seulement lorsque ce pouvoir est exercé de façon déraisonnable, d'une manière étrangère aux objectifs qui sous-tendent le pouvoir discrétionnaire. Lorsque le pouvoir discrétionnaire est exercé d'une façon conforme à cet objectif, un tel exercice peut être qualifié de raisonnable selon le marché que les parties ont choisi de mettre en place. Toutefois, lorsque l'exercice sort des balises établies par l'objectif contractuel, il est déraisonnable à la lumière de l'accord que les parties ont négocié et peut être considéré comme injuste et contraire aux exigences de la bonne foi.

Il faut évaluer l'équité selon ce qui est raisonnable en fonction du marché qu'ont conclu les parties. Ce n'est pas ce que le tribunal estime juste selon sa propre perception de ce qu'est l'exercice approprié du pouvoir discrétionnaire. Lorsque l'exercice du pouvoir discrétionnaire est en dehors de l'éventail des choix liés à son objectif sous-jacent — en dehors de l'objectif pour lequel l'accord que les parties ont elles-mêmes choisi confère ce pouvoir discrétionnaire — il est contraire aux exigences de la bonne foi. Les tribunaux peuvent intervenir lorsque l'exercice du pouvoir est arbitraire ou abusif compte tenu de son objectif établi par les parties; toutefois, il ne leur appartient pas de se demander si le pouvoir discrétionnaire a été exercé de façon opportune sur le plan moral ou avec sagesse d'un point de vue commercial. Les tribunaux doivent seulement s'assurer que les parties n'ont pas exercé leur pouvoir discrétionnaire d'une façon étrangère aux objectifs pour lesquels les parties elles-mêmes confèrent ce pouvoir. Dans un contexte contractuel, on détermine de tels choix principalement en se rapportant au contrat, interprété dans son ensemble — il s'agit de la première source de justice entre les parties.

Ce qu'un tribunal juge déraisonnable est étroitement lié au contexte et dépend en fin de compte de l'intention qu'ont manifestée les parties dans leur contrat. De façon générale cependant, en ce qui concerne les contrats conférant un pouvoir discrétionnaire pour lequel la question à trancher est facile à mesurer objectivement, la gamme des

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relatively smaller. For contracts that grant discretionary power in which the matter to be decided or approved is not readily susceptible to objective measurement, the range of reasonable outcomes will be relatively larger. It is in properly interpreting the contract for the purposes for which discretion was granted that the range of good faith behaviour comes into focus and breaches can be identified.

issues raisonnables sera relativement réduite. En ce qui concerne les contrats conférant un pouvoir discrétionnaire pour lequel la question à trancher ou à approuver ne se prête guère à une mesure objective, la gamme d'issues raisonnables sera relativement plus grande. C'est en interprétant correctement le contrat aux fins des objectifs pour lesquels le pouvoir discrétionnaire a été conféré que la gamme de comportements de bonne foi deviendra apparente et que l'on pourra cerner les violations.

Requiring substantial nullification — that is, the evisceration by one party of the better part of the benefit of the contract of the other — is not the appropriate standard for concluding a breach of the duty to exercise discretionary power in good faith. The fact that a party's exercise of discretion causes its contracting partner to lose some or even all of its anticipated benefit under the contract is not dispositive, in itself, as to whether the discretion was exercised in good faith. However, it could well be relevant to show that discretion had been exercised in a manner unconnected to the relevant contractual purposes.

Exiger l'annulation substantielle — c'est-à-dire, le fait pour une partie de vider de son sens une grande partie de l'avantage obtenu par l'autre partie dans le cadre du contrat — n'est pas la norme qui convient pour conclure à un manquement à l'obligation d'exercer son pouvoir discrétionnaire contractuel de bonne foi. Le fait que l'exercice par une partie de son pouvoir discrétionnaire fasse perdre à son partenaire contractuel une partie ou la totalité de son avantage prévu au contrat ne devrait pas être considéré comme un élément déterminant, en soi, permettant de répondre à la question de savoir si le pouvoir discrétionnaire a été exercé de bonne foi. Cependant, il pourrait fort bien s'avérer utile pour démontrer que ce pouvoir discrétionnaire a été exercé d'une manière étrangère aux objectifs contractuels pertinents.

Finally, the duty to exercise discretion in good faith is a general doctrine of contract law. It need not find its source in an implied term in the contract, but rather it operates in every contract irrespective of the intentions of the parties. Recognizing this general duty interferes very little with freedom of contract for two reasons. First, just as parties will rarely expect that their contract permits dishonest performance, contracting parties rarely if ever expect discretion granted by the contract to be exercised in a manner unconnected to the purposes for which it was conferred. Second, the content of the duty is guided by the will of the parties as expressed in their contract. Rather than interfering with the objectives of the contracting parties or imposing duties on them beyond their reasonable contemplation, this duty merely requires that parties operate within the scope of discretion defined by their own purposes for which they freely negotiated its grant. Parties who provide for discretionary power cannot contract out of the implied undertaking that the power will be exercised in good faith, in light of the purposes for which it was conferred.

Enfin, l'obligation d'exercer un pouvoir discrétionnaire de bonne foi est un principe général du droit des contrats. Cette obligation n'a pas à trouver sa source dans une condition implicite du contrat; elle se manifeste plutôt dans chaque contrat, sans égard aux intentions des parties. La reconnaissance de cette obligation générale porte très peu atteinte à la liberté contractuelle pour deux raisons. D'abord, tout comme les parties s'attendront rarement à ce que leur contrat les autorise à exécuter leurs obligations de façon malhonnête, elles ne s'attendent que rarement, voire jamais, à ce que le pouvoir discrétionnaire conféré par le contrat soit exercé d'une manière étrangère aux objectifs pour lesquels il a été conféré. Deuxièmement, la teneur de l'obligation est fonction de la volonté des parties telle qu'elle est exprimée dans leur contrat. Au lieu de nuire aux objectifs des parties contractantes ou de leur imposer des obligations qu'elles ne peuvent raisonnablement envisager, cette obligation ne fait qu'exiger des parties qu'elles respectent les limites du pouvoir discrétionnaire défini par leurs propres objectifs pour lesquels elles en ont librement négocié l'octroi. Les parties qui prévoient un pouvoir discrétionnaire ne peuvent se soustraire à l'engagement implicite voulant que le pouvoir soit exercé de bonne foi, en fonction des objectifs pour lesquels il a été conféré.

Metro's exercise of discretion was not unreasonable with regard to the purposes for which the discretion was

L'exercice par Metro de son pouvoir discrétionnaire n'était pas déraisonnable eu égard aux objectifs pour

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granted. Wastech's case does not rest on allegations that it fell prey to lies or deception or that Metro exercised its discretion capriciously or arbitrarily, and it does not point to any identifiable wrong committed by Metro beyond seeking its own best interest within the bounds set for the exercise of discretion by the contract. The contract gives Metro the absolute discretion to determine how the waste is to be allocated. There is no guaranteed minimum volume of waste allocated in a given year. Reading the contract as a whole, the purposes become clear: to allow Metro the flexibility necessary to maximize efficiency and minimize costs of the operation. The fact that this discretion exists alongside a detailed framework to adjust payments towards the goal of a negotiated level of profitability, belies the idea that the parties intended this discretion be exercised so as to provide Wastech with a certain level of profit. Those incentives are already carefully created elsewhere in the contract.

Based on these purposes, Metro did not act unreasonably. Metro's exercise of discretion was guided by the objectives of maximizing efficiency, preserving remaining site capacity, and operating the system in the most cost-effective manner, and was made in furtherance of its own business objectives. Wastech is asking for an advantage for which it did not bargain: it asks that Metro confer a benefit upon it that was not contemplated, expressly or impliedly, under the contract. Although Wastech emphasized that the contract was a long-term relational agreement dependent upon an element of trust and cooperation between Wastech and Metro, this is not dispositive of the case in favour of Wastech. This is not an example of an unforeseen or unregulated matter that, by reason of the relational character of the contract, was left to the trust and cooperation said to be inherent in the long-term arrangement. The parties foresaw this risk — and chose to leave the discretion in place.

Wastech asks the Court to have Metro subvert its own interest in name of accommodating Wastech's interest. However, Metro is Wastech's contracting partner, not its fiduciary. The loyalty required of it in the exercise of this discretion was loyalty to the bargain, not loyalty to Wastech. Wastech cannot rely on an understanding of good faith that sits uncomfortably with the foundation of contractual justice. When the contours of good faith performance in this context are properly identified, it is plain

lesquels le pouvoir discrétionnaire a été conféré. La cause de Wastech ne repose pas sur des allégations portant qu'elle a été victime de mensonges ou de tromperies ou que Metro a exercé son pouvoir discrétionnaire de façon abusive ou arbitraire, et elle ne relève pas de faute identifiable commise par Metro hormis la recherche de son propre intérêt dans les limites que fixe le contrat pour l'exercice du pouvoir discrétionnaire. Le contrat confère à Metro le pouvoir discrétionnaire absolu pour établir la façon dont les déchets seront répartis. Il n'y a aucun volume minimal garanti de déchets destinés aux sites au cours d'une année donnée. Lorsqu'on lit les clauses du contrat dans son ensemble, les objectifs deviennent clairs : donner à Metro la souplesse nécessaire pour maximiser l'efficacité et réduire au minimum les frais de l'opération. De plus, la coexistence de ce pouvoir discrétionnaire avec un cadre détaillé servant à ajuster les paiements en vue de l'atteinte d'un niveau négocié de rentabilité contredit l'idée que les parties entendaient que ce pouvoir discrétionnaire soit exercé de manière à ce que Wastech bénéficie d'une certaine rentabilité. Ces incitatifs détaillés existent déjà ailleurs dans le contrat.

À la lumière de ces objectifs, Metro n'a pas agi de façon déraisonnable. L'exercice par Metro de son pouvoir discrétionnaire était guidé par les objectifs d'optimisation de l'efficacité, de préservation de la capacité restante du site et d'exploitation du système de la manière la plus rentable possible, et Metro avait pris sa décision en vue d'atteindre ses propres objectifs opérationnels. Wastech cherche à obtenir un avantage qu'elle n'a pas négocié : elle demande que Metro lui confère un avantage qui n'a pas été envisagé, expressément ou implicitement, dans le contrat. Bien que Wastech ait souligné que le contrat constituait un accord relationnel à long terme tributaire d'un élément de confiance et de collaboration entre Wastech et Metro, cela ne permet pas de trancher l'affaire en faveur de Wastech. Il ne s'agit pas d'un exemple d'une situation imprévue ou non réglementée qui, en raison de la nature relationnelle du contrat, devait se régler grâce à la confiance et à la collaboration considérées comme inhérentes à l'accord à long terme. Les parties avaient prévu ce risque — et ont choisi de conserver le pouvoir discrétionnaire.

Wastech demande à la Cour de faire en sorte que Metro compromette son propre intérêt afin d'accommoder l'intérêt de Wastech. Toutefois, Metro est le partenaire contractuel de Wastech, non pas son fiduciaire. La loyauté exigée de sa part dans le cadre de l'exercice de ce pouvoir discrétionnaire était la loyauté envers le marché, et non envers Wastech. Celle-ci ne peut se fonder sur une compréhension de la bonne foi qui s'accorde mal avec le fondement de la justice contractuelle. Si l'on définit adéquatement les

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that Metro did not exercise its power to reallocate waste in breach of a good faith duty. An analogy to the standard of reasonable conduct in the law of abuse of contractual rights in Quebec does not assist Wastech in this case.

limites de l'exécution de bonne foi dans ce contexte, il est évident que Metro n'a pas exercé son pouvoir relatif à la répartition des déchets en violation d'une obligation d'agir de bonne foi. Par ailleurs, une analogie avec la norme de conduite raisonnable dans le domaine de l'abus de droits contractuels au Québec ne serait d'aucun secours à Wastech en l'espèce.

Per Côté, Brown and Rowe JJ.: There is agreement that the appeal should be dismissed. Answering the question posed is a matter of straightforwardly applying *Bhasin*, and confirming that, while *Bhasin* organized several established common law doctrines under the rubric of good faith, it did not represent an abandonment of commercial certainty by requiring contracting parties to place their counterparty's interests ahead of their own.

Les juges Côté, Brown et Rowe : Il y a accord sur le fait que le pourvoi devrait être rejeté. Pour répondre à la question soulevée, il faut simplement appliquer l'arrêt *Bhasin* et confirmer que, même si cet arrêt a classé plusieurs doctrines établies en common law sous la rubrique de la bonne foi, il ne représentait pas un abandon de la stabilité commerciale et n'exigeait pas que les parties contractantes subordonnent leurs intérêts à ceux de leur cocontractant.

While the majority refrains from identifying the standard of review, clear guidance on this point ought to be provided. Although there are important differences between commercial arbitration and administrative decision-making, those differences do not affect the standard of review where the legislature has provided for a statutory right of appeal. Appellate standards of review apply as a matter of statutory interpretation. The appeal in this case was brought pursuant to s. 31 of British Columbia's *Arbitration Act*, which provides that, either by consent of the parties or with leave of the Supreme Court of British Columbia, a party to an arbitration may appeal to the court on a question of law arising out of the award. In light of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, it follows that the standard of review to be applied by the Court in this case is correctness.

Même si les juges majoritaires s'abstiennent de se prononcer sur la norme de contrôle applicable, des indications claires sur ce point devraient être fournies. Bien qu'il existe des différences importantes entre l'arbitrage commercial et le processus décisionnel administratif, ces différences n'ont pas d'incidence sur la norme de contrôle applicable lorsque le législateur a prévu un droit d'appel dans la loi. Les normes de contrôle applicables en appel s'appliquent suivant les règles d'interprétation législative. Le présent pourvoi a été interjeté en vertu de l'art. 31 de l'*Arbitration Act* de la Colombie-Britannique qui prévoit que, sur consentement des parties ou sur autorisation de la Cour suprême de la Colombie-Britannique, une partie à un arbitrage peut interjeter appel au tribunal sur toute question de droit découlant de la sentence. Au vu de l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65, [2019] 4 R.C.S. 653, il s'ensuit que la norme de contrôle que doit appliquer la Cour en l'espèce est celle de la décision correcte.

The purpose of good faith is to secure the performance and enforcement of the contract made by the parties. It cannot be used as a device to create new, unbargained-for rights and obligations or to alter the express terms of the contract. Where an agreement reflects a shared, reasonable expectation as to the manner in which a discretion may be exercised, that expectation will be enforced. While parties will usually expect that a discretion will be exercised in accordance with the purposes for which it was conferred, this is so only where the purpose of a discretionary power arises from the terms of the contract, construed objectively, and having regard to the factual matrix. The obligation to exercise discretion reasonably does not reflect the imposition of external standards on the exercise of discretion, but rather giving effect to the standards inherent in the parties' own bargain. Accordingly, there is disagreement

L'objectif de la bonne foi est de garantir l'exécution et l'application du contrat conclu par les parties. Elle ne peut servir à créer de nouveaux droits et obligations non négociés, ou à modifier les termes exprès du contrat. Lorsqu'un accord révèle une attente partagée et raisonnable pour ce qui est de la façon dont un pouvoir discrétionnaire peut être exercé, cette attente se verra donner effet. Même si les parties s'attendront habituellement à ce que le pouvoir discrétionnaire soit exercé conformément aux fins pour lesquelles il a été conféré, il en est ainsi seulement lorsque l'objet du pouvoir discrétionnaire découle des modalités du contrat, interprété objectivement, et compte tenu de la matrice factuelle. L'obligation d'exercer un pouvoir discrétionnaire de façon raisonnable ne représente pas des normes externes imposées sur l'exercice du pouvoir discrétionnaire, mais donne plutôt effet aux normes propres

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with the majority that where a discretion is unfettered on its face, a court must form a broad view of the purposes of the venture to which the contract gives effect, and of what loyalty to that venture might involve for a party to it, and to take those broad purposes as providing the inherent limits for the exercise of the power. The majority's invocation of loyalty to the venture suggests that parties must use their discretion, even where it is chosen by the parties to be unfettered, in a way that advances the objectives of the contract. Approaching the interpretive task from such a starting point risks, even invites, undermining freedom of contract and distorting the parties' bargain by imposing constraints to which they did not agree.

Additionally, the purpose of a discretion is always defined by the parties' intentions, as revealed by the contract. Therefore, where a contract discloses a clear intention to grant a discretion that can be exercised for any purpose, courts, operating within their proper role, must give effect to that intention. With careful drafting, parties can largely immunize the exercise of discretion from review on this basis, or choose to specify the purpose for which a discretion has been granted in order to provide a clear standard against which the exercise of discretion is to be assessed. In either instance, their intention should be given effect and not subverted.

The duty of honest performance and the duty to exercise discretionary powers in good faith should remain distinct. Any suggestion that the duty of honest performance is a preliminary step in assessing whether there is a breach of the duty to exercise discretionary powers in good faith fails to comprehend or have regard for how the common law has distinguished between these duties. Further, rather than assisting in the development of the common law of good faith in contractual performance, the majority's digression into the civil law of Quebec gives rise to complication, uncertainty and confusion. It has no relevance in the present case, and it confuses matters for no useful purpose. The common law of British Columbia applies to the contract at issue and readily answers the questions of law posed in the appeal.

au marché conclu par les parties. En conséquence, il y a désaccord avec les juges majoritaires quant à l'affirmation portant que lorsque le pouvoir discrétionnaire est absolu à sa face même, le tribunal doit se faire une idée générale des objectifs de l'entreprise auxquels donne effet le contrat, et de la loyauté envers cette entreprise que pourrait entraîner celui-ci pour les parties, et de considérer ces objectifs généraux comme établissant les limites inhérentes de l'exercice du pouvoir. La mention par les juges majoritaires de la loyauté envers l'entreprise donne à penser que les parties doivent exercer leur pouvoir discrétionnaire, même lorsqu'elles ont décidé qu'il serait absolu, d'une façon qui favorise la réalisation des objectifs du contrat. Aborder la tâche d'interprétation sur la base d'un tel point de départ risque de miner la liberté contractuelle et de dénaturer le marché des parties en imposant des contraintes auxquelles elles n'ont pas consenti, et favorise même une telle conséquence.

Par ailleurs, l'objet d'un pouvoir discrétionnaire est toujours défini par les intentions des parties, qui se dégagent du contrat. Ainsi, lorsqu'un contrat révèle une intention claire de conférer un pouvoir discrétionnaire qui peut être exercé à toute fin, les tribunaux, dans le cadre du rôle qui leur incombe, doivent donner effet à cette intention. Grâce à une rédaction minutieuse, les parties peuvent mettre dans une large mesure l'exercice du pouvoir discrétionnaire à l'abri d'un contrôle sur ce fondement, ou elles peuvent choisir de préciser la fin pour laquelle un pouvoir discrétionnaire a été conféré afin de prévoir une norme claire en fonction de laquelle l'exercice du pouvoir discrétionnaire devra être évalué. Dans un cas comme dans l'autre, leur intention devrait se voir donner effet et non être minée.

L'obligation d'exécution honnête et l'obligation d'exercer les pouvoirs discrétionnaires de bonne foi devraient demeurer distinctes. Toute affirmation portant que l'obligation d'exécution honnête est une étape préliminaire pour évaluer s'il y a eu manquement à l'obligation d'exercer les pouvoirs discrétionnaires de bonne foi démontre une incompréhension de la façon dont la common law établit une distinction entre ces obligations, ou n'en tient pas compte. De surcroît, plutôt que de contribuer à l'évolution de la common law relativement à la bonne foi en matière d'exécution contractuelle, la digression des juges majoritaires sur le droit civil du Québec donne lieu à des difficultés, de l'incertitude et de la confusion. Celui-ci n'est d'aucune pertinence en l'espèce et cette digression crée de la confusion pour aucune raison valable. La common law de la Colombie-Britannique s'applique au contrat dont il est question et répond clairement aux questions de droit que soulève le présent pourvoi.

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APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Stromberg-Stein and Fisher JJ.A.), 2019 BCCA 66, 19 B.C.L.R. (6th) 217, 431 D.L.R. (4th) 512, [2019] B.C.J. No. 236 (QL), 2019 CarswellBC 336 (WL Can.), affirming a decision of McEwan J., 2018 BCSC 605, [2018] B.C.J. No. 684 (QL), 2018 CarswellBC 910 (WL Can.). Appeal dismissed.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Newbury, Stromberg-Stein et Fisher), 2019 BCCA 66, 19 B.C.L.R. (6th) 217, 431 D.L.R. (4th) 512, [2019] B.C.J. No. 236 (QL), 2019 CarswellBC 336 (WL Can.), qui a confirmé une décision du juge McEwan, 2018 BCSC 605, [2018] B.C.J. No. 684 (QL), 2018 CarswellBC 910 (WL Can.). Pourvoi rejeté.

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Geoffrey G. Cowper, *Q.C.*, *Mark D. Andrews*, *Q.C.*, and *Stanley Martin*, for the appellant.

Irwin G. Nathanson, *Q.C.*, and *Julia K. Lockhart*, for the respondent.

Jonathan Eades and *Graham J. Underwood*, for the intervener the Attorney General of British Columbia.

Jeremy Opolsky and *Winston Gee*, for the intervener the Canadian Chamber of Commerce.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ. was delivered by

Kasirer J. —

I. Overview

[1] This appeal raises the issue of whether a common law duty of good faith performance applies in a long-term contract for waste removal in the greater Vancouver region. More specifically, it bears on how principles of good faith might preclude what one scholar has called the "abuse of contractual discretionary powers" (J. D. McCamus, *The Law of Contracts* (3rd ed. 2020), at p. 938). In *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras. 47 and 50, Cromwell J. observed that the exercise of contractual discretion is one circumstance in which courts have found a duty of good faith performance exists in a manner consonant with the "organizing principle" from which this and other good faith duties derive: "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (para. 63, see also McCamus, pp. 931-943). However, *Bhasin* does not explore the source or content of the specific duty to exercise discretion in good faith, which matters were not at issue in that appeal.

Geoffrey G. Cowper, *c.r.*, *Mark D. Andrews*, *c.r.*, et *Stanley Martin*, pour l'appelante.

Irwin G. Nathanson, *c.r.*, et *Julia K. Lockhart*, pour l'intimée.

Jonathan Eades et *Graham J. Underwood*, pour l'intervenant le procureur général de la Colombie-Britannique.

Jeremy Opolsky et *Winston Gee*, pour l'intervenante la Chambre de commerce du Canada.

Version française du jugement du juge en chef Wagner et des juges Abella, Moldaver, Karakatsanis, Martin et Kasirer rendu par

Le juge Kasirer —

I. Aperçu

[1] Le présent pourvoi soulève la question de savoir si une obligation d'exécution de bonne foi découlant de la common law s'applique à un contrat à long terme relatif à l'enlèvement des déchets dans la grande région de Vancouver. Plus précisément, le pourvoi porte sur la façon dont les principes de bonne foi peuvent empêcher ce qu'un auteur a appelé [traduction] « l'abus de pouvoirs discrétionnaires contractuels » (J. D. McCamus, *The Law of Contracts* (3e éd. 2020), p. 938). Dans l'arrêt *Bhasin c. Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494, par. 47 et 50, le juge Cromwell a observé que l'exercice par une partie de son pouvoir discrétionnaire contractuel est une situation dans laquelle les tribunaux ont conclu à l'existence d'une obligation d'exécution de bonne foi en conformité avec le « principe directeur » dont cette obligation et d'autres obligations de bonne foi découlent : « les parties doivent, de façon générale, exécuter leurs obligations contractuelles de manière honnête et raisonnable, et non de façon abusive ou arbitraire » (par. 63, voir aussi McCamus, p. 931-943). Toutefois, l'arrêt *Bhasin* n'aborde pas les questions de la source ni de la teneur de l'obligation précise d'exercer un pouvoir discrétionnaire de bonne foi, car elles n'étaient pas en litige dans cette affaire.

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[2] The appellant here, a waste removal contractor, says the respondent exercised its contractual power to decide where the waste would be allocated in the region contrary to the requirements of good faith. The appellant argues that the courts below failed to understand the notion at the core of *Bhasin*, according to which a contracting party should have "appropriate regard to the legitimate contractual interests of [their] contracting partner" (*Bhasin*, at para. 65). It says that the respondent's exercise of discretion made it impossible to earn the level of profit it had bargained for under what it depicts as a long-term relational contract, predicated on trust between the parties. In the result, the respondent exercised its discretionary power in a way the appellant has described as failing to meet the standard of honesty and reasonableness required by *Bhasin* in this context.

[2] L'appelante en l'espèce, une entreprise d'enlèvement de déchets, affirme que l'intimée a exercé son pouvoir contractuel pour décider où les déchets seraient envoyés dans la région contrairement aux exigences de la bonne foi. L'appelante soutient que les juridictions inférieures n'ont pas compris le concept au cœur de l'arrêt *Bhasin*, selon lequel une partie contractante devrait « prendre en compte comme il se doit les intérêts légitimes de son partenaire contractuel » (*Bhasin*, par. 65). Selon l'appelante, l'exercice du pouvoir discrétionnaire de l'intimée a rendu impossible pour elle de réaliser les profits qu'elle avait négociés dans le cadre de ce qu'elle décrit comme un contrat relationnel à long terme, fondé sur la confiance entre les parties. En conséquence, l'intimée a exercé son pouvoir discrétionnaire d'une manière que l'appelante a décrite comme ne respectant pas la norme d'honnêteté et de raisonnabilité qu'exige l'arrêt *Bhasin* dans ce contexte.

[3] The problem in this case is not so much whether the duty to exercise contractual discretion in good faith exists, but on what basis it exists and according to what standard its breach can be made out. To be sure, the appellant is right to say that the organizing principle of good faith recognized in *Bhasin* exemplifies the idea that a contracting party should have appropriate regard to the legitimate contractual interests of their contracting partners. But in claiming compensation for its lost opportunity based on a supposedly dishonest or unreasonable exercise of the discretion to reallocate waste under the contract, the appellant misrepresents the organizing principle and overstates one of the specific duties of good faith derived therefrom.

[3] Le problème dans la présente affaire n'est pas tant de savoir si l'obligation d'exercer le pouvoir discrétionnaire contractuel de bonne foi existe, mais de déterminer sur quoi repose son existence et selon quelle norme un manquement à celle-ci peut être établi. Certes, l'appelante a raison de dire que le principe directeur de bonne foi reconnu dans l'arrêt *Bhasin* illustre l'idée qu'une partie contractante devrait prendre en compte comme il se doit les intérêts contractuels légitimes de son partenaire contractuel. Toutefois, en demandant une indemnisation pour la perte d'occasion subie en raison de l'exercice supposément malhonnête ou déraisonnable du pouvoir discrétionnaire relatif à la répartition des déchets prévu au contrat, l'appelante interprète mal le principe directeur et attribue une portée excessive à l'une des obligations précises de bonne foi qui en découle.

[4] The duty to exercise contractual discretion is breached only where the discretion is exercised unreasonably, which here means in a manner unconnected to the purposes underlying the discretion. This will be made out, for example, where the exercise of discretion is arbitrary or capricious, as Cromwell J. suggested in *Bhasin* in his formulation of the organizing principle of good faith performance. According to *Bhasin*, this duty is derived from the same requirement of corrective justice as the duty of honest

[4] Il y a manquement à l'obligation d'exercer le pouvoir discrétionnaire contractuel seulement lorsque ce pouvoir est exercé de façon déraisonnable, ce qui signifie en l'espèce d'une manière étrangère aux objectifs qui sous-tendent le pouvoir discrétionnaire. Cela sera établi, par exemple, lorsque l'exercice du pouvoir discrétionnaire est arbitraire ou abusif, comme le laisse entendre la formulation par le juge Cromwell dans l'arrêt *Bhasin* du principe directeur de l'exécution de bonne foi. Selon cet

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performance, which requirement demands that parties exercise or perform their rights and obligations under the contract having appropriate regard for the legitimate contractual interests of the contracting partner. Like the duty of honest performance observed in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, [2020] 3 S.C.R. 908, the duty recognized here is one that applies in a manner Cromwell J. referred to as doctrine in *Bhasin*, i.e., the duty applies regardless of the intentions of the parties (*Bhasin*, at para. 74).

arrêt, cette obligation découle de la même exigence de justice corrective que l'obligation d'exécution honnête, qui exige que les parties exécutent leurs obligations ou exercent leurs droits prévus au contrat en prenant en compte comme il se doit les intérêts contractuels légitimes de leur partenaire contractuel. Comme l'obligation d'exécution honnête dont il était question dans l'arrêt *C.M. Callow Inc. c. Zollinger*, 2020 CSC 45, [2020] 3 R.C.S. 908, l'obligation reconnue en l'espèce en est une qui s'applique, comme l'indique le juge Cromwell dans l'arrêt *Bhasin*, de la même manière qu'une doctrine, c'est-à-dire qu'elle s'applique quelles que soient les intentions des parties (*Bhasin*, par. 74).

[5] Carefully considered, the appellant's case does not rest on allegations that it fell prey to lies or deception. There is no claim that the respondent exercised its discretion capriciously or arbitrarily. The appellant does not point to, under the guise of allegedly unreasonable conduct, any identifiable wrong committed by the respondent beyond seeking its own best interest within the bounds set for the exercise of discretion by the agreement. The duty of good faith at issue here constrains the permissible exercise of discretionary powers in contract but, in so doing, it does not displace the detailed, negotiated bargain as the primary source of justice between the parties.

[5] Si on examine bien la cause de l'appelante, on constate qu'elle ne repose pas sur des allégations portant qu'elle a été victime de mensonges ou de tromperies. Il n'y est pas affirmé que l'intimée a exercé son pouvoir discrétionnaire de façon abusive ou arbitraire. L'appelante ne relève pas, sous l'apparence d'un comportement prétendument déraisonnable, de faute identifiable commise par l'intimée hormis la recherche de son propre intérêt dans les limites que fixe le contrat pour l'exercice du pouvoir discrétionnaire. Dans le cas qui nous occupe, l'obligation d'exécution de bonne foi en cause restreint l'exercice acceptable des pouvoirs discrétionnaires conférés par contrat, mais, ce faisant, elle ne remplace pas le marché détaillé et négocié comme source principale de justice entre les parties.

[6] Importantly, the good faith duty at issue does not require the respondent to subordinate its interests to those of the appellant, nor does it require that a benefit be conferred on the appellant that was not contemplated under the contract or one which stands beyond the purposes for which the discretion was agreed. Here, the appellant decries conduct that is self-interested, to be sure, and that, it says, made it impossible to achieve the fundamental benefit for which it had bargained. But in seeking damages for this loss, the appellant does not allege that the respondent committed any actionable wrong in exercising the discretion provided for under the contract. While it is true the arbitrator characterized the long-term contract here as a relational one, he found that the situation giving rise to this dispute, however

[6] Plus important encore, l'obligation d'agir de bonne foi en jeu n'exige pas que l'intimée subordonne ses intérêts à ceux de l'appelante, et n'exige pas non plus que soit conféré à l'appelante un avantage qui n'a pas été prévu au contrat ou dont la portée dépasse les objectifs pour lesquels a été consenti le pouvoir discrétionnaire. En l'espèce, l'appelante dénonce une conduite intéressée, certes, et affirme que cette conduite a rendu impossible pour elle d'obtenir l'avantage fondamental qu'elle avait négocié. Par contre, même si elle demande des dommages-intérêts pour cette perte, l'appelante n'allègue pas que l'intimée a commis une faute donnant ouverture à un droit d'action lorsqu'elle a exercé le pouvoir discrétionnaire prévu au contrat. Bien qu'il soit vrai que l'arbitre a caractérisé le contrat à long terme en

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unlikely it may have appeared to the parties, was a risk that the parties had specifically considered in drafting their detailed agreement. In that context, whatever trust and cooperation that the parties might owe one another arising out of the long-term relational character of the contract cannot resolve this case in favour of the appellant by requiring the respondent to act as a fiduciary.

cause de relationnel, il a conclu que la situation donnant lieu au présent litige, même si elle pouvait avoir semblé improbable pour les parties, constituait un risque que les parties avaient précisément envisagé lors de la rédaction de leur accord détaillé. Dans ce contexte, la confiance et la collaboration que pourraient se devoir mutuellement les parties en raison du caractère relationnel à long terme du contrat ne permettent pas de régler le présent cas en faveur de l'appelante en exigeant que l'intimée agisse en tant que fiduciaire.

[7] When the contours of good faith performance in this context are properly identified, it is plain that the respondent did not exercise its power to reallocate waste in breach of a good faith duty. In point of fact, in its call to be paid damages on the basis of the contractual duty of good faith owed to it by the respondent, the appellant is asking the Court to award it an advantage not provided for in the agreement between the parties in the absence of any appreciable breach of contract or identifiable wrong. This seems to me to confuse the requirements of good faith performance with an injunction to act selflessly in a way that stands outside the ordinary compass of social ordering by contract, in service of a notional solidarity between the parties based on a different theory of justice. Accordingly, I would dismiss this appeal.

[7] Si l'on définit adéquatement les limites de l'exécution de bonne foi dans ce contexte, il est évident que l'intimée n'a pas exercé son pouvoir relatif à la répartition des déchets en violation d'une obligation d'agir de bonne foi. Dans les faits, en sollicitant des dommages-intérêts fondés sur l'obligation contractuelle d'agir de bonne foi que l'intimée avait envers elle, l'appelante demande à la Cour de lui accorder un avantage qui n'était pas prévu dans l'accord conclu entre les parties, en l'absence d'une violation contractuelle importante ou d'une faute identifiable. Cela me semble une confusion des exigences de l'exécution de bonne foi avec une directive d'agir de façon désintéressée d'une manière qui sort des balises ordinaires de l'ordre social établi par contrat, au service d'une solidarité théorique entre les parties fondée sur une théorie différente de la justice. Par conséquent, je suis d'avis de rejeter le pourvoi.

II. Background

A. *The Contract*

[8] The appellant, Wastech Services Ltd. ("Wastech"), is a British Columbia company engaged in waste transportation and disposal. The respondent, the Greater Vancouver Sewerage and Drainage District ("Metro"), is a statutory corporation constituted under the *Greater Vancouver Sewerage and Drainage District Act*, S.B.C. 1956, c. 59. One of its primary mandates is the administration of waste disposal from the Metro Vancouver Regional District.

II. Contexte

A. *Le contrat*

[8] L'appelante, Wastech Services Ltd. (« Wastech »), est une entreprise de la Colombie-Britannique qui s'occupe du transport et de l'élimination des déchets. L'intimée, la société Greater Vancouver Sewerage and Drainage District (« Metro »), a été constituée en vertu de la *Greater Vancouver Sewerage and Drainage District Act*, S.B.C. 1956, c. 59. L'un de ses principaux mandats est de gérer l'élimination des déchets dans le district régional du Grand Vancouver.

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[9] Wastech and Metro had a long-standing commercial relationship. They entered into contracts for the disposal of waste from the Greater Vancouver Regional District twice in 1986, once in 1988 and again in 1992. In 1996, after approximately 18 months of negotiations, Wastech and Metro entered into a new waste disposal agreement ("Contract"), setting out what the parties described as "an integrated, comprehensive municipal solid waste transfer system . . . and sanitary landfill in a reliable, cost-effective and environmentally-sound manner" (A.R., vol. II, at p. 9, recital B). The Contract was complex, and included several recitals, numerous defined terms and schedules. It replaced the four existing agreements between Wastech and Metro and had a term of 20 years.

[9] Wastech et Metro entretiennent une relation commerciale depuis longtemps. Elles ont conclu des contrats pour l'élimination des déchets dans le district régional du Grand Vancouver deux fois en 1986, une fois en 1988 et à nouveau en 1992. En 1996, après environ 18 mois de négociations, Wastech et Metro ont conclu un nouvel accord d'élimination des déchets (« contrat »), établissant ce que les parties ont décrit comme un [TRADUCTION] « système municipal complet et intégré de transfert des déchets solides [. . .] et un site d'enfouissement fiables, rentables et respectueux de l'environnement » (d.a., vol. II, p. 9, attendu B). Le contrat était complexe et comprenait plusieurs attendus, de nombreuses définitions et annexes. Il remplaçait les 4 accords existants entre Wastech et Metro et était d'une durée de 20 ans.

[10] The Contract contemplated the removal and transportation of waste by Wastech on behalf of the district represented by Metro to three disposal facilities: the Vancouver Landfill; the Burnaby Waste to Energy Facility; and the Cache Creek Landfill. Wastech was to be paid at a reduced rate, subject to a number of variables, for the short-haul transportation of waste to the Vancouver Landfill and the Burnaby Waste to Energy Facility as compared to the rate paid to transport to the Cache Creek Landfill, which is farther away.

[10] Le contrat visait l'enlèvement et le transport des déchets par Wastech dans le district représenté par Metro vers trois installations d'élimination des déchets : le site d'enfouissement de Vancouver, l'installation de valorisation énergétique des déchets de Burnaby et le site d'enfouissement de Cache Creek. Wastech devait être payée à un taux réduit, sous réserve de certaines variables, pour le transport sur une courte distance des déchets vers le site d'enfouissement de Vancouver et l'installation de valorisation énergétique des déchets de Burnaby, en comparaison au taux qu'elle recevait pour le transport vers le site d'enfouissement de Cache Creek, plus éloigné.

[11] Wastech's compensation was structured around a "Target Operating Ratio" ("Target OR"). Defined in s. 14.1(ag) of the Contract as a ratio of 0.890, the Target OR reflected a scenario where Wastech's operating costs were 89 percent of its total revenues, resulting in an operating profit of 11 percent. It bears noting that the Contract did not guarantee that Wastech would achieve the Target OR in any given year.

[11] La rémunération de Wastech était structurée selon un [TRADUCTION] « ratio d'exploitation cible » (« RE cible »). Défini à l'al. 14.1(ag) du contrat comme un ratio de 0,890, le RE cible correspondait à un scénario où les coûts d'exploitation de Wastech s'élevaient à 89 pour 100 de ses revenus totaux, donnant ainsi un bénéfice d'exploitation de 11 pour 100. Il convient de mentionner que le contrat ne garantissait pas que Wastech atteindrait le RE cible chaque année.

[12] The Contract provided for various adjustments to allow for fluctuations in the actual operating ratio ("Actual OR") achieved by Wastech. Section 14.19 of the Contract provided that if the Actual OR deviated from the Target OR, the parties would share equally the financial consequences of the deviation.

[12] Le contrat prévoyait divers ajustements afin de tenir compte des fluctuations du ratio d'exploitation réel (« RE réel ») atteint par Wastech. L'article 14.19 du contrat prévoyait que si le RE réel différait du RE cible, les parties se partageraient également les conséquences financières de cette différence. Si le

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If the Actual OR were to *exceed* the Target OR, Metro would pay Wastech an additional sum equal to 50 percent of the difference between the Target OR and the Actual OR. Wastech would similarly compensate Metro if the Actual OR was *less* than the Target OR. Section 14.11 of the Contract also provided that the rates to be paid to Wastech and Metro's contribution to fix operating expenses would each be adjusted annually if the Actual OR achieved in the immediately preceding operating year was less than 0.860 or greater than 0.920.

[13] Section 12.7 of the Contract required Metro to provide Wastech, annually, with a detailed forecast of the allocation of all of the waste expected to be handled under the Contract for the following operating year. The arbitrator found that, "[o]ne purpose of this requirement [was] to give Wastech an opportunity to plan its future operations and manage its costs" (A.R., vol. I, p. 1 ("Award"), at para. 44). However, ss. 30.1, 30.2 and 30.4 gave Metro "absolute discretion" to determine and amend the minimum amount of waste to be transported to the Cache Creek Landfill for any given year.

[14] During negotiations, Wastech and Metro realized that waste transported to the long-haul Cache Creek Landfill might decrease and that one possible reason for such a decrease could be Metro's decision to reduce the waste transported to that site by redirecting it to the short-haul Vancouver Landfill. Moreover, both parties were aware that this could preclude Wastech from achieving the Target OR. Both parties believed that such a scenario was highly unlikely. Given their mutual desire to simplify the Contract, Wastech and Metro agreed not to include an adjustment provision dealing with that scenario in the Contract.

B. *Circumstances of the Alleged Breach*

[15] In September 2010, Metro provided Wastech its annual waste allocation plan for 2011, according to which about 600,000 to 700,000 tonnes of waste would have to be disposed of in the operating year. Metro directed Wastech to reallocate waste

RE réel *dépassait* le RE cible, Metro devrait verser à Wastech une somme additionnelle équivalant à 50 pour 100 de la différence entre le RE cible et le RE réel. Wastech indemniserait Metro de la même façon si le RE réel était *inférieur* au RE cible. L'article 14.11 du contrat prévoyait également que les taux devant être payés à Wastech et la contribution de Metro aux dépenses d'exploitation fixes seraient ajustés chaque année si le RE réel atteint au cours de l'année précédente était inférieur à 0,860 ou supérieur à 0,920.

[13] Selon l'article 12.7 du contrat, Metro devait fournir chaque année à Wastech une prévision détaillée de la répartition de tous les déchets devant être transportés dans le cadre du contrat pour l'année d'exploitation suivante. L'arbitre a conclu que [TRADUCTION] « [c]ette exigence [avait] notamment pour but de donner à Wastech l'occasion de planifier ses activités futures et de gérer ses coûts » (d.a., vol. I, p. 1 (« sentence arbitrale »), par. 44). Cependant, les art. 30.1, 30.2 et 30.4 conféraient à Metro le [TRADUCTION] « pouvoir discrétionnaire absolu » pour déterminer et modifier la quantité minimale de déchets devant être transportés vers le site d'enfouissement de Cache Creek pour une année donnée.

[14] Durant les négociations, Wastech et Metro se sont rendu compte que la quantité de déchets transportés sur une longue distance vers le site d'enfouissement de Cache Creek était susceptible de diminuer, notamment en raison de la décision de Metro de rediriger les déchets vers le site d'enfouissement de Vancouver, qui est moins loin. En outre, les deux parties savaient que cela pourrait empêcher Wastech d'atteindre le RE cible. Elles croyaient qu'un tel scénario était très peu probable. Étant donné leur volonté mutuelle de simplifier le contrat, Wastech et Metro ont convenu de ne pas inclure dans le contrat une clause de rajustement visant ce scénario.

B. *Circonstances de la violation alléguée*

[15] En septembre 2010, Metro a remis à Wastech son plan annuel de répartition des déchets pour 2011, selon lequel de 600 000 à 700 000 tonnes de déchets devaient être éliminées au cours de l'année. Metro a demandé à Wastech de modifier la répartition

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transportation for 2011: the Vancouver Landfill was to receive 200,000 tonnes, up from the 138,380 it received in 2010; the Burnaby Waste to Energy Facility was to receive enough waste to operate at maximum capacity; and the Cache Creek Landfill was to receive the remaining waste.

[16] Ultimately, the total waste transported by Wastech during the 2011 operating year was 609,340 tonnes; approximately 8 percent less than in 2010. The Cache Creek Landfill received 273,018 tonnes; approximately 31 percent less than in 2010. The Vancouver Landfill received 187,428 tonnes; approximately 36 percent more than it received in 2010. These totals reflected a conscious decision by Metro to reallocate waste from the Cache Creek Landfill to the Vancouver Landfill.

[17] As a result of the waste reallocation, and before adjustment payments, Wastech operated at a loss, achieving an operating ratio of 1.045. However, after taking into account the adjustment payments under s. 14.19, Wastech operated at a profit, achieving an operating ratio of 0.960. As I noted above, this adjustment payment was intended to ensure that the parties would share the financial consequences of a deviation from the Target OR equally. After taking into account this payment, Wastech therefore recorded an operating profit of 4 percent for the year, well shy of its target of 11 percent.

[18] Pursuant to s. 18.3 of the Contract, Wastech referred the dispute to arbitration, alleging that Metro breached the Contract by allocating waste among the facilities for 2011 in a manner that deprived Wastech of the possibility of achieving the Target OR that year. Wastech sought compensatory damages in the amount of $2,888,162, which, it said, represented the additional amount the company would have earned in 2011 if Metro's allocation of waste had not deprived it of the opportunity to achieve the Target OR.

des déchets devant être transportés pour 2011 : le site d'enfouissement de Vancouver devait recevoir 200 000 tonnes, soit une augmentation par rapport aux 138 380 tonnes reçues en 2010; l'installation de valorisation énergétique des déchets de Burnaby devait recevoir suffisamment de déchets pour fonctionner à pleine capacité; et le site d'enfouissement de Cache Creek devait recevoir le reste des déchets.

[16] En fin de compte, la quantité totale de déchets transportés par Wastech en 2011 a été de 609 340 tonnes, soit approximativement 8 pour 100 de moins qu'en 2010. Le site d'enfouissement de Cache Creek a reçu 273 018 tonnes, soit approximativement 31 pour 100 de moins qu'en 2010. Le site d'enfouissement de Vancouver a reçu 187 428 tonnes, soit approximativement 36 pour 100 de plus qu'en 2010. Ces totaux sont le résultat d'une décision délibérée de Metro d'envoyer au site d'enfouissement de Vancouver une partie des déchets qui devaient être transportés à celui de Cache Creek.

[17] À la suite de la nouvelle répartition des déchets, et avant les paiements de rajustement, Wastech fonctionnait à perte, son ratio d'exploitation étant de 1,045. Toutefois, si l'on tient compte des paiements de rajustement prévus à l'art. 14.19, Wastech réalisait un profit, atteignant un ratio d'exploitation de 0,960. Comme je l'ai mentionné précédemment, le paiement de rajustement visait à faire en sorte que les parties se partagent également les conséquences financières d'un écart par rapport au RE cible. Après avoir tenu compte de ce paiement, Wastech a donc enregistré un bénéfice d'exploitation de 4 pour cent pour l'année, bien inférieur à son objectif de 11 pour cent.

[18] En vertu de l'art. 18.3 du contrat, Wastech a renvoyé le différend à l'arbitrage, alléguant que Metro avait violé le contrat en répartissant les déchets parmi les installations pour 2011 d'une manière qui privait Wastech de la possibilité d'atteindre le RE cible cette année-là. Wastech a réclamé des dommages-intérêts compensatoires de 2 888 162 $, ce qui, selon elle, représentait le montant additionnel qu'elle aurait gagné en 2011 si la répartition des déchets établie par Metro ne l'avait pas privée de la possibilité d'atteindre le RE cible.

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III. Decisions Below

A. *The Arbitral Award — BCICAC Case No. DCA-1560, February 13, 2015 (Gerald W. Ghikas, Q.C.)*

[19] The arbitrator ruled in favour of Wastech.

[20] Wastech advanced two submissions. First, it argued that Metro's reallocation of waste from the Cache Creek Landfill to the Vancouver Landfill in the 2011 operating year violated an implied term of the Contract based on the presumed intentions of the parties. The alleged implied term as formulated by Wastech before the arbitrator was complex. In substance, it would oblige the parties to reset retroactively various rates and payments in the event that Metro reallocated waste in a manner that made it impossible for Wastech to achieve the Target OR in the immediately preceding operating year.

[21] In the alternative, Wastech submitted that Metro's discretionary power to allocate waste between the facilities was subject to a duty of good faith such that it could not be exercised in a way that would deprive Wastech of the opportunity to achieve the Target OR.

[22] The arbitrator declined to find that the term proposed by Wastech was implied because it was not obvious that the parties would have agreed to it. On the contrary, the arbitrator found that the parties made a decision not to include a term in the Contract "dealing with the subject-matter of the term" that Wastech submitted was implied (Award, at para. 74).

[23] Nevertheless, the arbitrator felt that this did not preclude him from considering whether Metro's discretionary power under the Contract was constrained by a duty of good faith. On this point, he agreed with Wastech that a duty of good faith applied, that Metro had breached that duty, and that Wastech was therefore entitled to compensation.

III. Décisions des juridictions inférieures

A. *La sentence arbitrale — nº de dossier DCA-1560 du BCICAC, 13 février 2015 (Gerald W. Ghikas, c.r.)*

[19] L'arbitre a jugé en faveur de Wastech.

[20] Wastech a présenté deux observations. Premièrement, elle a soutenu que la décision de Metro d'envoyer au site d'enfouissement de Vancouver des déchets qui devaient être envoyés à celui de Cache Creek en 2011 constituait une violation d'une condition implicite du contrat fondée sur les intentions présumées des parties. La condition implicite alléguée, telle qu'elle a été formulée par Wastech devant l'arbitre, était complexe. Essentiellement, elle aurait obligé les parties à rétablir rétroactivement divers taux et paiements dans le cas où Metro décidait de modifier la répartition des déchets d'une manière qui aurait rendu impossible pour Wastech d'atteindre le RE cible au cours de l'année d'exploitation précédente.

[21] Subsidiairement, Wastech a fait valoir que le pouvoir discrétionnaire de Metro relatif à la répartition des déchets entre les installations était assujetti à une obligation d'agir de bonne foi, de sorte qu'il ne pouvait être exercé d'une manière susceptible de priver Wastech de la possibilité d'atteindre le RE cible.

[22] L'arbitre a refusé de conclure que la condition proposée par Wastech était implicite parce qu'il n'était pas évident que les parties y auraient consenti. Au contraire, l'arbitre a jugé que les parties avaient pris la décision de ne pas inclure au contrat une clause [TRADUCTION] « traitant du sujet de la condition » que Wastech disait être implicite (sentence arbitrale, par. 74).

[23] Néanmoins, l'arbitre était d'avis que cela ne l'empêchait pas de se demander si le pouvoir discrétionnaire que le contrat conférait à Metro était limité par une obligation d'agir de bonne foi. Sur ce point, il était d'accord avec Wastech pour dire qu'une obligation d'agir de bonne foi s'appliquait, que Metro avait manqué à cette obligation et que Wastech avait donc droit à une indemnisation.

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[24] The arbitrator began by reviewing this Court's judgment in *Bhasin*. He observed that where a contract expressly confers a discretionary power on a party, courts have held that the power must be exercised in good faith. Since the Contract was a long-term, relational agreement dependent upon an element of trust and confidence between Wastech and Metro, the arbitrator held that the "existing doctrines" of good faith required Metro to have "'appropriate regard' for the legitimate contractual interests of Wastech when exercising its discretionary contractual power" to allocate waste (para. 85).

[24] L'arbitre a commencé par examiner le jugement rendu par la Cour dans l'arrêt *Bhasin*. Il a souligné que les tribunaux ont conclu que, dans le cas où un contrat confère expressément un pouvoir discrétionnaire à une partie, celui-ci doit être exercé de bonne foi. Comme le contrat était un accord relationnel à long terme qui reposait sur la confiance entre Wastech et Metro, l'arbitre a conclu que les [TRADUCTION] « règles existantes » de la bonne foi obligeaient Metro à « "prendre en compte comme il se doit" les intérêts contractuels légitimes de Wastech dans l'exercice de son pouvoir discrétionnaire contractuel » relatif à la répartition des déchets (par. 85).

[25] Turning to the evidence before him, the arbitrator accepted that Metro's reallocation of waste away from the Cache Creek Landfill for 2011 was "guided by the objectives of maximizing the [Burnaby Facility's] efficiency, preserving remaining site capacity at the [Cache Creek Landfill], and operating the system in the most cost-effective manner" (para. 87). In addition, prior to the reallocation of waste, Metro's financial position had suffered as a result of declining volumes of waste. Based on this evidence, the arbitrator found that Metro's reallocation decision "was made in furtherance of its own business objectives" and that, "[i]f viewed only from Metro's perspective and without regard to the interests of Wastech, Metro's conduct was both honest and reasonable" (para. 88).

[25] En ce qui concerne la preuve qui lui a été soumise, l'arbitre a accepté que la décision de Metro d'envoyer ailleurs des déchets qui devaient être envoyés au site d'enfouissement de Cache Creek en 2011 était [TRADUCTION] « guidée par les objectifs d'optimisation de l'efficacité [de l'installation de Burnaby], de préservation de la capacité restante du site [d'enfouissement de Cache Creek] et d'exploitation du système de la manière la plus rentable possible » (par. 87). En outre, avant que la répartition des déchets soit modifiée, la situation financière de Metro s'était détériorée en raison du déclin des volumes de déchets. Se fondant sur ces éléments de preuve, l'arbitre a conclu que Metro avait pris sa décision relative à la répartition des déchets « en vue d'atteindre ses propres objectifs opérationnels » et que, « [s]i l'on examinait la situation du point de vue de Metro uniquement et sans tenir compte des intérêts de Wastech, la conduite de Metro était honnête et raisonnable » (par. 88).

[26] In the arbitrator's view, it still remained to be determined whether Metro had "appropriate regard" to Wastech's interests under the Contract. This was the key question because "[t]he focus of the organizing principle stated in *Bhasin* is on conduct that does not show 'appropriate regard' for the 'legitimate expectations' of the other party as to how the contract will be performed" (para. 90). He wrote that, according to *Bhasin*, the exercise of a "bargained-for contractual right [is] 'dishonest' where it is wholly at odds with the legitimate contractual expectations of the other party", and that no additional form of

[26] Selon l'arbitre, il restait encore à établir si Metro avait [TRADUCTION] « pris en compte comme il se doit » les intérêts de Wastech dans le cadre du contrat. Il s'agissait là de la question principale, car « [l]e principe directeur énoncé dans l'arrêt *Bhasin* est axé sur une conduite dans le cadre de laquelle une partie ne "prend [pas] en compte comme il se doit" les "attentes légitimes" de l'autre partie en ce qui concerne l'exécution du contrat » (par. 90). Il a mentionné que, selon l'arrêt *Bhasin*, l'exercice d'un « droit contractuel négocié [est] "malhonnête" lorsqu'il est totalement incompatible avec les attentes

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dishonesty, such as "half-truths, lies or deceit", need be shown (para. 90).

contractuelles légitimes de l'autre partie », et qu'il n'est pas nécessaire de démontrer une autre forme de malhonnêteté, comme « une demi-vérité, un mensonge ou une tromperie » (par. 90).

[27] The arbitrator found that Metro's exercise of its discretionary power made it "not possible" for Wastech to achieve the Target OR (para. 89). He also found that Wastech had a legitimate contractual expectation that Metro would not exercise its power in a way that would deprive Wastech of the opportunity to achieve the Target OR (para. 92). Furthermore, the arbitrator wrote that having the opportunity to achieve the Target OR in every year of the Contract was "the fundamental benefit for which Wastech bargained" (para. 94). Noting that courts have often required evidence that a party's conduct "gutted" or eviscerated the contract, or deprived the other contracting party of all or substantially all of the benefit for which it bargained, the arbitrator said it was not necessary for Wastech to provide such evidence because "the over-arching principle stated in *Bhasin* does not include such a requirement" (para. 93).

[27] L'arbitre a conclu que l'exercice par Metro de son pouvoir discrétionnaire avait rendu [TRADUCTION] « impossible » pour Wastech d'atteindre le RE cible (par. 89). Il a aussi jugé que Wastech avait une attente contractuelle légitime que Metro n'exerce pas son pouvoir de manière à la priver de la possibilité d'atteindre le RE cible (par. 92). Par ailleurs, l'arbitre a mentionné que le fait d'avoir cette possibilité d'atteindre le RE cible chaque année du contrat était « l'avantage fondamental que Wastech avait négocié » (par. 94). Soulignant le fait que les tribunaux exigent souvent une preuve que la conduite d'une partie a « dépouillé » ou vidé le contrat de son sens, ou a privé l'autre partie contractante de la totalité ou de la quasi-totalité des avantages qu'elle avait négociés, l'arbitre a mentionné qu'il n'était pas nécessaire que Wastech fournisse de tels éléments de preuve, car « le principe fondamental énoncé dans l'arrêt *Bhasin* ne comprend pas une telle exigence » (par. 93).

[28] Based on this reasoning, the arbitrator held that "Metro's conduct show[ed] a lack of appropriate regard for Wastech's legitimate expectations" that was sufficient to justify finding a breach of a duty of good faith (para. 94). However, the arbitrator clarified that the breach occurred not in the reallocation decision itself, but rather in Metro's failure to compensate Wastech for its lost opportunity to achieve the Target OR (para. 95).

[28] À partir de ce raisonnement, l'arbitre a conclu que [TRADUCTION] « la conduite de Metro démontr[ait] que les attentes légitimes de Wastech n'avaient pas été prises en compte comme il se doit » et que cela suffisait à justifier une conclusion de manquement à l'obligation d'agir de bonne foi (par. 94). Cependant, l'arbitre a précisé que le manquement s'était produit non pas en lien avec la décision de modifier la répartition des déchets en tant que telle, mais plutôt en lien avec le fait que Metro n'a pas indemnisé Wastech pour la perte de la possibilité d'atteindre le RE cible (par. 95).

B. *Supreme Court of British Columbia — Leave Decision, 2016 BCSC 68, 409 D.L.R. (4th) 9 (Fitzpatrick J.)*

B. *Cour suprême de la Colombie-Britannique — Décision relative à la demande d'autorisation, 2016 BCSC 68, 409 D.L.R. (4th) 9 (la juge Fitzpatrick)*

[29] Metro petitioned for leave to appeal the arbitrator's award under s. 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55 [rep. & sub. 2020, c. 2, s. 72],

[29] Metro a demandé l'autorisation d'interjeter appel de la décision de l'arbitre en vertu de l'art. 31 de l'*Arbitration Act*, R.S.B.C. 1996, c. 55 [abr. et

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and was granted leave to appeal upon the following questions of law:

1. Did the Arbitrator err in law in failing to apply proper principles in holding that the exercise of a bargained-for right could be "dishonest" and an act undertaken in bad faith simply because it was wholly at odds with the expectations of the counter-party, which expectations were not embodied in the contract?

2. Did the Arbitrator err in law by confusing the "organizing principle" stated in *Bhasin* with a free-standing obligation of contractual good faith, disregarding the applicable principles of good faith as found in the authorities? [para. 40]

C. *Court of Appeal for British Columbia — Leave Decision, 2016 BCCA 393, 409 D.L.R. (4th) 4 (Frankel, MacKenzie and Fenlon JJ.A.)*

[30] Wastech appealed the order granting Metro leave to appeal. In brief oral reasons, the Court of Appeal unanimously dismissed Wastech's appeal.

D. *Supreme Court of British Columbia — Appeal Decision, 2018 BCSC 605 (McEwan J.)*

[31] The chambers judge hearing the merits of Metro's appeal set aside the arbitrator's award, awarded costs of the appeal to Metro, and remitted the issue of costs of the arbitration to the arbitrator.

[32] The chambers judge rejected Wastech's argument that "objectively reasonable constraints on the exercise of Metro's discretion must be imposed" based on the requirement that Metro had to show "appropriate regard" for Wastech's interests (paras. 23 and 41 (CanLII)).

[33] In the chambers judge's view, the imposition of a duty to have appropriate regard for the interests

rempl. 2020, c. 2, art. 72], et sa demande a été accueillie à l'égard des questions de droit suivantes :

[TRADUCTION]

1. L'arbitre a-t-il commis une erreur de droit en omettant d'appliquer les principes appropriés lorsqu'il a jugé que l'exercice par une partie d'un droit négocié pouvait être [TRADUCTION] « malhonnête » et constituer un acte de mauvaise foi simplement parce qu'il était totalement incompatible avec les attentes de l'autre partie contractante, lesquelles n'étaient pas énoncées dans le contrat?

2. L'arbitre a-t-il commis une erreur de droit en confondant le « principe directeur » énoncé dans l'arrêt *Bhasin* avec une obligation distincte de bonne foi contractuelle, omettant par le fait même de tenir compte des principes de bonne foi applicables tels qu'ils sont énoncés dans la jurisprudence? [par. 40]

C. *Cour d'appel de la Colombie-Britannique — Décision relative à la demande d'autorisation, 2016 BCCA 393, 409 D.L.R. (4th) 4 (les juges Frankel, MacKenzie et Fenlon)*

[30] Wastech a porté en appel l'ordonnance autorisant Metro à interjeter appel. Dans de brefs motifs oraux, la Cour d'appel a rejeté à l'unanimité l'appel de Wastech.

D. *Cour suprême de la Colombie-Britannique — Décision d'appel, 2018 BCSC 605 (le juge McEwan)*

[31] Le juge siégeant en cabinet qui a instruit l'appel de Metro sur le fond a annulé la décision de l'arbitre, adjugé les dépens de l'appel à Metro et renvoyé à l'arbitre la question des frais de l'arbitrage.

[32] Le juge siégeant en cabinet a rejeté l'argument de Wastech selon lequel [TRADUCTION] « des contraintes objectivement raisonnables doivent être imposées à l'exercice du pouvoir discrétionnaire de Metro » parce que cette dernière était tenue de « prendre en compte comme il se doit » les intérêts de Wastech (par. 23 et 41 (CanLII)).

[33] Selon le juge siégeant en cabinet, l'imposition d'une obligation de prendre en compte comme il se

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of another contracting party must be based on the terms of the contract itself. In this case, the parties considered and deliberately rejected a term constraining the exercise of Metro's discretionary power to allocate waste. He wrote: "This was a case of sophisticated parties leaving aside a term that might have addressed the problem", rather than an instance of overlooking or failing to consider a provision. For the chambers judge, this alone "negate[d] the approach taken by the Arbitrator" (para. 57).

doit les intérêts d'une autre partie contractante doit être fondée sur les conditions du contrat en tant que tel. En l'espèce, les parties ont envisagé et délibérément rejeté l'inclusion d'une condition limitant l'exercice du pouvoir discrétionnaire de Metro relatif à la répartition des déchets. Il a écrit ce qui suit : [TRADUCTION] « Il s'agit d'un cas où des parties bien informées ont laissé de côté une condition qui aurait pu régler le problème », plutôt que d'un cas où elles ont fait abstraction d'une disposition du contrat ou ont omis de la prendre en compte. Pour le juge siégeant en cabinet, ce point à lui seul [TRADUCTION] « invali[dait] l'approche adoptée par l'arbitre » (par. 57).

[34] Recalling that *Bhasin* explicitly recognized that a party may sometimes cause loss to another in the legitimate pursuit of economic self-interest, the chambers judge also held that the arbitrator had effectively ignored the terms of the Contract in finding that Metro's conduct was "dishonest" only because it was "at odds" with Wastech's legitimate contractual expectations (paras. 60-62). At the end of the day, he found it difficult to "see how the principle of good faith [could] be applied to [the Contract] in light of the actual circumstances in which the [Contract] was developed" (para. 61). He therefore allowed Metro's appeal.

[34] Rappelant que la Cour dans l'arrêt *Bhasin* a explicitement reconnu qu'une partie peut parfois causer une perte à une autre partie dans la poursuite légitime d'intérêts économiques personnels, le juge siégeant en cabinet a aussi conclu que l'arbitre avait effectivement fait fi des conditions du contrat en concluant que la conduite de Metro était [TRADUCTION] « malhonnête » seulement parce qu'elle était « incompatible » avec les attentes contractuelles légitimes de Wastech (par. 60-62). En fin de compte, il a jugé qu'il était difficile de [TRADUCTION] « voir comment le principe de bonne foi [pouvait] être appliqué au [contrat] compte tenu des circonstances dans lesquelles [celui-ci] a été établi » (par. 61). Il a donc accueilli l'appel de Metro.

E. *Court of Appeal for British Columbia — Appeal Decision, 2019 BCCA 66, 19 B.C.L.R. (6th) 217 (Newbury, Stromberg-Stein and Fisher JJ.A.)*

E. *Cour d'appel de la Colombie-Britannique — Décision d'appel, 2019 BCCA 66, 19 B.C.L.R. (6th) 217 (les juges Newbury, Stromberg-Stein et Fisher)*

[35] Wastech appealed the chambers judge's order. In reasons written by Newbury J.A., the Court of Appeal unanimously dismissed the appeal, with costs of the appeal awarded to Metro.

[35] Wastech a interjeté appel de l'ordonnance rendue par le juge siégeant en cabinet. Dans les motifs rédigés par la juge Newbury, la Cour d'appel a rejeté à l'unanimité l'appel et adjugé les dépens à Metro.

[36] Newbury J.A. began her analysis by noting that the chambers judge did not clearly answer the two questions of law before him. Accordingly, she considered the two questions afresh (paras. 63-65). In answering each of them affirmatively, the Court

[36] La juge Newbury a commencé son analyse en faisant remarquer que le juge siégeant en cabinet n'avait pas clairement répondu aux deux questions de droit dont il était saisi. En conséquence, elle a examiné les deux questions de nouveau (par. 63-65).

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of Appeal identified four errors of law committed by the arbitrator.

Répondant à chacune par l'affirmative, la Cour d'appel a relevé quatre erreurs de droit commises par l'arbitre.

[37] First, the Court of Appeal held that the arbitrator applied the wrong legal test for determining whether Metro's conduct nullified the benefits that Wastech reasonably expected to obtain from the Contract. Specifically, he failed to ascertain Wastech's legitimate contractual interests or expectations by reference to the terms of the Contract itself (para. 68).

[37] Premièrement, la Cour d'appel a conclu que l'arbitre avait appliqué le mauvais critère juridique pour établir si la conduite de Metro annulait les avantages que Wastech pouvait raisonnablement s'attendre à obtenir dans le cadre du contrat. Plus précisément, il n'avait pas vérifié quels étaient les attentes ou les intérêts contractuels légitimes de Wastech selon les conditions du contrat lui-même (par. 68).

[38] Second, the arbitrator erred in concluding that his rejection of Wastech's proposed implied term did not "add anything" to his good faith analysis when, as a matter of law, it "substantially took away from" Wastech's arguments in support of a breach of a duty of good faith (para. 69 (emphasis deleted); Award, at para. 91).

[38] Deuxièmement, l'arbitre a commis une erreur en concluant que son rejet de la condition implicite proposée par Wastech [TRADUCTION] « n'ajoutait rien » à son analyse de la bonne foi alors qu'en droit, il « amputait une grande partie » des arguments de Wastech à l'appui de l'existence d'un manquement à l'obligation d'agir de bonne foi (par. 69 (italiques omis); sentence arbitrale, par. 91).

[39] Third, the Court of Appeal held that the arbitrator erred in deciding that it was unnecessary to determine whether Metro's conduct had nullified or eviscerated the Contract in order to conclude that Metro had breached a duty of good faith (para. 70). That conclusion effectively created, contrary to what this Court wrote in *Bhasin*, a stand-alone duty not to show "disregard of [the other party's] contractual interests" (para. 70). Relying on *Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214, the Court of Appeal held that such a conclusion would constitute a "radical extension of the law" (para. 70).

[39] Troisièmement, la Cour d'appel a conclu que l'arbitre avait commis une erreur en jugeant qu'il n'était pas nécessaire d'établir si la conduite de Metro avait eu pour effet d'annuler le contrat ou de le vider de son sens pour conclure que Metro avait manqué à une obligation d'agir de bonne foi (par. 70). Cette conclusion créait effectivement, contrairement à ce que la Cour a affirmé dans l'arrêt *Bhasin*, une obligation distincte de ne pas [TRADUCTION] « omettre de prendre en compte les intérêts contractuels [de l'autre partie] » (par. 70). Se fondant sur l'arrêt *Styles c. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214, la Cour d'appel a conclu qu'une telle conclusion constituerait un [TRADUCTION] « élargissement radical du droit » (par. 70).

[40] Finally, Newbury J.A. wrote that the arbitrator was wrong to hold that "dishonesty" included the exercise of contractual rights in a manner that is wholly at odds with the legitimate contractual expectations of the other party. In *Bhasin*, Cromwell J. was "concerned substantially with conduct that has at least a subjective element of improper motive or dishonesty" (C.A. reasons, at para. 71). Some subjective

[40] Quatrièmement, la juge Newbury a écrit que l'arbitre avait eu tort de conclure que la [TRADUCTION] « malhonnêteté » comprenait l'exercice de droits contractuels d'une manière totalement incompatible avec les attentes contractuelles légitimes de l'autre partie. Dans l'arrêt *Bhasin*, l'analyse du juge Cromwell visait [TRADUCTION] « essentiellement une conduite comportant au moins un élément subjectif

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element of dishonesty, untruthfulness, improper motive, or "bad faith" is therefore necessary to attribute dishonesty to a party and find a breach of a duty of good faith. This could include conduct so reckless that contractual performance is inexplicable and incomprehensible to the point that it can be regarded as an "abuse of power, having regard to the purposes for which it [was] meant to be exercised" (para. 71, quoting *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 39).

de motif illégitime ou de malhonnêteté » (motifs de la C.A., par. 71). Un certain élément subjectif de malhonnêteté, de mensonge, de motif illégitime ou de « mauvaise foi » est donc nécessaire pour juger qu'une partie est malhonnête et pour conclure à un manquement à l'obligation d'agir de bonne foi. Cela pourrait inclure une conduite tellement insouciante que l'exécution du contrat est inexplicable et incompréhensible, à un point tel qu'elle peut être considérée comme [TRADUCTION] « un véritable abus de pouvoir par rapport à ses fins » (par. 71, citant *Finney c. Barreau du Québec*, 2004 CSC 36, [2004] 2 R.C.S. 17, par. 39).

[41] In light of the arbitrator's errors, the Court of Appeal dismissed Wastech's appeal, concluding that the chambers judge was correct to allow Metro's appeal. However, it also noted that its conclusions would have been the same had it applied a standard of reasonableness, rather than correctness, in reviewing the arbitrator's award (para. 74).

[41] Compte tenu des erreurs commises par l'arbitre, la Cour d'appel a rejeté l'appel de Wastech, concluant que le juge siégeant en cabinet avait eu raison d'accueillir l'appel de Metro. Cependant, elle a aussi noté que ses conclusions auraient été les mêmes si elle avait appliqué la norme de la décision raisonnable, plutôt que celle de la décision correcte, pour contrôler la décision de l'arbitre (par. 74).

IV. Analysis

A. *Standard of Review*

[42] The parties raise preliminary issues relating to the standard of review applicable on appeal from a commercial arbitration award and the proper character of the questions of law on appeal in this particular case.

[43] Wastech submits, first, that the Court of Appeal erred in reviewing the arbitrator's finding of a breach of the duty to exercise contractual discretionary powers in good faith. Relying on s. 31 of the *Arbitration Act* and the judgments of this Court in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, Wastech says that appeals from commercial arbitration awards are confined to extricable questions of law and that, here, Metro has failed to demonstrate a proper legal basis to set aside the award. Matters of contractual interpretation raise, both generally and in this case, questions of mixed fact and law, says Wastech and, as such, they are not

IV. Analyse

A. *Norme de contrôle*

[42] Les parties soulèvent des questions préliminaires concernant la norme de contrôle applicable aux appels des sentences arbitrales commerciales et la nature véritable des questions de droit en appel dans le cas présent.

[43] Wastech soutient d'abord que la Cour d'appel a commis une erreur dans son examen de la conclusion de l'arbitre concernant l'existence d'un manquement à l'obligation d'exercer les pouvoirs discrétionnaires contractuels de bonne foi. Invoquant l'art. 31 de l'*Arbitration Act* et les jugements rendus par la Cour dans les arrêts *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633, et *Teal Cedar Products Ltd. c. Colombie-Britannique*, 2017 CSC 32, [2017] 1 R.C.S. 688, Wastech affirme que les appels interjetés contre les sentences arbitrales commerciales se limitent aux questions de droit isolables et que, en l'espèce, Metro n'a démontré aucun fondement juridique justifiant l'annulation de la sentence arbitrale. Wastech affirme

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reviewable on appeal. Second, Wastech submits that the questions of law relevant in this case, as decided by the arbitrator, are subject to review on the reasonableness standard. Nevertheless, Wastech also says the arbitrator committed no reviewable errors even on a correctness standard.

que les questions d'interprétation contractuelle soulèvent, autant en général que dans le cas qui nous occupe, des questions mixtes de fait et de droit et que par conséquent, elles ne peuvent pas faire l'objet d'une révision en appel. Ensuite, Wastech soutient que les questions de droit qui sont pertinentes dans la présente affaire, comme les a tranchées l'arbitre, sont susceptibles de contrôle selon la norme de la décision raisonnable. Néanmoins, Wastech affirme également que l'arbitre n'a commis aucune erreur donnant ouverture à révision, même selon la norme de la décision correcte.

[44] Metro answers by noting that the Court of Appeal considered *Sattva* and *Teal Cedar* fully and was aware of the limited scope of appeals in commercial arbitration. The court rightly confirmed that the questions raised here are questions of law reviewable on the correctness standard. Here, says Metro, the questions upon which leave was granted relate to the content of the duty to exercise contractual discretionary powers in good faith and the arbitrator's error in stating the legal test, which are plainly questions of law. Metro further submits that even if the applicable standard is reasonableness, the arbitrator's award was unreasonable and cannot stand.

[44] Metro répond en faisant observer que la Cour d'appel a examiné attentivement les arrêts *Sattva* et *Teal Cedar* et a tenu compte de la portée limitée des appels dans les cas d'arbitrage commercial. La cour a confirmé à juste titre que les questions soulevées en l'espèce sont des questions de droit susceptibles de contrôle selon la norme de la décision correcte. Metro affirme que dans la présente affaire, les questions pour lesquelles l'autorisation d'interjeter appel a été accordée sont liées à la teneur de l'obligation d'exercer les pouvoirs discrétionnaires contractuels de bonne foi et à l'erreur commise par l'arbitre lorsqu'il a établi le critère juridique applicable, qui sont manifestement des questions de droit. Metro soutient également que même si la norme applicable est celle de la décision raisonnable, la décision de l'arbitre était déraisonnable et ne peut être maintenue.

[45] This Court has indeed held that the standard of review applicable in appeals under s. 31 of the *Arbitration Act* is reasonableness, unless the question is one that would attract the correctness standard, such as constitutional questions or those questions of law that are of central importance to the legal system as a whole and outside the adjudicator's expertise (*Sattva*, at paras. 102-6; *Teal Cedar*, at paras. 74-76). I am mindful, however, that this Court's judgment in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, which was released shortly after this appeal was heard, set out a revised framework for determining the standard of review a court should apply when reviewing the merits of an administrative decision. I note that *Vavilov* does not advert either to *Teal Cedar* or *Sattva*, decisions which emphasize that deference serves the

[45] La Cour a effectivement conclu que la norme de contrôle applicable dans les appels interjetés en vertu de l'art. 31 de l'*Arbitration Act* 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 de l'arbitre (*Sattva*, par. 102-106; *Teal Cedar*, par. 74-76). Je suis cependant conscient du fait que le jugement rendu par la Cour dans l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65, [2019] 4 R.C.S. 653, publié peu après l'instruction du présent pourvoi, établit un cadre d'analyse révisé servant à déterminer la norme de contrôle qu'une cour de

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particular objectives of commercial arbitration (see *Sattva*, at para. 104; *Teal Cedar*, at paras. 81-83).

justice devrait appliquer lorsqu'elle se penche sur le fond d'une décision administrative. Je note que l'arrêt *Vavilov* ne fait pas référence aux arrêts *Teal Cedar* et *Sattva*, décisions où il est souligné que la déférence répond aux objectifs particuliers de l'arbitrage commercial (voir *Sattva*, par. 104; *Teal Cedar*, par. 81-83).

[46] In these circumstances, I would leave for another day consideration of the effect, if any, of *Vavilov* on the standard of review principles articulated in *Sattva* and *Teal Cedar*. We have not had the benefit of submissions on that question, nor do we have the assistance of reasons on point from the courts below. Moreover, the parties here agree, rightly in my view, that the outcome of this appeal does not depend on the identification of the proper standard of review. Thus, although this Court would ordinarily be called upon to determine whether the Court of Appeal identified the correct standard of review and applied it properly, in this case it is unnecessary to decide whether the standard is correctness or reasonableness (see *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47). On either standard, the arbitrator's award cannot stand. Respectfully stated, the fact that I do not pursue discussion of this particular point raised in the opinion of my colleagues should not be understood as my agreeing with their view (see, similarly, *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15, at para. 15).

[46] Dans ces circonstances, je remettrais à plus tard l'examen de l'effet, le cas échéant, de l'arrêt *Vavilov* sur les principes relatifs à la norme de contrôle énoncés dans les arrêts *Sattva* et *Teal Cedar*. Nous n'avons pas eu l'occasion de recevoir des observations sur cette question, et nous ne pouvons pas non plus avoir recours aux motifs des instances inférieures sur ce point. De plus, les parties en l'espèce conviennent, à juste titre selon moi, que l'issue du présent pourvoi ne dépend pas de la détermination de la bonne norme de contrôle. Par conséquent, bien que notre Cour soit normalement appelée à trancher si la Cour d'appel a choisi la bonne norme de contrôle et l'a appliquée correctement, il est inutile dans le cas qui nous occupe de décider si la norme applicable est celle de la décision correcte ou celle de la décision raisonnable (voir *Agraira c. Canada (Sécurité publique et Protection civile)*, 2013 CSC 36, [2013] 2 R.C.S. 559, par. 45-47). Que l'on applique l'une ou l'autre de ces normes, la décision de l'arbitre ne peut être maintenue. Soit dit en tout respect, le fait que je ne poursuive pas la discussion sur ce point précis soulevé dans l'opinion de mes collègues ne devrait pas être interprété comme un acquiescement à leur avis (voir, de façon similaire, *Terre-Neuve-et-Labrador (Procureur général), c. Uashaunnuat (Innus de Uashat et Mani-Utenam)*, 2020 CSC 4, [2020] 1 R.C.S. 15, par. 15).

[47] I also agree with Metro that Wastech cannot, at this stage, challenge the questions on which the award was granted. After all, it did not appeal the Court of Appeal's leave to appeal decision, where it had unsuccessfully argued that the order granting Metro leave to appeal should be overturned on the principal ground that the issues raised were questions of mixed fact and law. Nevertheless, I respectfully agree with the Attorney General of British Columbia's submission that, in granting leave to appeal, leave courts should ensure that the questions

[47] Je suis également d'accord avec Metro pour affirmer que, à cette étape-ci, Wastech ne peut pas contester les questions à l'égard desquelles la sentence arbitrale a été rendue. Après tout, elle n'a pas interjeté appel de la décision de la Cour d'appel sur la demande d'autorisation, dans le cadre de laquelle elle avait fait valoir sans succès que l'ordonnance autorisant Metro à interjeter appel devrait être infirmée pour le principal motif que les questions soulevées étaient des questions mixtes de fait et de droit. Néanmoins, je souscris en tout respect à l'opinion

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of law upon which leave is granted are simply and precisely stated to prosecute the appeal efficiently. In this case, the complicated formulation of the first question of law, in particular, made it difficult for the courts below to provide a direct and effective answer.

du procureur général de la Colombie-Britannique selon laquelle, lorsqu'ils accordent l'autorisation d'interjeter appel, les tribunaux devraient s'assurer que les questions de droit à l'égard desquelles l'autorisation est accordée sont énoncées de façon simple et précise en vue d'une instruction efficace de l'appel. En l'espèce, la formulation complexe de la première question de droit, en particulier, a rendu difficile pour les instances inférieures de fournir une réponse directe et efficace.

B. *Good Faith*

B. *Bonne foi*

[48] Wastech submits that the courts below erred in overturning the arbitrator's determination that Metro breached a duty of good faith, specifically one that constrained the manner in which Metro could exercise its discretionary power to allocate waste amongst the various disposal facilities. The arbitrator was right, says Wastech, that Metro failed to show appropriate regard to Wastech's "legitimate contractual expectations", as understood in *Bhasin*, and therefore breached the Contract.

[48] Wastech soutient que les tribunaux d'instances inférieures ont commis une erreur en annulant la conclusion de l'arbitre selon laquelle Metro avait manqué à une obligation d'agir de bonne foi, plus précisément une obligation qui limitait la façon dont Metro pouvait exercer son pouvoir discrétionnaire relatif à la répartition des déchets entre les diverses installations. Elle affirme que l'arbitre a eu raison de conclure que Metro avait omis de prendre en compte comme il se doit les « attentes contractuelles légitimes » de Wastech, au sens où on l'entend dans l'arrêt *Bhasin*, et qu'elle a donc violé le contrat.

[49] To this end, Wastech invokes the organizing principle of good faith recognized by this Court in *Bhasin* — that "parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily" (para. 63). This exemplifies, says Wastech, 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" (*Bhasin*, at para. 65).

[49] À cette fin, Wastech invoque le principe directeur de bonne foi reconnu par notre Cour dans l'arrêt *Bhasin* — selon lequel « les parties doivent, de façon générale, exécuter leurs obligations contractuelles de manière honnête et raisonnable, et non de façon abusive ou arbitraire » (par. 63). Selon Wastech, cela illustre le concept selon lequel « la partie contractante, lorsqu'elle exécute ses obligations contractuelles, devrait prendre en compte comme il se doit les intérêts légitimes de son partenaire contractuel » (*Bhasin*, par. 65).

[50] Wastech disagrees with the Court of Appeal's conclusion that the arbitrator erred by effectively creating a free-standing obligation not to show "disregard of [the other party's] contractual interests", which the Court of Appeal considered to be a "radical extension of the law" (para. 70). Wastech acknowledges that the organizing principle is not a "stand alone" or "free-standing" obligation to have appropriate regard to the contracting party's interests when performing a contract. Wastech submits,

[50] Wastech ne souscrit pas à la conclusion de la Cour d'appel voulant que l'arbitre ait commis une erreur en créant dans les faits une obligation distincte de ne pas [TRADUCTION] « omettre de prendre en compte les intérêts contractuels [de l'autre partie] », ce que la Cour d'appel a considéré comme un « élargissement radical du droit » (par. 70). Wastech reconnaît que le principe directeur n'est pas une obligation « distincte » ou « autonome » de prendre en compte comme il se doit les intérêts de la partie

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however, that the arbitrator correctly held that a specific manifestation of the organizing principle of good faith applies in this case, and that Metro failed to abide by the constraints imposed on its exercise of discretion by that existing doctrine.

[51] Wastech is certainly not mistaken in saying that the organizing principle of good faith performance provides a standard from which more specific legal doctrines may be derived (*Bhasin*, at para. 64). Generally, claims of breach of good faith will not succeed if they do not fall within an "existing doctrin[e]" of good faith, although the existing doctrines "overlap to some extent" and all derive from the same organizing principle (*Bhasin*, at paras. 48 and 66). Furthermore, the list of existing doctrines is not closed and may be developed incrementally where the existing law is found wanting. But such developments should be consistent with the structure of the common law of contracts and give due weight to the importance of private ordering through agreements as well as certainty in commercial affairs (*Bhasin*, at para. 66).

[52] While Wastech is correct to observe that the organizing principle of good faith rests, in part, on the notion that contracting parties should have appropriate regard to the legitimate contractual interests of their contracting partner, the governing principles of the existing doctrines define the "highly context-specific" meaning of "appropriate consideration" and "legitimate interests" in the particular situations and relationships in which good faith obligations have heretofore been recognized (*Bhasin*, at para. 69). Careful reference to the specific doctrine at issue in each case is critical because, as Metro rightly notes, "it is no test for the content of the duty of good faith to say that one has to have appropriate regard for the legitimate contractual interests of the counterparty — because appropriate regard is a broad phrase that covers a variety of different levels of conduct depending on the circumstances" (R.F., at para. 47). Importantly, whatever variation may come with context, a contracting party — unlike a fiduciary — typically is not required to serve the

contractante lors de l'exécution d'un contrat. Elle soutient toutefois que l'arbitre a conclu à juste titre qu'une manifestation précise du principe directeur de bonne foi s'applique en l'espèce, et que Metro n'a pas respecté les contraintes qu'impose ce principe à l'exercice de son pouvoir discrétionnaire.

[51] Wastech n'a certainement pas tort d'affirmer que le principe directeur de l'exécution de bonne foi prévoit une norme « dont il est possible de tirer des règles de droit plus particulières » (*Bhasin*, par. 64). De façon générale, la notion de bonne foi ne sera pas retenue si elle ne cadre pas avec la « règl[e] existant[e] » de bonne foi, même si ces règles « se chevauchent dans une certaine mesure » et sont toutes tirées du même principe directeur (*Bhasin*, par. 48 et 66). Par ailleurs, la liste des règles existantes n'est pas exhaustive et peut être élargie graduellement lorsque les règles de droit existantes sont jugées insuffisantes. Toutefois, un tel élargissement devrait être compatible avec la structure du droit des contrats en common law et reconnaître toute son importance au choix personnel fait au moyen d'accords ainsi qu'à la stabilité dans les affaires commerciales (*Bhasin*, par. 66).

[52] Bien que Wastech ait raison de constater que le principe directeur de bonne foi repose, en partie, sur la notion selon laquelle les parties contractantes doivent prendre en compte comme il se doit les intérêts légitimes de leur partenaire contractuel, les principes régissant les règles existantes définissent la signification « hautement contextuelle » des expressions « tenir compte comme il se doit » et « intérêts légitimes » dans les situations et les relations particulières où des obligations d'agir de bonne foi ont été jusqu'alors reconnues (*Bhasin*, par. 69). Il est essentiel d'invoquer avec soin les règles précises en cause dans chaque cas, parce que, comme le mentionne Metro avec raison, [TRADUCTION] « le fait de dire qu'il faut prendre en compte comme il se doit les intérêts contractuels légitimes de l'autre partie ne constitue pas un test pour la teneur de l'obligation d'agir de bonne foi — car cette expression est large et vise une variété de niveaux de conduite selon les circonstances » (m.i., par. 47). Il importe de noter que, peu importe la variation selon le contexte,

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contractual interests of the other party by duties of good faith performance.

une partie contractante — contrairement à un fiduciaire — n'est habituellement pas tenue de servir les intérêts contractuels de l'autre partie par des obligations d'exécution de bonne foi.

[53] In my view, it has not been shown that Metro performed its obligations or executed its rights under the Contract in a manner contrary to the applicable requirements of good faith. It breached neither the duty of honest performance nor the duty to exercise discretion in good faith. Respectfully stated, the arbitrator's conclusion that Wastech had made out a contractual breach of a duty of good faith performance must be set aside.

[53] À mon avis, il n'a pas été démontré que Metro avait exécuté ses obligations ou exercé ses droits prévus au contrat d'une manière contraire aux exigences applicables de la bonne foi. Elle n'a pas manqué à l'obligation d'exécution honnête, ni à l'obligation d'exercer le pouvoir discrétionnaire de bonne foi. Soit dit en tout respect, la conclusion de l'arbitre portant que Wastech avait établi un manquement contractuel à une obligation d'exécution de bonne foi doit être écartée.

(1) The Duty of Honest Performance

(1) L'obligation d'exécution honnête

[54] Wastech and Metro agree that for a contractual discretionary power to be exercised in good faith, it cannot, at a minimum, be exercised dishonestly. These submissions are consistent with the jurisprudence of this Court. As explained in *Bhasin*, at paras. 73-75, and reaffirmed in *Callow*, at para. 53, the duty of honest performance, a distinct manifestation of the organizing principle of good faith, constrains the manner in which all contractual rights and obligations are exercised or performed, as a matter of contractual doctrine. This necessarily includes the exercise of contractual discretionary powers. To exercise a contractual discretionary power dishonestly within the meaning of *Bhasin* is a breach of contract.

[54] Wastech et Metro conviennent que pour qu'un pouvoir discrétionnaire contractuel soit exercé de bonne foi, il ne peut, à tout le moins, être exercé de façon malhonnête. Ces observations sont conformes à la jurisprudence de notre Cour. Comme il est expliqué dans l'arrêt *Bhasin*, par. 73-75, et confirmé dans l'arrêt *Callow*, par. 53, l'obligation d'exécution honnête, une manifestation distincte du principe directeur de bonne foi, limite la manière dont tous les droits et obligations contractuels sont exercés ou exécutés, suivant la doctrine du droit des contrats. Cela inclut nécessairement l'exercice des pouvoirs discrétionnaires contractuels. Exercer un pouvoir discrétionnaire contractuel de façon malhonnête au sens où on l'entend dans l'arrêt *Bhasin* constitue une violation de contrat.

[55] I hasten to say that the duty of honest performance, as contemplated in *Bhasin*, is not at issue here. Wastech does not allege that Metro lied or otherwise knowingly misled Wastech in respect of a matter directly linked to the performance of the Contract, including in the exercise of its discretionary power to allocate waste between the various disposal facilities. This brand of dishonesty is necessary to establish a breach of the duty of honest performance recognized in *Bhasin* and applied in *Callow*. Wastech expressly conceded before the arbitrator that the duty of honest performance in this precise sense is not at issue in this case (Award,

[55] Je m'empresse de dire que l'obligation d'exécution honnête, comme l'envisage notre Cour dans l'arrêt *Bhasin*, n'est pas en cause dans la présente affaire. Wastech n'allègue pas que Metro a menti ou l'a intentionnellement induite en erreur à l'égard d'une question directement liée à l'exécution du contrat, y compris dans l'exercice de son pouvoir discrétionnaire relatif à la répartition des déchets entre les diverses installations d'élimination. Cette forme de conduite malhonnête doit être présente pour établir un manquement à l'obligation d'exécution honnête reconnue dans l'arrêt *Bhasin* et appliquée dans l'arrêt *Callow*. Wastech a expressément concédé devant

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at para. 82). Despite this concession, and despite his conclusion that, from its perspective, Metro's exercise of discretion was "honest", the arbitrator nevertheless held that evidence of "half-truths, lies or deceit" is not required to prove that a discretionary power has been exercised dishonestly (paras. 88 and 90). The exercise of a discretionary power can be "dishonest", he said, where it is "wholly at odds with the legitimate contractual expectations of the other party" (para. 90). The Court of Appeal held that the arbitrator erred on this point. In its view, some subjective element is required to establish dishonesty in the relevant sense (paras. 71-73).

l'arbitre que l'obligation d'exécution honnête en ce sens précis n'est pas en cause en l'espèce (sentence arbitrale, par. 82). Malgré cette concession, et malgré la conclusion de l'arbitre selon laquelle Metro a, de son point de vue, exercé son pouvoir discrétionnaire de manière [TRADUCTION] « honnête », celui-ci a néanmoins conclu qu'une preuve relative à « une demi-vérité, un mensonge ou une tromperie » n'était pas nécessaire pour prouver qu'un pouvoir discrétionnaire a été exercé de façon malhonnête (par. 88 et 90). L'arbitre a affirmé que l'exercice d'un pouvoir discrétionnaire peut être « malhonnête » lorsqu'il est [TRADUCTION] « totalement incompatible avec les attentes contractuelles légitimes de l'autre partie » (par. 90). La Cour d'appel a conclu que l'arbitre avait commis une erreur sur ce point. À son avis, un certain élément subjectif est requis pour établir qu'il y a eu malhonnêteté au sens où il faut l'entendre (par. 71-73).

[56] I agree generally with the Court of Appeal on this point. Here there is certainly no lie. There is not even an allegation of misrepresentation of the truth of any character. Given its concession that there is no issue of dishonesty on the facts of this case, Wastech does not contest the Court of Appeal's conclusion that dishonesty cannot be proven without some subjective element. The duty of honest performance set forth in *Bhasin* was not breached here. But that is not the end of Wastech's argument. Instead, Wastech submits that the arbitrator was correct in holding that a breach of good faith can still be proven even in the absence of a finding of dishonesty. In other words, Wastech submits that honesty is not the only constraint that good faith imposed on Metro's exercise of discretion. I turn next to a consideration of this point.

[56] Je souscris de façon générale à l'avis de la Cour d'appel sur ce point. Il n'y a assurément pas de mensonge dans le cas qui nous occupe. Il n'y a même pas d'allégation de fausse représentation de la vérité, de quelque nature que ce soit. Comme elle a concédé qu'il n'était pas question de malhonnêteté au vu des faits de l'espèce, Wastech ne conteste pas la conclusion de la Cour d'appel selon laquelle on ne peut prouver qu'il y a eu malhonnêteté sans un certain élément subjectif. En l'espèce, il n'y a pas eu de manquement à l'obligation d'exécution honnête énoncée dans l'arrêt *Bhasin*, mais l'argument de Wastech ne s'arrête pas là; elle soutient plutôt que l'arbitre a eu raison de conclure qu'un manquement à l'obligation de bonne foi peut quand même être prouvé en l'absence d'une conclusion de malhonnêteté. Autrement dit, Wastech soutient que l'honnêteté n'est pas la seule contrainte qu'imposait la bonne foi au pouvoir discrétionnaire de Metro. J'examinerai maintenant ce point.

(2) The Duty to Exercise Contractual Discretion in Good Faith

(2) L'obligation d'exercer le pouvoir discrétionnaire contractuel de bonne foi

[57] Pursuant to the framework set out in *Bhasin*, the arbitrator concluded that an existing doctrine obliged Metro to exercise its discretion in good faith. While not dispositive, Wastech and Metro agree with

[57] Conformément au cadre d'analyse établi dans l'arrêt *Bhasin*, l'arbitre a conclu qu'une doctrine existante obligeait Metro à exercer son pouvoir discrétionnaire de bonne foi. Bien que cela ne soit pas

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the arbitrator that an existing doctrine of good faith applies in this case which constrained the manner in which Metro could exercise its discretionary power under the Contract.

déterminant, Wastech et Metro sont d'accord avec l'arbitre pour dire qu'une doctrine existante de bonne foi s'applique en l'espèce et limitait la façon dont Metro pouvait exercer son pouvoir discrétionnaire conféré par le contrat.

[58] I agree with the parties that the duty to exercise contractual discretionary powers in good faith is well-established in the common law and note it was expressly recognized by Cromwell J. in his account of the organizing principle of good faith in *Bhasin* (paras. 47-48, 50 and 89, citing a number of authors including J. D. McCamus, *The Law of Contracts* (2nd 2012), at pp. 835-68; S. M. Waddams, *The Law of Contracts* (6th ed. 2010), at paras. 494-508). As Cromwell J. observed, the duty was applied by this Court in *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187 (*Bhasin*, at para. 50). It is not, therefore, a recent creation cut from whole cloth.

[58] Je conviens avec les parties que l'obligation d'exercer les pouvoirs discrétionnaires contractuels de bonne foi est bien établie en common law et je constate qu'elle a été expressément reconnue par le juge Cromwell lorsqu'il a énoncé le principe directeur de bonne foi dans l'arrêt *Bhasin* (par. 47-48, 50 et 89, citant plusieurs auteurs dont J. D. McCamus, *The Law of Contracts* (2e éd. 2012), p. 835-868; S. M. Waddams, *The Law of Contracts* (6e éd. 2010), par. 494-508). Comme l'a observé le juge Cromwell, la Cour a appliqué cette obligation dans l'arrêt *Mitsui & Co. (Canada) Ltd. c. Banque Royale du Canada*, [1995] 2 R.C.S. 187 (*Bhasin*, par. 50). Il ne s'agit donc pas d'une création récente sortie de nulle part.

[59] It was not necessary in *Bhasin* to spell out the contours of this aspect of good faith performance of contracts. In this appeal, in order to answer Wastech's claim that the power to reallocate waste was used in a manner that failed to show appropriate regard for its interests, one must determine what constraints the duty to exercise discretion in good faith imposes on the holder of that discretion. This Court must then ask whether Metro failed to abide by those constraints, thereby breaching the Contract.

[59] Il n'était pas nécessaire dans l'arrêt *Bhasin* de détailler la portée de cet aspect de l'exécution de bonne foi des contrats. Dans le présent pourvoi, afin de répondre à la prétention de Wastech suivant laquelle le pouvoir de répartir les déchets a été exercé d'une manière qui ne tenait pas compte comme il se doit de ses intérêts, il faut déterminer quelles contraintes impose l'obligation d'exercer le pouvoir discrétionnaire de bonne foi à son titulaire. La Cour doit ensuite se demander si Metro a omis de se conformer à ces contraintes, et a violé par le fait même le contrat.

[60] In their submissions before this Court, the parties have marshalled an array of arguments in their efforts to identify the proper limits imposed by the duty to exercise discretion in good faith. Wastech's primary submission is that, under pre-*Bhasin* jurisprudence, the "governing" and "proper" standard for assessing whether Metro exercised its discretionary power to allocate waste in good faith is "reasonableness". Wastech submits that it would be unreasonable for a party to exercise its discretion "in such a way as to deny the other contractual party substantial benefits flowing to it which represent fundamental aspects of the parties' legitimate contractual expectations" (Appellant's Condensed Book, at p. 1). By depriving

[60] Dans les observations qu'elles ont présentées à la Cour, les parties ont rassemblé une gamme de moyens en vue de cerner les limites appropriées qu'impose l'obligation d'exercer le pouvoir discrétionnaire de bonne foi. L'observation principale de Wastech est que, selon la jurisprudence précédant l'arrêt *Bhasin*, la norme « directrice » et « appropriée » pour évaluer si Metro a exercé de bonne foi son pouvoir discrétionnaire relatif à la répartition des déchets est celle de la « raisonnabilité ». Wastech soutient qu'il serait déraisonnable pour une partie d'exercer son pouvoir discrétionnaire [TRADUCTION] « de manière à priver l'autre partie contractuelle d'avantages importants qui lui reviennent et

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Wastech of the "fundamental benefit for which [it] bargained" — the opportunity to achieve the Target OR in every year of the Contract — Wastech says Metro exercised its discretion unreasonably and therefore contrary to the requirements of the duty to exercise contractual discretionary powers in good faith (A.F., at para. 23).

qui représentent des aspects fondamentaux des attentes contractuelles légitimes des parties » (recueil condensé de l'appelante, p. 1). Wastech affirme qu'en la privant de [TRADUCTION] « l'avantage fondamental qu'[elle] avait négocié » — soit la possibilité d'atteindre le RE cible chaque année du contrat — Metro a exercé son pouvoir discrétionnaire de manière déraisonnable, et donc contraire aux exigences de l'obligation d'exercer les pouvoirs discrétionnaires contractuels de bonne foi (m.a., par. 23).

[61] In my respectful view, Wastech's position contains two closely related flaws. First, it overstates the meaning of "reasonableness" in this context. Second, its submission rests on the further erroneous proposition that determining whether a party's exercise of discretion resulted in the "substantial nullification" or "evisceration" of the benefit or objective of the contract is a correct method of assessing whether that party exercised its discretion in accordance with the requirements of the good faith duty at issue. I begin, however, with an explanation of that duty.

[61] À mon humble avis, la position de Wastech comporte deux points faibles étroitement liés. Premièrement, elle exagère le sens de la « raisonnabilité » dans ce contexte. Deuxièmement, son observation repose sur la proposition erronée voulant qu'il soit approprié d'établir si l'exercice du pouvoir discrétionnaire par une partie a donné lieu à une « annulation substantielle » ou à une « perte de sens » de l'avantage négocié ou de l'objectif du contrat pour évaluer si cette partie a exercé son pouvoir discrétionnaire en conformité avec les exigences de l'obligation de bonne foi en cause. Je commencerai toutefois par expliquer cette obligation.

[62] One may well ask — as courts and scholars have on occasion — how the exercise of an apparently unfettered contractual discretion could ever constitute a breach of contract since one could argue that a party, in exercising such a discretionary power, even opportunistically, is merely doing what the other party agreed it could do in the contract (D. Stack, "The Two Standards of Good Faith in Canadian Contract Law" (1999), 62 *Sask. L. Rev.* 201, at p. 208). The answer can best be traced to the "standard" that underpins and is manifested in the specific legal doctrine requiring that where one party exercises a discretionary power, it must be done in good faith. Expressed as an organizing principle, this standard is that parties must perform their contractual duties, and exercise their contractual rights, honestly and reasonably and not capriciously or arbitrarily (*Bhasin*, at paras. 63-64). Accordingly, a discretionary power, even if unfettered, is constrained by good faith. To exercise it, for example, capriciously or arbitrarily, is wrongful and constitutes a breach of contract. Even unfettered, the discretionary power will have purposes that reflects the parties' shared

[62] On peut se demander — comme l'ont fait les tribunaux et les universitaires à l'occasion — comment l'exercice d'un pouvoir discrétionnaire contractuel apparemment absolu peut constituer une violation de contrat, puisqu'on pourrait faire valoir qu'une partie, lorsqu'elle exerce un tel pouvoir, même de façon opportuniste, fait simplement ce que l'autre partie a convenu qu'elle pouvait faire dans le contrat (D. Stack, « The Two Standards of Good Faith in Canadian Contract Law » (1999), 62 *Sask. L. Rev.* 201, p. 208). La réponse se trouve dans la « norme » qui sous-tend les règles de droit particulières et se manifeste dans la doctrine particulière applicable, laquelle exige que lorsqu'une partie exerce un pouvoir discrétionnaire, elle doive le faire de bonne foi. Définie comme un principe directeur, cette norme exige que les parties exécutent leurs obligations contractuelles, et exercent leurs droits contractuels, de manière honnête et raisonnable, et non de façon abusive ou arbitraire (*Bhasin*, par. 63-64). Par conséquent, un pouvoir discrétionnaire, même absolu, est limité par la bonne foi. L'exercer de manière abusive ou arbitraire, par exemple, est fautif et constitue une

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interests and expectations, which purposes help identify when an exercise is capricious or arbitrary, to stay with this same example. Like the duty of honest performance considered in *Bhasin* and *Callow*, the duty to exercise discretionary power in good faith places limits on how one can exercise facially unfettered contractual rights. When the good faith duty is violated, the contract has been breached. The question is what constraints this particular duty puts on the exercise of contractual discretion.

violation de contrat. Même absolu, le pouvoir discrétionnaire aura des objectifs qui tiennent compte des attentes et des intérêts communs des parties, lesquels aident à déterminer quand l'exercice est abusif ou arbitraire, pour garder le même exemple. Comme l'obligation d'exécution honnête étudiée dans les arrêts *Bhasin* et *Callow*, l'obligation d'exercer le pouvoir discrétionnaire de bonne foi limite la façon dont une personne peut exercer des droits contractuels à première vue illimités. Lorsqu'il y a manquement à l'obligation d'exécution de bonne foi, il y a violation du contrat. La question est de savoir quelles contraintes pose cette obligation précise à l'exercice du pouvoir discrétionnaire contractuel.

[63] Stated simply, the duty to exercise contractual discretion in good faith requires the parties to exercise their discretion in a manner consistent with the purposes for which it was granted in the contract, or, in the terminology of the organizing principle in *Bhasin*, to exercise their discretion reasonably.

[63] Pour dire les choses simplement, l'obligation d'exercer un pouvoir discrétionnaire contractuel de bonne foi exige des parties qu'elles exercent celui-ci d'une manière conforme aux objectifs pour lesquels il est conféré par contrat, ou, pour reprendre la terminologie du principe directeur dans l'arrêt *Bhasin*, qu'elles exercent leur pouvoir discrétionnaire de manière raisonnable.

(a) *Content of the Duty*

a) *Teneur de l'obligation*

[64] I begin with an observation that, in *Bhasin*, this Court unanimously agreed that, in some circumstances, good faith may require "reasonable" contractual performance. For example, at para. 66, Cromwell J. wrote that the "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 <u>reasonable</u> contractual performance" (emphasis added). Indeed, this is consistent with the organizing principle itself, which expressly refers to reasonable contractual performance, and with Professor McCamus' description of the cases applying the duty to exercise contractual discretionary powers in good faith: "A number of Canadian authorities applying this proposition have linked it to the concept of good faith. In each of them, the defendant was required to exercise the power in question in a reasonable fashion" ((2020), at p. 932; see also *Bhasin*, at para. 63).

[64] D'abord, il est à noter que, dans l'arrêt *Bhasin*, la Cour a reconnu à l'unanimité que, dans certaines circonstances, la bonne foi peut exiger que l'exécution contractuelle soit « raisonnable ». Par exemple, au par. 66, le juge Cromwell a écrit que le « principe directeur de bonne foi se manifeste par les règles existantes portant sur les types de situations et de relations dans lesquelles la loi exige, à certains égards, une exécution contractuelle honnête, franche ou <u>raisonnable</u> » (je souligne). En effet, cela est conforme au principe directeur en tant que tel, lequel fait expressément référence à l'exécution contractuelle raisonnable, ainsi qu'à la description que fait le professeur McCamus des affaires où l'obligation d'exercer les pouvoirs discrétionnaires contractuels de bonne foi a été appliquée : [TRADUCTION] « Un certain nombre de décisions canadiennes où cette proposition a été appliquée l'ont reliée à la notion de bonne foi. Dans chacune de celles-ci, le défendeur était tenu d'exercer le pouvoir en question de manière raisonnable » ((2020), p. 932; voir aussi *Bhasin*, par. 63).

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[65] I also observe that many Canadian courts have held that reasonableness is required in the specific context of exercises of contractual discretionary powers. For example, in *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755, a decision relied upon by both Wastech and Metro, the Court of Appeal for Ontario concluded: ". . . the discretion must be exercised in a reasonable way" (p. 763). More recently, in *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409, 130 O.R. (3d) 641, the same court wrote: "That a discretion given to a contracting party must be exercised reasonably is clear from the authorities" (para. 28). Additional Canadian examples abound (see, e.g., *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (C.A.), at p. 7; *Jack Wookey Hldg. Ltd. v. Tanizul Timber Ltd.* (1988), 27 B.C.L.R. (2d) 221 (C.A.), at p. 225; *Canadian National Railway Co. v. Inglis Ltd.* (1997), 36 O.R. (3d) 410 (C.A.), at pp. 415-6; *Marshall v. Bernard Place Corp.* (2002), 58 O.R. (3d) 97 (C.A.), at para. 26; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 96; *Filice v. Complex Services Inc.*, 2018 ONCA 625, 428 D.L.R. (4th) 548, at para. 38).

[65] Je constate également que de nombreux tribunaux canadiens ont conclu que l'exercice d'un pouvoir discrétionnaire contractuel en particulier doit être raisonnable. Par exemple, dans l'arrêt *Greenberg c. Meffert* (1985), 50 O.R. (2d) 755, une décision sur laquelle se sont fondées tant Wastech que Metro, la Cour d'appel de l'Ontario a conclu que [TRADUCTION] « le pouvoir discrétionnaire doit être exercé de manière raisonnable » (p. 763). Plus récemment, dans l'arrêt *2123201 Ontario Inc. c. Succession Israel*, 2016 ONCA 409, 130 O.R. (3d) 641, la même cour a écrit ceci : [TRADUCTION] « Il ressort clairement de la jurisprudence que le pouvoir discrétionnaire conféré à une partie contractante doit être exercé de manière raisonnable » (par. 28). Il existe de nombreux autres exemples dans la jurisprudence canadienne (voir, p. ex., *LeMesurier c. Andrus* (1986), 54 O.R. (2d) 1 (C.A.), p. 7; *Jack Wookey Hldg. Ltd. c. Tanizul Timber Ltd.* (1988), 27 B.C.L.R. (2d) 221 (C.A.), p. 225; *Canadian National Railway Co. c. Inglis Ltd.* (1997), 36 O.R. (3d) 410 (C.A.), p. 415-416; *Marshall c. Bernard Place Corp.* (2002), 58 O.R. (3d) 97 (C.A.), par. 26; *Shelanu Inc. c. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), par. 96; *Filice c. Complex Services Inc.*, 2018 ONCA 625, 428 D.L.R. (4th) 548, par. 38).

[66] Courts in the United Kingdom and Australia have ruled similarly (see, e.g., *Abu Dhabi National Tanker Co. v. Product Star Shipping Ltd. (The "Product Star") (No. 2)*, [1993] 1 Lloyd's Rep. 397 (Eng. C.A.), at p. 404, per Leggatt L.J.; *Renard Constructions (ME) Pty Ltd. v. Minister for Public Works* (1992), 26 N.S.W.L.R. 234 (C.A.), at p. 258, per Priestley J.A.).

[66] Les tribunaux du Royaume-Uni et de l'Australie ont rendu des décisions semblables (voir, p. ex., *Abu Dhabi National Tanker Co. c. Product Star Shipping Ltd. (The "Product Star") (No. 2)*, [1993] 1 Lloyd's Rep. 397 (C.A. Angl.), p. 404, le lord juge Leggatt; *Renard Constructions (ME) Pty Ltd. c. Minister for Public Works* (1992), 26 N.S.W.L.R. 234 (C.A.), p. 258, le juge Priestley).

[67] Finally, many jurists have expressed support for the proposition that contractual discretionary powers must be exercised reasonably in order to abide by the requirements of the good faith duty at issue, or have at least acknowledged that courts often apply such a constraint (see, e.g., A. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000), 116 *L.Q.R.* 66, at p. 76; J. D. McCamus, "Abuse of Discretion, Failure to Cooperate and Evasion of Duty: Unpacking the Common Law Duty of Good Faith Contractual Performance" (2005), 29 *Adv. Q.* 72, at p. 80;

[67] Enfin, un grand nombre de juristes ont exprimé leur appui à l'égard de la proposition voulant que les pouvoirs discrétionnaires contractuels doivent être exercés de manière raisonnable en vue du respect des exigences de l'obligation d'agir de bonne foi en cause, ou ont au moins reconnu que les tribunaux appliquent souvent une telle contrainte (voir, p. ex., A. Mason, « Contract, Good Faith and Equitable Standards in Fair Dealing » (2000), 116 *L.Q.R.* 66, p. 76; J. D. McCamus, « Abuse of Discretion, Failure to Cooperate and Evasion of Duty : Unpacking the Common Law Duty of Good

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McCamus (2020), at p. 937; J. M. Paterson, "Good Faith Duties in Contract Performance" (2014), 14 *O.U.C.L.J.* 283, at pp. 284, 299 and 302; A. Gray, "Development of Good Faith in Canada, Australia and Great Britain" (2015), 57 *Can. Bus. L.J.* 84, at p. 113; S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at para. 503).

[68] I think it best to note at the outset that I do not refer to reasonableness in an administrative law sense. Rather, I agree with Professor McCamus' view that reasonableness for this good faith duty is understood by reference to purpose: ". . . where discretionary powers are conferred by agreement, it is implicitly understood that the powers are to be exercised reasonably. The concept of reasonableness in this context implies a duty to exercise the discretion honestly and in light of the purposes for which it was conferred" ((2020), at p. 937).

[69] Thus, beyond the requirement of honest performance, to determine whether a party failed in its duty to exercise discretionary power in good faith, one must ask the following question: was the exercise of contractual discretion unconnected to the purpose for which the contract granted discretion? If so, the party has not exercised the contractual power in good faith.

[70] The touchstone for measuring whether a party has exercised a discretionary power in good faith is the purpose for which the discretion was created. Where discretion is exercised in a manner consonant with the purpose, that exercise may be characterized as reasonable according to the bargain the parties had chosen to put in place. Perforce, the exercise of power consonant with purpose may be thought of as undertaken fairly and in good faith on the parties' own terms. As such, barring issues such as unconscionability not raised in this appeal, that exercise is best understood, as a general matter, to be insulated from judicial review as a matter of fairness.

Faith Contractual Performance » (2005), 29 *Adv. Q.* 72, p. 80; McCamus (2020), p. 937; J. M. Paterson, « Good Faith Duties in Contract Performance » (2014), 14 *O.U.C.L.J.* 283, p. 284, 299 et 302; A. Gray, « Development of Good Faith in Canada, Australia and Great Britain » (2015), 57 *Rev. can. dr. comm.* 84, p. 113; S. M. Waddams, *The Law of Contracts* (7e éd. 2017), par. 503).

[68] Je crois qu'il vaut mieux signaler d'emblée que je ne parle pas de la raisonnabilité au sens où on l'entend en droit administratif. Je suis plutôt d'accord avec le point de vue du professeur McCamus selon lequel le caractère raisonnable pour cette obligation d'agir de bonne foi est interprété en fonction de l'objectif : [TRADUCTION] « . . . lorsque des pouvoirs discrétionnaires sont conférés par un accord, il est implicitement entendu que ces pouvoirs doivent être exercés de manière raisonnable. Le concept de raisonnabilité dans ce contexte emporte une obligation d'exercer le pouvoir discrétionnaire de façon honnête et en tenant compte des objectifs pour lesquels il a été conféré » ((2020), p. 937).

[69] Donc, outre l'exigence d'exécution honnête, pour établir si une partie a manqué à son obligation d'exercer le pouvoir discrétionnaire de bonne foi, il faut se poser la question suivante : l'exercice du pouvoir discrétionnaire contractuel était-il étranger à l'objectif pour lequel le contrat conférait ce pouvoir? Le cas échéant, la partie n'a pas exercé le pouvoir contractuel de bonne foi.

[70] La pierre d'assise pour évaluer si une partie a exercé son pouvoir discrétionnaire de bonne foi est l'objectif pour lequel il a été créé. Lorsque le pouvoir discrétionnaire est exercé d'une façon conforme à cet objectif, un tel exercice peut être qualifié de raisonnable selon le marché que les parties ont choisi de mettre en place. Forcément, l'exercice du pouvoir conforme à l'objectif peut être considéré comme étant juste et de bonne foi selon les termes des parties. Par conséquent, excluant les questions comme celle de l'iniquité qui ne sont pas soulevées dans le présent pourvoi, il faut voir cet exercice, de façon générale, comme étant à l'abri d'un contrôle judiciaire pour des raisons d'équité.

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[71] But where the exercise stands outside of the compass set by contractual purpose, the exercise is unreasonable in light of the agreement for which the parties bargained and, as such, it may be thought of as unfair and contrary to the requirements of good faith. Scholars commenting on trends in common law jurisdictions have observed that "courts have repeatedly held that discretionary contractual powers should not be exercised for an 'improper' or 'extraneous' purpose" (J. M. Paterson, "Implied Fetters on the Exercise of Discretionary Contractual Powers" (2009), 35 *Mon. L. R.* 45, at p. 54). As Professor Collins has written, "[t]he good faith standard . . . enables a court to control discretionary decisions that are perceived to be based on improper purposes, that is where the power is used for a purpose not originally expected by the subject of the power" (H. Collins, "Discretionary Powers in Contracts", in D. Campbell, H. Collins and J. Wightman, eds., *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (2003), 219, at p. 223). It is this principle that constrains contractual discretion and, accordingly, fixes the proper limits for judicial review of the exercise of the power. Importantly, it is not what a court sees as fair according to its view of what is the proper exercise of the discretion. Instead, drawing on the purpose set by the parties, the measure of fairness is what is reasonable according to the parties' own bargain. Where the exercise of the discretionary power falls outside of the range of choices connected to its underlying purpose — outside the purpose for which the agreement the parties themselves crafted provides discretion — it is thus contrary to the requirements of good faith. Courts can then intervene, for example, where the exercise of the power is arbitrary or capricious in light of its purpose as set by the parties.

[71] Toutefois, lorsque l'exercice sort des balises établies par l'objectif contractuel, il est déraisonnable à la lumière de l'accord que les parties ont négocié et, par conséquent, il peut être considéré comme injuste et contraire aux exigences de la bonne foi. Les auteurs qui ont commenté les tendances dans les ressorts de common law ont observé que [TRADUCTION] « les tribunaux ont à maintes reprises conclu que les pouvoirs discrétionnaires contractuels ne devraient pas être exercés en vue d'un objectif "inapproprié" ou "dépourvu de pertinence" » (J. M. Paterson, « Implied Fetters on the Exercise of Discretionary Contractual Powers » (2009), 35 *Mon. L. R.* 45, p. 54). Comme l'a écrit le professeur Collins, [TRADUCTION] « [l]a norme de la bonne foi [. . .] permet au tribunal de faire un contrôle des décisions discrétionnaires perçues comme étant fondées sur des objectifs inappropriés, c'est-à-dire lorsque le pouvoir est utilisé en vue d'un objectif qui ne se rattache habituellement pas à l'objet du pouvoir » (H. Collins, « Discretionary Powers in Contracts », dans D. Campbell, H. Collins et J. Wightman, dir., *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (2003), 219, p. 223). C'est ce principe qui restreint le pouvoir discrétionnaire contractuel et, par conséquent, établit les limites appropriées relatives au contrôle judiciaire de l'exercice du pouvoir. Il importe de noter que ce n'est pas ce que le tribunal estime juste selon sa perception de ce qu'est l'exercice approprié du pouvoir discrétionnaire. Le tribunal doit plutôt, s'appuyant sur l'objectif établi par les parties, évaluer l'équité selon ce qui est raisonnable en fonction du marché qu'ont conclu les parties. Lorsque l'exercice du pouvoir discrétionnaire est en dehors de l'éventail des choix liés à son objectif sous-jacent — en dehors de l'objectif pour lequel l'accord que les parties ont elles-mêmes choisi confère le pouvoir discrétionnaire — il est contraire aux exigences de la bonne foi. Les tribunaux peuvent alors intervenir, par exemple, lorsque l'exercice du pouvoir est arbitraire ou abusif compte tenu de son objectif établi par les parties.

[72] Sometimes, the text of the discretionary clause itself will make the parties' contractual purpose clear. In other circumstances, purpose can only be understood by reading the clause in the context of the contract as a whole. Writing extra-judicially, Lord Sales

[72] Parfois, le texte de la clause discrétionnaire lui-même indiquera clairement l'objectif contractuel des parties. En d'autres circonstances, on ne peut comprendre l'objectif qu'en lisant la clause dans le contexte du contrat dans son ensemble. Dans un

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has recently explained that where the clause that confers a discretionary power is "entirely general", a court will have to construe the ambit of the power itself (P. Sales, "Use of Powers for Proper Purposes in Private Law" (2020), 136 *L.Q.R.* 384, at p. 393). In those cases, he notes at p. 393: "It is necessary instead to form a broad view of the purposes of the venture to which the contract gives effect, and of what loyalty to that venture might involve for a party to it, and to take those broad purposes as providing the inherent limits for the exercise of the power."

écrit extrajudiciaire, le lord Sales a récemment expliqué que lorsque la clause qui confère un pouvoir discrétionnaire est [TRADUCTION] « entièrement générale », le tribunal devra interpréter lui-même la portée du pouvoir (P. Sales, « Use of Powers for Proper Purposes in Private Law » (2020), 136 *L.Q.R.* 384, p. 393). Il souligne à la p. 393 que dans ces cas : [TRADUCTION] « Il est plutôt nécessaire de se faire une idée générale des objectifs de l'entreprise auxquels donne effet le contrat, et de la loyauté envers cette entreprise que pourrait entraîner celui-ci pour les parties, et de considérer ces objectifs généraux comme établissant les limites inhérentes de l'exercice du pouvoir. »

[73] I hasten to say that the role of the courts is not to ask whether the discretion was exercised in a morally opportune or wise fashion from a business perspective. The common law recognizes that "[c]ompetition between businesses regularly involves each business taking steps to promote itself at the expense of the other. . . . Far from prohibiting such conduct, the common law seeks to encourage and protect it" (*A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31, citing *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1, at para. 142). As a general matter, good faith should not be used as a pretext for scrutinizing motive (*Bhasin*, at para. 70).

[73] Je m'empresse de dire qu'il n'appartient pas aux tribunaux de se demander si le pouvoir discrétionnaire a été exercé de façon opportune sur le plan moral ou avec sagesse d'un point de vue commercial. La common law reconnaît que « [d]es entreprises en concurrence vont régulièrement faire en sorte de se faire valoir au détriment de leurs concurrentes. [. . .] Loin d'interdire ce comportement, la common law cherche à l'encourager et à le protéger » (*A.I. Enterprises Ltd. c. Bram Enterprises Ltd.*, 2014 CSC 12, [2014] 1 R.C.S. 177, par. 31, citant *OBG Ltd. c. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1, par. 142). En règle générale, le principe de la bonne foi ne devrait pas servir de prétexte à un examen approfondi des motivations des parties (*Bhasin*, par. 70).

[74] Not only does this deferential approach ensure "some elbow-room for the aggressive pursuit of self-interest" (C. Sappideen and P. Vines, eds., *Fleming's The Law of Torts* (10th ed. 2011), at para. 30.120; see also *A.I. Enterprises*, at para. 31), but it also prevents good faith from veering into "a form of *ad hoc* judicial moralism or 'palm tree' justice" (*Bhasin*, at para. 70). In this context, then, courts must only ensure parties have not exercised their discretion in ways unconnected to the purposes for which the contract grants that power.

[74] Non seulement cette déférence garantit [TRADUCTION] « une certaine liberté d'action en vue de la poursuite énergique d'intérêts personnels » (C. Sappideen et P. Vines, dir., *Fleming's The Law of Torts* (10e éd. 2011), par. 30.120; voir aussi *A.I. Enterprises*, par. 31), mais elle évite aussi que le principe de la bonne foi se transforme en « une forme de moralisme judiciaire ponctuel ou en une "justice au cas par cas" » (*Bhasin*, par. 70). Dans ce contexte, alors, les tribunaux doivent seulement s'assurer que les parties n'ont pas exercé leur pouvoir discrétionnaire d'une façon étrangère aux objectifs pour lesquels le contrat confère ce pouvoir.

[75] To this end, it is helpful to keep in mind that, generally speaking, a range of outcomes flows from the choices that may be considered a reasonable

[75] À cet égard, il est utile de garder à l'esprit que, généralement, une gamme d'issues découle des choix qui peuvent être considérés comme un exercice

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exercise of discretion when considered in light of the purposes identified by the contract. Some of these choices may properly be thought of as connected to the purposes of the discretion. Others will be demonstrably unconnected to the contemplated purposes. Wherever a party is granted discretion, there may be differing yet legitimate ways in which that party can exercise its power that is itself part of the bargain. In a contractual context, these choices are ascertained principally by reference to the contract, interpreted as a whole — the first source of justice between the parties. Good faith does not eliminate the discretion-exercising party's power of choice. Rather, it simply limits the range of legitimate ways in which a discretionary power may be exercised in light of the relevant purposes (S. J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980), 94 *Harv. L. Rev.* 369, at pp. 385-86). Where discretion is exercised for an improper purpose, as against that which was intended by the parties, one that is "ulterior or extraneous" to their intentions, it is exercised in bad faith (J. D. McCamus, "The New General 'Principle' of Good Faith Performance and the New 'Rule' of Honesty in Performance in Canadian Contract Law" (2015), 32 *J.C.L.* 103, at p. 115).

raisonnable du pouvoir discrétionnaire au regard des objectifs fixés dans le contrat. Certains de ces choix peuvent être considérés à juste titre comme étant liés aux objectifs du pouvoir discrétionnaire. D'autres seront manifestement étrangers aux objectifs envisagés. Chaque fois qu'une partie se voit conférer un pouvoir discrétionnaire, elle pourrait l'exercer de différentes façons légitimes qui font elles-mêmes partie du marché. Dans un contexte contractuel, on détermine de tels choix principalement en se rapportant au contrat, interprété dans son ensemble — il s'agit de la première source de justice entre les parties. La bonne foi n'élimine pas le pouvoir de choisir de la partie exerçant le pouvoir discrétionnaire. Elle limite simplement la gamme des façons légitimes dont ce pouvoir peut être exercé compte tenu des objectifs applicables (S. J. Burton, « Breach of Contract and the Common Law Duty to Perform in Good Faith » (1980), 94 *Harv. L. Rev.* 369, p. 385-386). Lorsque le pouvoir discrétionnaire est exercé en vue d'un objectif illégitime, comme à l'encontre de l'intention des parties, dans un dessein [TRADUCTION] « secret ou étranger » à leurs intentions, il est exercé de mauvaise foi (J. D. McCamus, « The New General 'Principle' of Good Faith Performance and the New 'Rule' of Honesty in Performance in Canadian Contract Law » (2015), 32 *J.C.L.* 103, p. 115).

[76] With this approach in mind, I stress that what a court considers unreasonable is highly context-specific, and ultimately "depend[s] upon the intention of the parties as disclosed by their contract" (*Greenberg*, at p. 762; see also *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240, 88 B.C.L.R. (5th) 105, at paras. 63-65; G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at pp. 312-13). Demonstrating a breach will necessarily centre on an exercise of contractual interpretation. It is in properly interpreting the contract and the purposes for which discretion was granted that the range of good faith behaviour comes into focus and breaches can be identified.

[76] Ayant cette approche à l'esprit, j'insiste pour dire que ce qu'un tribunal juge déraisonnable est étroitement lié au contexte et [TRADUCTION] « dépend en fin de compte de l'intention qu'ont manifestée les parties dans leur contrat » (*Greenberg*, p. 762; voir aussi *Sherry c. CIBC Mortgages Inc.*, 2016 BCCA 240, 88 B.C.L.R. (5th) 105, par. 63-65; G. R. Hall, *Canadian Contractual Interpretation Law* (3e éd. 2016), p. 312-313). La démonstration d'une violation sera nécessairement axée sur une opération d'interprétation contractuelle. C'est en interprétant correctement le contrat et les objectifs pour lesquels le pouvoir discrétionnaire a été conféré que la gamme de comportements de bonne foi deviendra apparente et que l'on pourra cerner les violations.

[77] I add, however, the following comment as a general guide. For contracts that grant discretionary power in which the matter to be decided is readily susceptible of objective measurement — e.g., matters

[77] J'ajoute cependant la remarque suivante à titre de guide général. En ce qui concerne les contrats conférant un pouvoir discrétionnaire pour lequel la question à trancher est facile à mesurer

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relating to "operative fitness, structural completion, mechanical utility or marketability" — the range of reasonable outcomes will be relatively smaller (*Greenberg*, at p. 762). For contracts that grant discretionary power "in which the matter to be decided or approved is not readily susceptible [to] objective measurement — [including] matters involving taste, sensibility, personal compatibility or judgment of the party" exercising the discretionary power — the range of reasonable outcomes will be relatively larger (*Greenberg*, at p. 761). I emphasize, however, that this comment should operate as a general guide, not a means to categorize unreasonableness.

objectivement — p. ex. des questions liées [TRADUCTION] « à la capacité opérationnelle, à l'achèvement d'une structure, à l'utilité mécanique ou à la qualité marchande » — la gamme des issues raisonnables sera relativement réduite (*Greenberg*, p. 762). En ce qui concerne les contrats conférant un pouvoir discrétionnaire [TRADUCTION] « pour lequel la question à trancher ou à approuver ne se prête guère à une mesure objective — [notamment] les questions relatives au goût, à la sensibilité, à la compatibilité personnelle ou au jugement de la partie » qui exerce le pouvoir discrétionnaire — la gamme d'issues raisonnables sera relativement plus grande (*Greenberg*, p. 761). Je souligne toutefois que cette remarque devrait servir de guide général, et non de moyen pour catégoriser l'exercice déraisonnable du pouvoir.

[78] To understand the requirements of this duty it is helpful to consider the standards advanced by the parties, and the extent to which these concepts assist in determining whether the exercise of discretion is unreasonable, that is, not connected to the relevant purposes.

[78] Pour comprendre ce qu'exige cette obligation, il est utile d'examiner les normes mises de l'avant par les parties, et la mesure dans laquelle ces concepts aident à établir si l'exercice du pouvoir discrétionnaire est déraisonnable, c'est-à-dire étranger aux objectifs applicables.

[79] I recall that Wastech argues that the good faith duty at issue prohibited Metro from exercising its discretion in a way that denied it benefits fundamental to its legitimate contractual expectations. For its part, Metro concedes that contractual discretionary powers "may not be exercised to nullify or eviscerate the fundamental benefit of the contract" (R.F., at para. 54).

[79] Rappelons que Wastech fait valoir que l'obligation d'agir de bonne foi en cause interdisait à Metro d'exercer son pouvoir discrétionnaire de manière à la priver des avantages fondamentaux à ses attentes contractuelles légitimes. Quant à elle, Metro concède que les pouvoirs discrétionnaires contractuels [TRADUCTION] « ne peuvent pas être exercés pour annuler l'avantage fondamental du contrat ou lui faire perdre son sens » (m.i., par. 54).

[80] In support of its position, Wastech relies principally upon *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (S.C. (T.D.)), aff'd (1992), 112 N.S.R. (2d) 180 (S.C. (App. Div.)), an influential decision regarding good faith in contract law, where Kelly J. wrote that "bad faith" includes conduct that is "contrary to community standards of honesty, reasonableness or fairness", and can generally be said to occur where an exercise of discretion "substantially nullif[ies] the bargained objective or benefit contracted for by the other" (paras. 38, 58 and 60). This standard has subsequently been adopted and applied by a number of Canadian appellate courts, and endorsed by some scholars (see,

[80] Pour appuyer sa position, Wastech se fonde principalement sur l'arrêt *Gateway Realty Ltd. c. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (C.S. (1re inst.)), conf. par (1992), 112 N.S.R. (2d) 180 (C.S. (Div. d'appel)), une décision influente concernant la bonne foi en droit contractuel, où le juge Kelly a écrit que la [TRADUCTION] « mauvaise foi » comprend la conduite qui est « contraire aux normes sociales de l'honnêteté, de la raisonnabilité ou de l'équité » et que l'on peut généralement dire qu'il y a mauvaise foi lorsque l'exercice du pouvoir discrétionnaire « annule substantiellement l'objectif ou l'avantage négocié par l'autre partie au contrat » (par. 38, 58 et 60). Cette norme a par la suite été

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e.g., *Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (C.A.), at para. 22; *Klewchuk v. Switzer*, 2003 ABCA 187, 330 A.R. 40, at para. 33; G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at p. 530).

[81] Wastech submits that the arbitrator's conclusions as to the nature of the impact on Wastech of Metro's exercise of discretion amount to a finding of "nullification" or "evisceration". In particular, Wastech points to the arbitrator's findings that Metro's exercise of discretion made it "impossible" for Wastech to achieve the Target OR, and that having the opportunity to achieve the Target OR in every year of the Contract was "the fundamental benefit for which Wastech bargained" (Award, at para. 94). Metro answers that the arbitrator made no finding of "substantial nullification" or "evisceration", nor was such a finding open to him on the facts (R.F., at paras. 73 and 75; Transcript, at p. 93).

[82] Respectfully stated, I am of the view that requiring "substantial nullification" — that is to say, the evisceration by one party of the better part of the benefit of the contract of the other — is not the appropriate standard for concluding a breach of the duty to exercise discretionary power in good faith.

[83] The fact that a party's exercise of discretion causes its contracting partner to lose some or even all of its anticipated benefit under the contract should not be regarded as dispositive, in itself, as to whether the discretion was exercised in good faith (Burton, at pp. 384-85). As authors A. Swan, J. Adamski, and A. Y. Na explain, the mere fact that a party is deprived of substantially the whole benefit of a contract is not sufficient, absent proof of the discretion-exercising party's fault or default, to make out a claim for breach of the contract (see *Canadian Contract Law* (4th ed. 2018), at §7.73). In other words, absent some

adoptée et appliquée par plusieurs cours d'appel canadiennes et approuvée par certains universitaires (voir, p. ex., *Mesa Operating Limited Partnership c. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (C.A.), par. 22; *Klewchuk c. Switzer*, 2003 ABCA 187, 330 A.R. 40, par. 33; G. H. L. Fridman, *The Law of Contract in Canada* (6e éd. 2011), p. 530).

[81] Wastech soutient que les conclusions de l'arbitre concernant la nature des répercussions qu'a eues sur elle l'exercice du pouvoir discrétionnaire de Metro équivalent à une conclusion [TRADUCTION] « [d']annulation » ou de « perte de sens ». Plus particulièrement, Wastech attire l'attention sur la conclusion de l'arbitre portant que l'exercice du pouvoir discrétionnaire de Metro a rendu « impossible » pour Wastech d'atteindre le RE cible, et sur celle portant que le fait d'avoir la possibilité d'atteindre le RE cible chaque année du contrat était [TRADUCTION] « l'avantage fondamental que Wastech avait négocié » (sentence arbitrale, par. 94). Metro répond que l'arbitre n'a pas tiré de conclusion [TRADUCTION] « [d']annulation substantielle » ou de « perte de sens » et que, de toute façon, il ne pouvait pas tirer une telle conclusion au vu des faits (m.i., par. 73 et 75; transcription, p. 93).

[82] Soit dit en tout respect, je suis d'avis qu'exiger « l'annulation substantielle » — c'est-à-dire, le fait pour une partie de vider de son sens une grande partie de l'avantage obtenu par l'autre partie dans le cadre du contrat — n'est pas la norme qui convient pour conclure à un manquement à l'obligation d'exercer son pouvoir discrétionnaire contractuel de bonne foi.

[83] Le fait que l'exercice par une partie de son pouvoir discrétionnaire fasse perdre à son partenaire contractuel une partie ou la totalité de son avantage prévu au contrat ne devrait pas être considéré comme un élément déterminant, en soi, permettant de répondre à la question de savoir si le pouvoir discrétionnaire a été exercé de bonne foi (Burton, p. 384-385). Comme l'expliquent les auteurs A. Swan, J. Adamski et A. Y. Na, le simple fait qu'une partie soit privée de la quasi-totalité de l'avantage d'un contrat ne suffit pas, s'il n'y a aucune preuve que la partie ayant exercé son pouvoir discrétionnaire

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infringement of the non-exercising party's rights, there is no actionable wrong for the law to correct.

[84] For these reasons, I conclude that the "substantial nullification" or "evisceration" of the benefit of a contract is not a necessary prerequisite to finding that a party breached the duty to exercise contractual discretionary powers in good faith. However, the fact that an exercise of discretion substantially nullifies or eviscerates the benefit of the contract could well be relevant to show that discretion had been exercised in a manner unconnected to the relevant contractual purposes.

[85] The parties also submit that the good faith duty at issue does not permit a party to exercise its discretion capriciously or arbitrarily. In support, Wastech and Metro both point to the organizing principle recognized in *Bhasin* — which states that parties generally must perform their contractual duties "honestly and reasonably and not capriciously or arbitrarily" (*Bhasin*, at para. 63) — and to a line of decided cases, which they say confirm the existence of such constraints on the exercise of contractual discretionary powers.

[86] I agree with the parties that the jurisprudence supports a conclusion that the good faith duty at issue does not permit a party to exercise its discretion capriciously or arbitrarily. In *Greenberg*, at p. 763, the Court of Appeal for Ontario noted that the discretionary provision in question had to be "exercised in a reasonable way, not arbitrarily or capriciously". Similarly, the Supreme Court of the United Kingdom affirmed the existence of these constraints in English law in *British Telecommunications plc v. Telefónica O2 UK Ltd.*, [2014] UKSC 42, [2014] 4 All E.R. 907, at para. 37: ". . . it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good

a commis une faute ou un manquement, pour étayer une allégation de violation de contrat (voir *Canadian Contract Law* (4e éd. 2018), §7.73). Autrement dit, s'il n'y a pas d'atteinte aux droits de la partie qui n'exerce pas un pouvoir discrétionnaire, il n'y a pas de faute donnant ouverture à un droit d'action que les règles de droit peuvent corriger.

[84] Pour ces motifs, je conclus que l'« annulation substantielle » ou la « perte de sens » de l'avantage d'un contrat n'est pas une condition préalable pour conclure qu'une partie a manqué à l'obligation d'exercer les pouvoirs discrétionnaires contractuels de bonne foi. Cependant, le fait que l'exercice d'un pouvoir discrétionnaire annule substantiellement l'avantage d'un contrat ou lui fait perdre son sens pourrait fort bien s'avérer utile pour démontrer que ce pouvoir discrétionnaire a été exercé d'une manière étrangère aux objectifs contractuels pertinents.

[85] Les parties font également valoir que l'obligation d'agir de bonne foi en cause ne permet pas à une partie d'exercer son pouvoir discrétionnaire de manière abusive ou arbitraire. Pour appuyer leurs arguments, Wastech et Metro attirent toutes les deux l'attention sur le principe directeur reconnu dans l'arrêt *Bhasin* — qui prévoit que les parties doivent généralement exécuter leurs obligations contractuelles « de manière honnête et raisonnable, et non de façon abusive ou arbitraire » (*Bhasin*, par. 63) — ainsi que sur un courant jurisprudentiel qui, selon elles, confirme l'existence de telles contraintes à l'égard de l'exercice des pouvoirs discrétionnaires contractuels.

[86] Je suis d'accord avec les parties pour dire que la jurisprudence étaye la conclusion selon laquelle l'obligation de bonne foi en cause ne permet pas à une partie d'exercer son pouvoir discrétionnaire de façon abusive ou arbitraire. Dans l'arrêt *Greenberg*, à la p. 763, la Cour d'appel de l'Ontario a souligné que le pouvoir discrétionnaire en question devait être [TRADUCTION] « exercé d'une façon raisonnable, et non de manière abusive ou arbitraire ». De même, dans l'arrêt *British Telecommunications plc c. Telefónica O2 UK Ltd.*, [2014] UKSC 42, [2014] 4 All. E.R. 907, la Cour suprême du Royaume-Uni a confirmé l'existence de ces contraintes dans le droit anglais, au par. 37 : [TRADUCTION] « . . . il est bien

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faith and not arbitrarily or capriciously . . . . This will normally mean that it must be exercised consistently with its contractual purpose”.

établi qu’en l’absence d’un libellé très clair à l’effet contraire, un pouvoir discrétionnaire doit être exercé de bonne foi et non de façon arbitraire ou abusive [. . .]. Cela veut habituellement dire qu’il doit être exercé en conformité avec l’objectif du contrat ».

[87] Although capriciousness and arbitrariness have sometimes been referred to independently of improper purpose, I agree with the Supreme Court in *Telefónica* that a capricious or arbitrary exercise of a discretionary power is an example of such a power being exercised contrary to that standard. When seeking to demonstrate that discretion was exercised capriciously or arbitrarily, one necessarily considers contractual purposes by showing that discretion was exercised in a manner unconnected to the underlying contractual purposes for which the power was conferred.

[87] Bien qu’il ait parfois été question de l’exercice abusif et arbitraire indépendamment de l’exercice en vue d’un objectif inapproprié, je souscris à la conclusion de la Cour suprême du Royaume-Uni dans l’arrêt *Telefónica* selon laquelle l’exercice abusif ou arbitraire d’un pouvoir discrétionnaire est un exemple d’exercice d’un tel pouvoir contraire à cette norme. Lorsqu’on cherche à prouver que le pouvoir discrétionnaire a été exercé de manière abusive ou arbitraire, on examine nécessairement les objectifs contractuels pour évaluer la conduite en démontrant que le pouvoir discrétionnaire a été exercé d’une façon étrangère aux objectifs contractuels sous-jacents pour lesquelles le pouvoir a été conféré.

[88] In sum, then, the duty to exercise discretion in good faith will be breached where the exercise of discretion is unreasonable, in the sense that it is unconnected to the purposes for which the discretion was granted. This will notably be the case where the exercise of discretion is capricious or arbitrary in light of those purposes because that exercise has fallen outside the range of behaviour contemplated by the parties. The fact that the exercise substantially nullifies or eviscerates the fundamental contractual benefit may be relevant but is not a necessary prerequisite to establishing a breach.

[88] En résumé, donc, il y a manquement à l’obligation d’exercer le pouvoir discrétionnaire de bonne foi lorsque l’exercice de ce pouvoir est déraisonnable, en ce sens qu’il est étranger aux objectifs pour lesquels le pouvoir discrétionnaire a été conféré. Ce sera notamment le cas lorsque l’exercice du pouvoir discrétionnaire est abusif ou arbitraire compte tenu de ces objectifs, parce que cet exercice n’appartient pas à la gamme des comportements envisagés par les parties. Le fait que l’exercice annule substantiellement l’avantage fondamental du contrat ou lui fasse perdre son sens peut s’avérer pertinent, mais ce n’est pas une condition préalable nécessaire pour établir qu’il y a eu manquement.

(b) *Source of the Duty*

b) *Source de l’obligation*

[89] Having determined the content of the duty, I turn now to consider its source so as to ascertain whether it arises on the facts of this case.

[89] Ayant établi la teneur de l’obligation, j’examinerai maintenant sa source pour établir si l’obligation existe au vu des faits de l’espèce.

[90] I acknowledge that there is some debate as to the source of this duty. The arbitrator held that the requirements of the officious bystander test for implying a term in fact did not need to be met in order for the good faith duty at issue to apply. Similarly, Wastech submits that the good faith duty at issue

[90] Je reconnais qu’il existe un certain débat quant à la source de cette obligation. L’arbitre a conclu qu’il n’était pas nécessaire que les exigences du critère de l’observateur objectif permettant de conclure à l’existence d’une condition implicite soient satisfaites pour que l’obligation d’agir de bonne foi en

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"operates as a matter of law" and is not limited to circumstances where a term can be implied as a matter of fact (A.F., at para. 74). For its part, Metro concedes that the failure to imply a term does not necessarily preclude, as a matter of law, the imposition of a good faith duty. Cromwell J. observed in *Bhasin* that there is "a shadow of uncertainty over a good deal of the jurisprudence" regarding the source of many good faith obligations (para. 74; see also paras. 48 and 52). While Cromwell J. expressly addressed this uncertainty for the duty of honest performance, clarifying that it operates as a general doctrine of contract law, he did not resolve this uncertainty for all existing manifestations of the organizing principle (para. 74). It therefore falls to this Court to do so in respect of the duty to exercise contractual discretionary powers in good faith and in light of Wastech's argument that good faith constrains the exercise of Metro's power here.

[91] In my view, it is appropriate to recognize the duty to exercise discretion in good faith as a general doctrine of contract law. Like the duty of honest performance, it need not find its source in an implied term in the contract, but rather it operates in every contract irrespective of the intentions of the parties (see *Bhasin*, at para. 74). This brings conceptual clarity to the law of good faith by analyzing the duty to exercise discretion in good faith in line with the *Bhasin* duty.

[92] Further, recognizing this general duty interferes very little with freedom of contract for two reasons. First, just as parties will rarely expect that their contract permits dishonest performance (*Bhasin*, at para. 76), contracting parties rarely if ever expect discretion granted by the contract to be exercised in a manner unconnected to the purposes for which it was conferred. For example, on the facts of this case, a duty on Metro to exercise its discretion in good faith was necessary to give business efficacy

cause s'applique. De même, Wastech soutient que l'obligation de bonne foi en cause [TRADUCTION] « existe en droit » et ne se limite pas aux circonstances où une condition peut être implicite sur le plan des faits (m.a., par. 74). Pour sa part, Metro concède que le fait qu'il n'y ait pas de condition implicite n'empêche pas nécessairement, sur le plan du droit, l'imposition d'une obligation d'agir de bonne foi. Le juge Cromwell a noté dans l'arrêt *Bhasin* qu'un « débat [. . .] laisse planer l'incertitude sur une bonne partie de la jurisprudence » concernant la source de nombreuses obligations de bonne foi (par. 74; voir aussi par. 48 et 52). Bien que le juge Cromwell ait expressément abordé cette incertitude pour l'obligation d'exécution honnête, précisant qu'elle constitue une doctrine générale du droit des contrats, il ne l'a pas réglée pour toutes les manifestations existantes du principe directeur (par. 74). Il revient donc à la Cour de le faire pour l'obligation d'exercer les pouvoirs discrétionnaires contractuels de bonne foi, à la lumière de l'argument avancé par Wastech selon lequel la bonne foi restreint l'exercice du pouvoir de Metro en l'espèce.

[91] À mon avis, il y a lieu de reconnaître l'obligation d'exercer un pouvoir discrétionnaire de bonne foi en tant que principe général du droit des contrats. Cette obligation, tout comme celle d'exécution honnête, n'a pas à trouver sa source dans une condition implicite du contrat; elle se manifeste plutôt dans chaque contrat, sans égard aux intentions des parties (voir *Bhasin*, par. 74). Cela apporte une clarté conceptuelle aux règles de droit en matière de bonne foi en harmonisant l'analyse de l'obligation d'exercer le pouvoir discrétionnaire de bonne foi avec l'obligation énoncée dans l'arrêt *Bhasin*.

[92] En outre, la reconnaissance de cette obligation générale porte très peu atteinte à la liberté contractuelle pour deux raisons. D'abord, tout comme les parties s'attendront rarement à ce que leur contrat les autorise à exécuter leurs obligations de façon malhonnête (*Bhasin*, par. 76), elles ne s'attendent que rarement, voire jamais, à ce que le pouvoir discrétionnaire conféré par le contrat soit exercé d'une manière étrangère aux objectifs pour lesquels il a été conféré. Par exemple, au vu des faits de l'espèce, l'imposition

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to the Contract. As the arbitrator rightly observed, absent a duty of good faith constraining the exercise of Metro's discretion, "Metro theoretically ha[d] the discretion to reduce the volume of waste directed to the [Cache Creek Landfill] to zero" (A.F., para. 94). It is absurd to think the parties intended for Metro to have such untrammelled power given that it would have left Wastech subject to Metro's "uninhibited whim" (The *"Product Star"*, at p. 404, per Leggatt L.J.). Indeed, it is difficult to imagine any party wishing to confer such untrammelled power on its contracting partner. For this reason, when contracting parties confer a discretionary power, even without any apparent constraining criteria or conditions, courts have long recognized that the "natural inference" is that they intend some minimum constraints on the exercise of the discretion (Sales, at p. 387; see also Swan, Adamski and Na, at §8.304; *Bhasin*, at para. 45). In my view, those minimum constraints include the expectation that the parties will not exercise their discretion in a manner unconnected to the purposes for which it was granted, for example in a capricious or arbitrary manner. Given that parties will very often expect minimum constraints of this nature, recognizing that these constraints apply to all contracts by virtue of the duty to exercise discretionary power in good faith interferes little with their freedom of contract.

[93] Second, as discussed above, the content of the duty is guided by the will of the parties as expressed in their contract. Rather than interfering with the objectives of the contracting parties or imposing duties on them beyond their reasonable contemplation, this duty merely requires that parties operate within the scope of discretion defined by their own purposes for which they freely negotiated its grant. Holding the parties to this standard will generally be consistent with, not an unanticipated departure from, their freely negotiated bargain. Recognizing

d'une obligation à Metro d'exercer son pouvoir discrétionnaire de bonne foi était nécessaire pour donner une efficacité commerciale au contrat. Comme l'a observé l'arbitre à juste titre, en l'absence d'une obligation d'agir de bonne foi limitant l'exercice du pouvoir discrétionnaire de Metro, [TRADUCTION] « celle-ci [pouvait] théoriquement, en vertu de son pouvoir discrétionnaire, réduire à zéro le volume de déchets envoyés au [site d'enfouissement de Cache Creek] » (m.a., par. 94). Il est absurde de penser que les parties voulaient que Metro détienne un tel pouvoir sans entraves étant donné que cela aurait soumis Wastech aux [TRADUCTION] « caprices désinhibés » de Metro (*The « Product Star »*, p. 404, le lord juge Leggatt). En effet, il est difficile d'imaginer qu'une partie veuille conférer à son partenaire contractuel un pouvoir aussi absolu. Pour cette raison, lorsque des parties contractantes confèrent un pouvoir discrétionnaire, même s'il n'y a pas de condition ou de critère limitatif apparent, les tribunaux reconnaissent depuis longtemps une [TRADUCTION] « inférence naturelle » selon laquelle les parties entendent que des contraintes minimales limitent l'exercice du pouvoir discrétionnaire (Sales, p. 387; voir aussi Swan, Adamski et Na, §8.304; *Bhasin*, par. 45). À mon avis, ces contraintes minimales comprennent l'attente que les parties n'exercent pas leur pouvoir discrétionnaire d'une manière étrangère aux objectifs pour lesquels il a été conféré, par exemple d'une manière abusive ou arbitraire. Comme les parties s'attendent très souvent à ce qu'il y ait des contraintes minimales de cette nature, reconnaître que celles-ci s'appliquent à tous les contrats en raison de l'obligation d'exercer le pouvoir discrétionnaire de bonne foi porte très peu atteinte à leur liberté contractuelle.

[93] Deuxièmement, comme nous l'avons vu, la teneur de l'obligation est fonction de la volonté des parties telle qu'elle est exprimée dans leur contrat. Au lieu de nuire aux objectifs des parties contractantes ou de leur imposer des obligations qu'elles ne peuvent raisonnablement envisager, cette obligation ne fait qu'exiger des parties qu'elles respectent les limites du pouvoir discrétionnaire défini par leurs propres objectifs pour lesquels elles en ont librement négocié l'octroi. Le fait d'assujettir les parties à cette norme s'accordera généralement avec le marché qu'elles ont

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a general duty of contract law here will therefore interfere very little with that freedom.

[94] Overall, then, like the duty of honest performance, the duty to exercise contractual discretion in good faith is not an implied term, but a general doctrine of contract law that operates irrespective of the intentions of the parties (*Bhasin*, at para. 74). This places the two duties on the same footing, and conforms to the general assumption that parties do not intend discretion to be completely unconstrained (see *Bhasin*, at para. 45). Just like the duty of honest performance, the duty to exercise contractual discretion in good faith, as described herein, should be understood to be obligatory in all contracts. Parties who provide for discretionary power cannot contract out of the implied undertaking that the power will be exercised in good faith, i.e., in light of the purposes for which it was conferred. This holding will impinge on freedom of contract but only in those rare cases in which parties seek to authorize the exercise of contractual discretion in a manner unconnected with its underlying purposes or otherwise immunize such conduct from judicial review.

[95] Accordingly, there is no question that the duty to exercise contractual discretionary powers in good faith applies in this case. The entire agreement clause in this Contract (s. 32.17) does not exclude the duty, although, in any particular case, the contract as a whole will guide the analysis of what the duty requires. This also means the fact that the arbitrator rejected the existence of an implied term did not preclude recognizing and applying the duty to exercise contractual discretion in good faith.

(c) *Application to Metro's Exercise of Discretion*

[96] Was Metro's exercise of discretion unreasonable with regard to the purposes for which the

librement négocié, au lieu de s'en écarter de manière imprévue. Par conséquent, la reconnaissance d'une obligation générale en droit des contrats dans la présente affaire portera très peu atteinte à cette liberté.

[94] Dans l'ensemble, donc, comme l'obligation d'exécution honnête, l'obligation d'exercer le pouvoir discrétionnaire contractuel de bonne foi n'est pas une condition implicite, mais une doctrine d'application générale du droit des contrats qui trouve application sans égard aux intentions des parties (*Bhasin*, par. 74). Cela place les deux obligations sur le même pied, et est conforme à la présomption générale que les parties n'ont pas l'intention qu'un pouvoir discrétionnaire soit complètement absolu (voir *Bhasin*, par. 45). Tout comme l'obligation d'exécution honnête, l'obligation d'exercer le pouvoir discrétionnaire contractuel de bonne foi, tel qu'il est décrit dans les présents motifs, devrait être considérée comme obligatoire dans tous les contrats. Les parties qui prévoient un pouvoir discrétionnaire ne peuvent se soustraire à l'engagement implicite voulant que le pouvoir soit exercé de bonne foi, c'est-à-dire en fonction des objectifs pour lesquels il a été conféré. Cette conclusion n'empiètera sur la liberté contractuelle que dans les rares cas où les parties cherchent à autoriser l'exercice d'un pouvoir discrétionnaire contractuel d'une manière étrangère à ses objectifs sous-jacents, ou à mettre autrement une pareille conduite à l'abri du contrôle judiciaire.

[95] En conséquence, il ne fait aucun doute que l'obligation d'exercer des pouvoirs discrétionnaires contractuels de bonne foi s'applique en l'espèce. La clause d'intégralité de l'entente (art. 32.17) n'écarte pas l'obligation, quoique, dans un cas donné, le contrat dans son ensemble guide l'analyse de ce qu'exige l'obligation. Cela veut également dire que le rejet, par l'arbitre, de l'existence d'une clause implicite n'empêchait pas de reconnaître et d'appliquer l'obligation d'exercer le pouvoir discrétionnaire contractuel de bonne foi.

c) *Application à l'exercice du pouvoir discrétionnaire de Métro*

[96] L'exercice par Metro de son pouvoir discrétionnaire était-il déraisonnable eu égard aux objectifs

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discretion was granted and thereby a breach of the duty? In my view, it was not.

[97] I recall that the Contract gives Metro the "absolute discretion" to determine the minimum amount of waste that will be transported to the Cache Creek Landfill as opposed to the other waste disposal sites in a given period. Unlike some previous agreements between the parties, there is no guaranteed minimum volume of waste allocated to this site in a given year (Award, at para. 84). This minimum amount ("Trailer Capacity Guarantee") is to be determined in reference to the seasonal variation of waste flows and "other factors which influence the volume of [w]aste being delivered to the Cache Creek Landfill during a calendar year" (A.R., vol. II, at p. 68, s. 30.5). Beyond this general statement, there is no guidance as to the purposes underlying the grant of discretion to Metro to determine this amount.

[98] However, reading the clauses in the context of the Contract as a whole, the purposes become clearer. The recitals at the beginning of the Contract describe the parties' intention to, among other things, incentivize each other to "maximize efficiency and minimize costs", to provide for the "maximization of the municipal solid waste disposal capacity of the Cache Creek Landfill", and to be "sensitive to significant changes in operating standards, services or system configuration" (A.R., vol. II, at p. 9, recitals C(2) and (6) to (7)). This is consistent with the text of the overall Contract, which provides flexibility to account for variable factors foreseen by the parties such as waste volumes, operating costs and the capacity of the waste disposal sites (Award, at para. 43). As discussed above, the Contract adjusts for the impacts these factors will have on Wastech's profitability, not only by adjusting the rates payable by Metro, but also by requiring it to share in the consequences of failing to meet the target level of profitability (ss. 14.11 and 14.19). It was through

pour lesquels le pouvoir discrétionnaire a été conféré et constituait-il par le fait même un manquement à l'obligation? À mon avis, la réponse est non.

[97] Rappelons que le contrat confère à Metro le [TRADUCTION] « pouvoir discrétionnaire absolu » pour établir la quantité minimale de déchets qui seront transportés au site d'enfouissement de Cache Creek, et non aux autres sites d'élimination des déchets, au cours d'une période donnée. Contrairement à ce que prévoyaient certains accords antérieurs entre les parties, il n'y a aucun volume minimal garanti de déchets destinés à ce site au cours d'une année donnée (sentence arbitrale, par. 84). Cette quantité minimale (« capacité de remorquage garantie ») doit être fixée en fonction de la variation saisonnière du flux de déchets et [TRADUCTION] « d'autres facteurs qui influent sur le volume de déchets transportés au site d'enfouissement de Cache Creek durant une année civile » (m.a., vol. II, p. 68, art. 30.5). Mis à part cette affirmation générale, il n'y a aucune indication quant aux objectifs qui sous-tendent l'octroi à Metro du pouvoir discrétionnaire pour fixer cette quantité.

[98] Cependant, lorsqu'on lit les clauses en tenant compte du contrat dans son ensemble, les objectifs deviennent plus clairs. Les attendus au début du contrat décrivent l'intention des parties de, notamment, s'inciter l'une et l'autre à [TRADUCTION] « maximiser l'efficacité et à réduire les coûts au minimum », à permettre « l'exploitation optimale de la capacité municipale d'élimination des déchets solides du site d'enfouissement de Cache Creek », et à être « attentives aux changements importants apportés aux normes d'exploitation, aux services ou à la configuration du système » (d.a., vol. II, p. 9, attendus C(2) et (6) à (7)). Ces attendus concordent avec le texte de l'ensemble du contrat, qui se veut souple pour tenir compte des divers facteurs prévus par les parties, comme les volumes de déchets, les frais d'exploitation et la capacité des sites d'élimination des déchets (sentence arbitrale, par. 43). Comme nous l'avons vu, le contrat s'adapte aux répercussions qu'auront ces facteurs sur la rentabilité de Wastech, non seulement en ajustant les

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this structure that the parties decided to manage the risk and rewards of the operation.

taux payables par Metro, mais aussi en l'obligeant à assumer sa part des conséquences de l'omission d'atteindre le degré cible de rentabilité (art. 14.11 et 14.19). C'est par le truchement de cette structure que les parties ont décidé de gérer le risque et les bénéfices de l'opération.

[99] In this context, the purposes of giving Metro discretion to determine waste allocation in its "absolute discretion" were clearly to allow it the flexibility necessary to maximize efficiency and minimize costs of the operation. Granting such discretion, as opposed to fixing certain waste volumes, serves the overall objective of allowing the parties to adapt to changing circumstances over the life of the Contract so as to ensure this operational efficiency. Further, the fact that this discretion exists alongside a detailed framework to adjust payments towards the goal of a negotiated level of profitability, contradicts the idea that the parties intended this discretion be exercised so as to provide Wastech with a certain level of profit. Those incentives are already carefully created elsewhere in the Contract. Reading these clauses in context, then, the purposes for granting Metro "absolute discretion" was to allow it to structure the disposal of waste for which it had contracted Wastech in an efficient and cost-effective manner given the operational variability the parties foresaw.

[99] Dans ce contexte, les objectifs pour lesquels Metro s'est vu conférer le « pouvoir discrétionnaire absolu » relatif à la répartition des déchets étaient clairement de lui donner la souplesse nécessaire pour maximiser l'efficacité et réduire au minimum les frais de l'opération. L'octroi d'un tel pouvoir, par opposition à l'établissement de certains volumes de déchets, favorise la réalisation de l'objectif général de permettre aux parties de s'adapter à l'évolution de la situation pendant la durée du contrat, de sorte que cette efficacité opérationnelle soit assurée. De plus, la coexistence de ce pouvoir discrétionnaire avec un cadre détaillé servant à ajuster les paiements en vue de l'atteinte d'un niveau négocié de rentabilité contredit l'idée que les parties entendaient que ce pouvoir discrétionnaire soit exercé de manière à ce que Wastech bénéficie d'une certaine rentabilité. Ces incitatifs détaillés existent déjà ailleurs dans le contrat. Ainsi, lorsqu'on lit les clauses susmentionnées dans leur contexte, les objectifs pour lesquels Metro s'est vu conférer un « pouvoir discrétionnaire absolu » étaient de lui permettre d'organiser l'élimination des déchets, pour laquelle elle avait conclu un contrat avec Wastech, de manière efficiente et rentable compte tenu de la variabilité opérationnelle que prévoyaient les parties.

[100] Based on these purposes, Metro did not act unreasonably. Metro's exercise of discretion was "guided by the objectives of maximizing the [Burnaby Waste to Energy Facility's] efficiency, preserving remaining site capacity at the [Cache Creek Landfill], and operating the system in the most cost-effective manner" and "was made in furtherance of its own business objectives" (Award, at paras. 87-88). All this points to an exercise of discretion that cannot be said to be unconnected to the contractual purposes for which it was granted.

[100] À la lumière de ces objectifs, Metro n'a pas agi de façon déraisonnable. L'exercice par Metro de son pouvoir discrétionnaire était [TRADUCTION] « guidé par les objectifs d'optimisation de l'efficacité [de l'installation de valorisation énergétique de Burnaby], de préservation de la capacité restante du site [d'enfouissement de Cache Creek] et d'exploitation du système de la manière la plus rentable possible », et Metro avait pris sa décision « en vue d'atteindre ses propres objectifs opérationnels » (sentence arbitrale, par. 87-88). Tout cela dénote un pouvoir discrétionnaire qui ne peut être considéré comme étranger aux objectifs contractuels pour lesquels il a été conféré.

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[101] Importantly, the duty did not require Metro to subordinate its interests to those of Wastech in exercising its discretionary power in the manner that Wastech claims. The Contract purposely included no guarantee that the Target OR would be achieved. The parties were aware of the risk that the exercise of discretion represented and chose, notwithstanding long negotiations and a detailed agreement, not to constrain the discretion in the way Wastech now requests. In point of fact, Wastech is asking for an advantage for which it did not bargain. It asks, in effect, that Metro confer a benefit upon it that was not contemplated, expressly or impliedly, under the Contract. On my understanding, this stands outside of the "requirement of justice" identified by Cromwell J. in *Bhasin* (para. 64).

[102] Although, during the hearing of this appeal, Wastech repeatedly emphasized the arbitrator's conclusion that the Contract was a long-term, relational agreement dependent upon an element of trust and cooperation between Wastech and Metro, this is not dispositive of the case in favour of Wastech. Despite the arbitrator's conclusion, which I do not purport to disturb, the detailed nature of the Contract plainly demonstrates that the parties carefully structured their relationship, and precisely allocated the risks of their bargain between them by means of, among other things, the various adjustment mechanisms set out in the Contract. Assessing whether Metro exercised its discretion in good faith cannot ignore this context. This is not an example of an unforeseen or unregulated matter that, by reason of the relational character of the Contract, was left to the trust and cooperation said to be inherent in the long-term arrangement. The parties foresaw this risk — and chose to leave the discretion in place.

[103] It seems to me that the only questionable conduct raised here is that Metro's exercise of discretion made it "impossible" for Wastech to achieve the Target OR in 2011. To be sure, given the spirit of trust and cooperation underlying the Contract — which, again, the arbitrator, in his review of the facts, described as being long-term and relational — the

[101] Fait à noter, l'obligation n'obligeait pas Metro à subordonner ses intérêts à ceux de Wastech dans l'exercice de son pouvoir discrétionnaire, de la façon invoquée par cette dernière. Le contrat n'incluait à dessein aucune garantie que le RE cible serait atteint. Les parties étaient conscientes du risque que représentait l'exercice du pouvoir discrétionnaire et ont choisi, malgré de longues négociations et un accord détaillé, de ne pas limiter ce pouvoir discrétionnaire de la façon dont le demande maintenant Wastech. En fait, cette dernière cherche à obtenir un avantage qu'elle n'a pas négocié. Elle demande dans les faits que Metro lui confère un avantage qui n'a pas été envisagé, expressément ou implicitement, dans le contrat. Selon ce que je comprends, cela ne relève pas de l'« exigence de justice » énoncée par le juge Cromwell dans l'arrêt *Bhasin* (par. 64).

[102] Bien que, lors de l'instruction du présent pourvoi, Wastech ait souligné à maintes reprises la conclusion de l'arbitre selon laquelle le contrat constituait un accord relationnel à long terme tributaire d'un élément de confiance et de collaboration entre Wastech et Metro, cela ne permet pas de trancher l'affaire en faveur de Wastech. Malgré la conclusion de l'arbitre, que je n'ai pas l'intention de modifier, la nature détaillée du contrat montre clairement que les parties ont soigneusement structuré leur relation et précisément réparti entre elles les risques de leur marché, notamment au moyen des divers mécanismes de rajustement prévus au contrat. On ne peut mettre ce contexte de côté lorsqu'on évalue si Metro a exercé son pouvoir discrétionnaire de bonne foi. Il ne s'agit pas d'un exemple d'une situation imprévue ou non réglementée qui, en raison de la nature relationnelle du contrat, devait se régler grâce à la confiance et à la collaboration considérées comme inhérentes à l'accord à long terme. Les parties avaient prévu ce risque — et ont choisi de conserver le pouvoir discrétionnaire.

[103] Il me semble que la seule conduite douteuse évoquée en l'espèce soit celle de l'exercice du pouvoir discrétionnaire par Metro qui a rendu « impossible » pour Wastech d'atteindre le RE cible en 2011. Certes, étant donné l'esprit de confiance et de collaboration qui sous-tend le contrat — que l'arbitre, dans son examen des faits, a encore une

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legitimate contractual interests of these parties were different than parties to, say, a more transactional agreement (see *Bhasin*, at para. 69). The fact remains that the Contract did not guarantee that Wastech would achieve the Target OR in any given year. Indeed, the various, complex adjustment mechanisms provided in the Contract itself, which only apply where the Actual OR for a given year deviates from the Target OR, plainly demonstrate that the parties anticipated that the Target OR would not be achieved in some years (Award, at para. 84). Accordingly, the mere fact that Wastech did not have the opportunity to achieve the Target OR in one year of the 20-year Contract is not altogether surprising, notwithstanding the arbitrator's conclusion that the Contract was a long-term, relational agreement. Rather, it seems to me that the impact of Metro's exercise of discretion on Wastech simply reflects the allocation of risk set out in the Contract, for which Wastech negotiated and to which it agreed. Indeed, recital C(3) specifically notes that the Contract provided for the sharing of "risks and benefits". It is true that the eventuality at the origin of this dispute was thought by both parties to be unlikely. But together they saw the risk and, together, they turned away from it, leaving the discretion in place. In this sense, Metro cannot be said to have exercised its discretion in a manner demonstrably unconnected with the relevant purposes. Wastech itself may have expected that opportunity every year, but given the terms of the bargain to which it agreed, that expectation was not shared.

[104] The text of the discretionary clause in the case at bar did not spell out, in explicit terms, why the Contract provides Metro with "absolute discretion" to allocate waste from one year to the next. But when read in the context of the Contract as a whole, with an eye to what Lord Sales calls the parties' "loyalty to th[e] venture", the purpose that constrained Metro's exercise of discretion becomes plain.

fois décrit comme un contrat de nature relationnelle à long terme —, les intérêts contractuels légitimes de ces parties étaient différents de ceux des parties à un accord de nature plus transactionnelle par exemple (voir l'arrêt *Bhasin*, par. 69). Il demeure que le contrat ne garantissait pas que Wastech atteindrait le RE cible chaque année. Effectivement, les divers mécanismes de rajustement complexes prévus dans le contrat lui-même, qui ne s'appliquent que lorsque le RE réel pour une année donnée est différent du RE cible, démontrent clairement que les parties avaient prévu que le RE cible ne serait pas atteint certaines années (sentence arbitrale, par. 84). En conséquence, le simple fait que Wastech n'ait pas eu l'occasion d'atteindre le RE cible durant l'une des 20 années du contrat n'est pas vraiment surprenant, malgré la conclusion de l'arbitre selon laquelle le contrat était un accord de nature relationnelle à long terme. Il me semble plutôt que l'incidence sur Wastech de l'exercice du pouvoir discrétionnaire de Metro reflète simplement la répartition du risque établie dans le contrat, que Wastech a négociée et acceptée. De fait, l'attendu C(3) mentionne expressément que le contrat prévoyait le partage des [TRADUCTION] « risques et avantages ». Il est vrai que la situation à l'origine du litige était considérée comme improbable par les parties. Cependant, elles ont toutes les deux perçu le risque et, ensemble, elles l'ont écarté, laissant le pouvoir discrétionnaire en place. En ce sens, on ne peut pas dire que Metro a exercé son pouvoir discrétionnaire d'une manière manifestement étrangère aux objectifs applicables. Wastech aurait pu s'attendre à bénéficier de cette possibilité chaque année, mais vu les conditions du marché qu'elle a accepté, cette attente n'était pas partagée.

[104] Le texte de la clause discrétionnaire dans le cas qui nous occupe n'indiquait pas expressément pourquoi le contrat conférait à Metro un « pouvoir discrétionnaire absolu » relativement à la répartition des déchets d'une année à l'autre. Toutefois, à la lumière du contexte du contrat dans son ensemble, et en tenant compte de ce que le lord Sales appelle la [TRADUCTION] « loyauté [des parties] envers l'entreprise », l'objectif qui restreint l'exercice du pouvoir discrétionnaire de Metro devient évident.

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[105] Reading the Contract as a whole, one understands that there was no guarantee that Wastech would achieve the Target OR in any given year. The risk that revenues could vary from one year to the next was in the contemplation of the parties, and this variance could well be based on factors such as the exercise of Metro's discretion to reallocate waste. This risk was addressed in the Contract, notably through the adjustment clauses. The risk that the exercise of discretion would affect profitability of either party in a given year was thus a considered one and, that risk notwithstanding, the discretionary power was left in place. In these circumstances, the purpose of the clause was plainly to give Metro the leeway, based on its judgment as to what was best for itself, to adjust the proportions of the allocations of waste amongst the three sites as it required to ensure the efficiency of the operation. The ability to make that allocation was not only permitted, but it could be said to reflect the purpose of the clause.

[105] Si on lit le contrat dans son ensemble, on comprend qu'il n'y avait aucune garantie que Wastech atteigne le RE cible lors d'une année donnée. Le risque que les revenus varient d'une année à l'autre avait été envisagé par les parties, et cette variation pourrait bien être fondée sur des facteurs comme l'exercice par Metro de son pouvoir discrétionnaire relatif à la répartition des déchets. Le contrat abordait ce risque, notamment au moyen des dispositions de rajustement. Le risque que l'exercice du pouvoir discrétionnaire affecte le profit réalisé par l'une ou l'autre des parties au cours d'une année donnée a donc été pris en compte et, malgré tout, le pouvoir discrétionnaire a été conservé. Dans ces circonstances, l'objectif de la disposition était simplement de donner à Metro la latitude, en fonction de son jugement de ce qui est le mieux pour elle, pour rajuster les proportions de la répartition des déchets parmi les trois sites de la façon nécessaire pour assurer l'efficacité de l'opération. La capacité de faire une telle répartition était non seulement permise, mais on peut aussi dire qu'elle reflétait l'objectif de la disposition.

[106] While Metro's choice, from the point of view of its contracting partner, Wastech, was disadvantageous, that choice was within the range permitted by the purpose of the clause. In that sense it was in good faith even if the exercise meant that Wastech's own interest suffered as a consequence. Because the exercise of discretion was within the range of conduct contemplated by the purpose of the clause, it cannot be said, according to the standards of contractual justice, to be in bad faith or unfair.

[106] Bien que le choix de Metro, du point de vue de son partenaire contractuel, Wastech, fût désavantageux, il faisait partie de l'éventail permis par l'objectif de la disposition, en ce sens qu'il avait été fait de bonne foi, même si l'exercice avait pour effet de porter préjudice à l'intérêt de Wastech. Puisque l'exercice du pouvoir discrétionnaire faisait partie de l'éventail des conduites pouvant être envisagées en fonction de l'objectif de la disposition, on ne peut dire, selon les normes de la justice contractuelle, qu'il a été fait de mauvaise foi ou qu'il était injuste.

[107] By asking for what amounts to a guarantee of the Target OR in every year of the Contract, Wastech is asking for an outcome that stands outside of the Contract. It complains that the outcome is unfair because, in the result, it would not be in a position to earn the revenue to which it felt entitled. In point of fact, Wastech is asking for Metro's discretion to be constrained so that it can achieve a result — an advantage — for which it did not bargain and, in fact, that it might have been said to have bargained away. It asks the Court to have Metro subvert its own interest in name of accommodating Wastech's

[107] En demandant ce qui équivaut à une garantie du RE cible chaque année du contrat, Wastech cherche à obtenir une issue qui n'est pas visée par le contrat. Elle se plaint que l'issue est injuste parce que, en définitive, elle ne serait pas en mesure de gagner le revenu auquel elle estimait avoir droit. Dans les faits, Wastech demande que le pouvoir discrétionnaire de Metro soit restreint de sorte qu'elle puisse obtenir un résultat — un avantage — qu'elle n'a pas négocié et, en fait, auquel elle aurait renoncé. Elle demande à la Cour de faire en sorte que Metro compromette son propre intérêt afin d'accommoder

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interest. But Metro is Wastech's contracting partner, not its fiduciary. The loyalty required of it in the exercise of this discretion was loyalty to the bargain, not loyalty to Wastech. Wastech cannot rely on an understanding of good faith that sits uncomfortably with the foundation of contractual justice.

(d) *Quebec Civil Law Would Not Assist Wastech*

[108] Lastly, I allow myself to observe that Metro argues, after noting Cromwell J.'s allusions to the abuse of rights in civil law in *Bhasin*, that Wastech's position would not be treated more favourably under Quebec law. It is true, as is acknowledged in *Bhasin*, at para. 83, that art. 7 of the *Civil Code of Québec* ("*C.C.Q.*") provides in part that good faith requires parties to refrain from exercising their rights, including contractual rights, in an unreasonable manner.[1] Indeed, even prior to the enactment of this rule, this Court held in *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, that the doctrine of abuse of rights requires that contractual rights be exercised reasonably in the Quebec law of obligations (pp. 154-55). In *Houle*, this Court characterized the defendant bank's conduct as "sudden, impulsive, and harmful", and that it constituted, for the Court, "a flagrant abuse of the bank's contractual right" (p. 176). I recall that in *Callow* this Court drew on the Quebec abuse of rights framework to clarify that the direct link to contractual performance required to make out a breach of the duty of honest performance was met where an obligation was performed, or a right exercised, dishonestly and therefore in bad faith. In this case, there is no reason to draw on this framework, as the bad faith exercise of the contractual discretion is an uncontroversial definitional feature of this duty. Instead it is the *content* of the duty that is at issue here. There is, of course, no question of applying Quebec law to this dispute but, says Metro, even by analogy or comparison, the standard of reasonable

[1] Article 7 *C.C.Q.*: "No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner, and therefore contrary to the requirements of good faith". Cromwell J. also referred expressly to art. 6 and 1375 *C.C.Q.* (*Bhasin*, at para. 83).

l'intérêt de Wastech; mais Metro est le partenaire contractuel de Wastech, non pas son fiduciaire. La loyauté exigée de sa part dans le cadre de l'exercice de ce pouvoir discrétionnaire était la loyauté envers le marché, et non envers Wastech. Celle-ci ne peut se fonder sur une compréhension de la bonne foi qui s'accorde mal avec le fondement de la justice contractuelle.

d) *Le droit civil du Québec ne serait d'aucun secours à Wastech*

[108] Enfin, je me permets d'observer que Metro soutient, après avoir souligné les allusions à l'abus de droit en droit civil qu'a faites le juge Cromwell dans l'arrêt *Bhasin*, que la position de Wastech ne serait pas traitée plus favorablement en vertu du droit québécois. Il est vrai, tel qu'il est reconnu dans l'arrêt *Bhasin* au par. 83, que l'art. 7 du *Code civil du Québec* (« *C.c.Q.* ») prévoit notamment que la bonne foi oblige les parties à s'abstenir d'exercer leurs droits, y compris leurs droits contractuels, d'une manière déraisonnable[1]. D'ailleurs, même avant l'adoption de cette règle, la Cour a conclu dans l'arrêt *Houle c. Banque Canadienne Nationale*, [1990] 3 R.C.S. 122, que la théorie de l'abus des droits exige que les droits contractuels soient exercés de manière raisonnable en droit québécois des obligations (p. 154-155). Dans l'arrêt *Houle*, la Cour a qualifié la conduite de la banque défenderesse de « soudaine, impulsive et dommageable » et a affirmé qu'elle constituait, d'après la Cour, un « abus flagrant du droit contractuel de la banque » (p. 176). Je rappelle que dans l'arrêt *Callow*, notre Cour s'est référée au cadre d'analyse québécois de l'abus de droit afin de préciser que le lien direct avec l'exécution contractuelle nécessaire pour établir un manquement à l'obligation d'exécution honnête est présent si une obligation a été exécutée, ou un droit exercé, de façon malhonnête et donc de mauvaise foi. En l'espèce, il n'y a aucune raison de se rapporter à ce cadre, car l'exercice de mauvaise foi du pouvoir discrétionnaire contractuel est une caractéristique

[1] Article 7 du *C.c.Q.* : « Aucun droit ne peut être exercé en vue de nuire à autrui ou d'une manière excessive et déraisonnable, allant ainsi à l'encontre des exigences de la bonne foi. » Le juge Cromwell a également mentionné expressément les art. 6 et 1375 du *C.c.Q.* (*Bhasin*, par. 83).

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conduct in the law of abuse of contractual rights in Quebec would not provide Wastech with the redress it seeks here.

définitionnelle non contestée de cette obligation. C'est plutôt la *teneur* de l'obligation qui est en cause dans la présente affaire. Bien sûr, il n'est pas question d'appliquer le droit québécois au présent litige, mais, selon Metro, même si l'on procédait par analogie ou comparaison, la norme de conduite raisonnable dans le domaine de l'abus de droits contractuels au Québec ne permettrait pas à Wastech d'obtenir le redressement qu'elle réclame en l'espèce.

[109] I agree with Metro that invoking the substantive content of what constitutes an abuse in the exercise of a discretionary contractual clause in Quebec law is of no help to Wastech in this case. In arguing that the denial of the opportunity to earn its target revenue reflects an unreasonable exercise of Metro's discretion to reallocate waste, Wastech does not allege that Metro acted imprudently or negligently, in an intemperate manner or with an intention to harm, factors often considered to be relevant to the measure of abuse of right in *Houle* and in the cases decided under art. 6, 7 and 1375 *C.C.Q.* (J.-L. Baudouin and P.-G. Jobin, *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, Nos. 156 and 157). Moreover, Quebec scholars and courts have pointed out that the standard as to what constitutes an abusive exercise of a discretionary right is an especially exacting one: typically it is said to repose on [TRANSLATION] "bad faith or a blatant fault causing abnormal injury" (J.-L. Baudouin, P. Deslauriers and B. Moore, *La responsabilité civile*, vol. 1, *Principes généraux* (8th ed. 2014), at para. 1-232, citing *Ponce v. Montrusco & Associés inc.*, 2008 QCCA 329, [2008] R.J.D.T. 65). None of this kind of conduct is alleged by Wastech in support of its claim based on the supposedly unreasonable exercise of the power in the Contract in this case. It is true that some authorities in Quebec support the view that a contractual right should not be exercised capriciously or arbitrarily (D. Lluelles and B. Moore, *Droit des obligations* (3rd ed. 2018), No. 1987). But, as we have seen, even allowing for these measures as relevant to what is the reasonable exercise of a discretionary power in the common law, Wastech has not staked its claim against Metro on this basis.

[109] Je conviens avec Metro qu'invoquer la teneur réelle de ce qui constitue un abus dans l'exercice d'un pouvoir discrétionnaire contractuel en droit québécois n'est d'aucun secours à Wastech en l'espèce. En soutenant que le fait d'être privé de la possibilité de toucher son revenu cible indique un exercice déraisonnable du pouvoir discrétionnaire de Metro relatif à la répartition des déchets, Wastech ne prétend pas que Metro a fait preuve d'imprudence ou de négligence, qu'elle s'est comportée de manière immodérée ou a agi dans l'intention de causer du tort, des facteurs souvent jugés pertinents pour évaluer l'abus de droit dans l'arrêt *Houle* et les décisions rendues en application des articles 6, 7 et 1375 *C.c.Q.* (J.-L. Baudouin et P.-G. Jobin, *Les obligations* (7e éd. 2013), P.-G. Jobin et N. Vézina, no 156 et 157). De plus, la doctrine et les tribunaux québécois ont souligné que la norme servant à établir ce qui constitue un exercice abusif d'un droit discrétionnaire est particulièrement exigeante : on affirme généralement qu'elle repose sur « la mauvaise foi ou sur une faute caractérisée engendrant un préjudice anormal » (J.-L. Baudouin, P. Deslauriers et B. Moore, *La responsabilité civile*, vol. 1, *Principes généraux* (8e éd. 2014), par. 1-232, citant *Ponce c. Montrusco & Associés inc.*, 2008 QCCA 329, [2008] R.J.D.T. 65). Wastech n'allègue aucune conduite de ce genre à l'appui de sa demande fondée sur l'exercice supposément déraisonnable du pouvoir conféré par le contrat en l'espèce. Certes, quelques sources québécoises appuient la thèse voulant qu'un droit contractuel ne doive pas être exercé de façon abusive ou arbitraire (D. Lluelles et B. Moore, *Droit des obligations* (3e éd. 2018), no 1987). Toutefois, comme nous l'avons vu, même si l'on admettait la pertinence de ces mesures pour déterminer en quoi consiste l'exercice raisonnable d'un pouvoir discrétionnaire en common law, la poursuite de Wastech contre Metro ne reposait pas sur ce fondement.

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[110] More importantly still, Wastech's argument that Metro's discretionary power should have been exercised in the spirit of cooperation — a principle that has been recognized on occasion in Quebec — would be of no assistance to Wastech here. Ultimately, Wastech asks, under the guise of good faith performance of Metro's discretionary power, that it be provided with a benefit not contemplated by the parties in the Contract. Whatever the extent to which a duty of cooperation with one's contracting party is required by the law of good faith in Quebec, it would stop short of requiring Metro, in the absence of any wrongful conduct, to confer a guarantee of profit that is not provided for in the Contract. In this sense, this Court has compared Quebec law to a similar notion sketched for the common law in *Bhasin* in the case of *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, at para. 128: "The duty to cooperate with the other contracting party does not mean that one's own interests must be sacrificed." Whatever cooperation is required of contracting parties by good faith, in ordinary commercial contracts or even in long-term relational agreements, the law does not require, as a general rule, the parties to act as the law would require of a fiduciary, or to redistribute advantages under the agreement in a manner that stands outside the ordinary purview of contractual justice (see, e.g., *Dunkin' Brands Canada Ltd. v. Bertico inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1, at para. 74, and *Gestion immobilière Bégin inc. v. 9156-6901 Québec inc.*, 2018 QCCA 1935, at para. 28 (CanLII)). Decidedly, an analogy to Quebec law does not assist Wastech in this case.

(3) Conclusion on Good Faith

[111] Where a party to a contract exercises its discretion unreasonably, which in this context means in a manner not connected to the underlying purposes of the discretion granted by the contract, its conduct amounts to a breach of the duty to exercise contractual discretionary powers in good faith — a wrongful exercise of the discretionary power — and thus a contractual breach that must be corrected. Requiring a party to pay damages to repair such a wrong accords with the theory of corrective justice

[110] Plus important encore, l'argument de Wastech selon lequel le pouvoir discrétionnaire de Metro aurait dû être exercé dans un esprit de coopération — un principe qui a été reconnu à l'occasion au Québec — ne serait d'aucun secours à Wastech en l'espèce. En définitive, Wastech demande, sous le couvert de l'exécution de bonne foi du pouvoir discrétionnaire de Metro, de recevoir un avantage que les parties n'avaient pas prévu au contrat. Peu importe la mesure dans laquelle une obligation de coopération avec l'autre partie contractante est requise par le droit relatif à l'obligation d'agir de bonne foi au Québec, cela ne reviendrait pas à exiger que Metro, en l'absence d'une conduite fautive, confère une garantie de profit qui n'est pas prévue au contrat. En ce sens, la Cour a comparé le droit québécois à une notion semblable esquissée pour la common law dans l'arrêt *Bhasin*, dans l'affaire de *Churchill Falls (Labrador) Corp. c. Hydro-Québec*, 2018 CSC 46, [2018] 3 R.C.S. 101, par. 128 : « Le devoir de collaborer avec son cocontractant n'exige pas de sacrifier ses intérêts propres. » Peu importe la collaboration des parties contractantes qu'exige la bonne foi, dans les contrats commerciaux ordinaires ou même dans les accords relationnels à long terme, le droit n'exige pas, en règle générale, que les parties agissent comme la loi l'exigerait d'un fiduciaire, ou qu'elle redistribue les avantages aux termes de l'accord d'une manière qui ne relève habituellement pas de la justice contractuelle (voir, p. ex., *Dunkin' Brands Canada Ltd. c. Bertico inc.*, 2015 QCCA 624, 41 B.L.R. (5th) 1, par. 74, et *Gestion immobilière Bégin inc. c. 9156-6901 Québec inc.*, 2018 QCCA 1935, par. 28 (CanLII)). Décidément, une analogie avec le droit québécois n'est pas utile à Wastech en l'espèce.

(3) Conclusion sur la bonne foi

[111] Lorsqu'une partie à un contrat exerce son pouvoir discrétionnaire de façon déraisonnable, ce qui signifie dans le présent contexte d'une manière étrangère aux objectifs qui sous-tendent le pouvoir discrétionnaire conféré par le contrat, sa conduite constitue un manquement à l'obligation d'exercer ses pouvoirs discrétionnaires de bonne foi — soit un exercice fautif du pouvoir discrétionnaire — et donc une violation contractuelle qui doit être corrigée. Obliger une partie à payer des dommages-intérêts

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and does not amount to a reallocation of the benefits under the contract as determined by the parties or a gift from one party to another.

pour réparer une telle faute est compatible avec la théorie de la justice corrective et ne constitue pas une réaffectation des avantages prévus au contrat comme l'ont établi les parties, ni un don de l'une des parties à l'autre.

[112] This same theory of corrective justice anchors the organizing principle of good faith and the specific duties derived therefrom as reflected in Cromwell J.'s statements in *Bhasin* that the organizing principle is a "requirement of justice". That does not require a party to subordinate its interests to those of the other party (para. 86). Like the distinct duty of honest performance, the duty to exercise contractual discretionary powers in good faith is not a fiduciary duty. In exercising a contractual discretionary power, "a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest" (para. 70). Doing so is not necessarily exercising discretion wrongfully or in "bad faith".

[112] Cette même théorie de la justice corrective est à la base du principe directeur de l'exécution de bonne foi et des obligations particulières qui en découlent, comme cela ressort des déclarations formulées par le juge Cromwell dans l'arrêt *Bhasin*, selon lesquelles le principe directeur est une « exigence de justice ». Cela n'oblige pas une partie à subordonner ses intérêts à ceux de l'autre partie (par. 86). Comme l'obligation distincte d'exécution honnête, l'obligation d'exercer les pouvoirs discrétionnaires contractuels de bonne foi n'en est pas une qui est de nature fiduciaire. Lorsqu'elle exerce un pouvoir discrétionnaire contractuel, « une partie peut parfois causer une perte à une autre partie — même de façon intentionnelle — dans la poursuite légitime d'intérêts économiques personnels » (par. 70). Cela ne constitue pas nécessairement un exercice abusif ou de « mauvaise foi » d'un pouvoir discrétionnaire.

[113] I note once again that the duty to exercise discretionary powers in good faith does not require a party to confer a benefit on the other party that was not a part of their original agreement, nor does it require a party to subordinate its interests to those of the other party. Respectfully stated, the arbitrator failed to abide by these tenets and the arbitral award extends the good faith duty at issue beyond its proper bounds. In these circumstances, Wastech's argument that Metro could not deprive it of the fundamental benefit for which it bargained fails to take into account the terms of the agreement itself and the purpose for which Metro was extended the discretionary power in question. The parties saw the risk that Wastech could fail to meet the Target OR in a given year. They chose to leave that risk in the bargain and refrained from guaranteeing Wastech's profit margin. In light of this, Wastech cannot say the exercise of the discretion was unreasonable. In essence, it argues that good faith required Metro to subordinate its interests to Wastech, and to guarantee to Wastech something which the Contract they painstakingly negotiated over approximately

[113] Je souligne encore une fois que l'obligation d'exercer les pouvoirs discrétionnaires de bonne foi n'exige pas qu'une partie confère à l'autre un avantage qui n'était pas prévu dans leur accord initial, et n'exige pas non plus qu'une partie subordonne ses intérêts à ceux de l'autre partie. Soit dit en tout respect, l'arbitre n'a pas respecté ces préceptes et la sentence arbitrale étend l'obligation de bonne foi en cause au-delà des limites qui s'imposent. Dans ces circonstances, l'argument de Wastech selon lequel Metro ne pouvait pas la priver de l'avantage fondamental qu'elle avait négocié ne tient pas compte des conditions de l'accord en tant que tel et de l'objectif pour lequel Metro s'est vu confier le pouvoir discrétionnaire en question. Les parties avaient constaté le risque que Wastech puisse ne pas atteindre le RE cible au cours d'une année. Elles ont choisi d'assumer ce risque dans le marché et n'ont pas garanti de marge de profit à Wastech. Compte tenu de ce choix, Wastech ne peut dire que l'exercice du pouvoir discrétionnaire était déraisonnable. Essentiellement, Wastech soutient que la bonne foi obligeait Metro à subordonner ses intérêts aux siens, et à lui garantir quelque chose qui n'était

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18 months did not. Generally speaking, this is not the role of good faith in the common law of contract in light of the requirement of justice spoken to in *Bhasin* and the arbitrator erred in law by giving effect to these arguments. For these reasons, I agree with the courts below that Wastech's claim must fail: the arbitrator's award cannot stand whether the standard of review is correctness or reasonableness.

pas prévu dans le contrat qu'elles avaient laborieusement négocié pendant environ 18 mois. De manière générale, ce n'est pas là le rôle de la bonne foi dans la common law en matière de contrats compte tenu de l'exigence de justice abordée dans l'arrêt *Bhasin*, et l'arbitre a commis une erreur de droit en donnant effet à ces arguments. Pour les motifs qui précèdent, je souscris à la conclusion des instances inférieures selon laquelle la demande de Wastech doit être rejetée : la sentence arbitrale ne peut être maintenue, que la norme de contrôle applicable soit celle de la décision correcte ou celle de la décision raisonnable.

V. Disposition

[114] I would dismiss the appeal with costs.

V. Dispositif

[114] Je suis d'avis de rejeter le pourvoi avec dépens.

The reasons of Côté, Brown and Rowe JJ. were delivered by

Version française des motifs des juges Côté, Brown et Rowe rendus par

Brown and Rowe JJ. —

Les juges Brown et Rowe —

I. Introduction

[115] We are in accord with our colleague Kasirer J. to dismiss the appeal. Notwithstanding our agreement in the result, we write separately for four reasons. First, this Court should clarify the applicable standard of review. Secondly, while we agree that the purpose of a discretion is the proper focus of the good faith analysis, in assessing that purpose, courts must give effect to the parties' bargain. Thirdly, we do not agree with our colleague's treatment of the duty of honest performance insofar as he suggests that it is a preliminary step in addressing the duty to exercise discretion in good faith. Finally, our colleague's reliance on the civil law of Quebec is unnecessary, ill-advised and wholly misplaced. Rather than assisting in the development of the common law of good faith in contractual performance, as stated by this Court in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, the digression into the civil law gives rise to complication, uncertainty and confusion.

I. Introduction

[115] Nous sommes d'accord avec notre collègue le juge Kasirer pour rejeter le pourvoi. Malgré que nous souscrivions au résultat, nous rédigeons des motifs distincts pour quatre raisons. Premièrement, la Cour devrait préciser la norme de contrôle applicable. Deuxièmement, bien que nous convenions que l'analyse de la bonne foi doit à juste titre être axée sur l'objet d'un pouvoir discrétionnaire, les tribunaux doivent donner effet au marché conclu par les parties pour établir quel est cet objet. Troisièmement, nous ne souscrivons pas au traitement que fait notre collègue de l'obligation d'exécution honnête dans la mesure où il laisse entendre qu'il s'agit d'une étape préliminaire à l'examen de l'obligation d'exercer un pouvoir discrétionnaire de bonne foi. Enfin, son recours au droit civil du Québec est inutile, malavisé et totalement injustifié. Plutôt que de contribuer à l'évolution de la common law relativement à la bonne foi en matière d'exécution contractuelle, comme l'a établi notre Cour dans l'arrêt *Bhasin c. Hrynew*, 2014 CSC 71, [2014] 3 R.C.S. 494, la digression sur le droit civil donne lieu à des difficultés, de l'incertitude et de la confusion.

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[116] At root, answering the question posed by this appeal is a matter of straightforwardly applying *Bhasin* and confirming that, while *Bhasin* organized several established common law doctrines under the rubric of "good faith", it did not represent an abandonment of commercial certainty by requiring contracting parties to place their counterparty's interests ahead of their own. Inasmuch as the effect of the arbitrator's decision in this case was to require that the respondent protect the appellant's interests at the expense of its own, it is not consistent with *Bhasin* or the jurisprudence that preceded it. We would therefore dismiss the appeal.

II. Standard of Review

[117] Our colleague refrains from identifying the standard of review, since on either standard he would overturn the arbitrator's conclusions. In our view, however, this Court ought to provide clear guidance on this point. Conflicting lines of authority have arisen concerning the application of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, to arbitration appeals (*Northland Utilities (NWT) Limited v. Hay River (Town of)*, 2021 NWTCA 1, at paras. 21-44 (CanLII); *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery And Gaming Corporation*, 2020 ONSC 1516, at paras. 62-75 (CanLII); *Cove Contracting Ltd. v. Condominium Corporation No 012 5598 (Ravine Park)*, 2020 ABQB 106, 10 Alta. L.R. (7th) 178, at paras. 3-12; *Allstate Insurance Co. v. Ontario (Minister of Finance)*, 2020 ONSC 830, 149 O.R. (3d) 761, at paras. 12-19; *Buffalo Point First Nation v. Cottage Owners Association*, 2020 MBQB 20, at paras. 46-48 (CanLII); *Clark v. Unterschultz*, 2020 ABQB 338, 41 R.F.L. (8th) 28, at paras. 55-56). This question ought to be resolved.

[118] In *Vavilov*, this Court concluded that the appellate standards of review identified in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, apply to statutory rights of appeal from administrative decisions (para. 37). Certain trial courts have, however, resisted applying this principle to appeals from arbitral awards. Two reasons are offered for

[116] Fondamentalement, pour répondre à la question soulevée dans le présent pourvoi, il faut simplement appliquer l'arrêt *Bhasin* et confirmer que, même si cet arrêt a classé plusieurs doctrines établies en common law sous la rubrique de la « bonne foi », il ne représentait pas un abandon de la stabilité commerciale et n'exigeait pas que les parties contractantes subordonnent leurs intérêts à ceux de leur cocontractant. Dans la mesure où l'effet de la décision de l'arbitre en l'espèce était d'exiger que l'intimée protège les intérêts de l'appelante aux dépens des siens, celle-ci n'est pas conforme à l'arrêt *Bhasin* ou à la jurisprudence l'ayant précédé. Nous sommes donc d'avis de rejeter le pourvoi.

II. Norme de contrôle

[117] Notre collègue s'abstient de se prononcer sur la norme de contrôle applicable, car il infirmerait les conclusions de l'arbitre peu importe la norme appliquée. Cependant, à notre avis, la Cour devrait fournir des indications claires sur ce point. L'application de l'arrêt *Canada (Ministre de la Citoyenneté et de l'Immigration) c. Vavilov*, 2019 CSC 65, [2019] 4 R.C.S. 653, aux appels des sentences arbitrales a donné lieu à des courants jurisprudentiels divergents (*Northland Utilities (NWT) Limited c. Hay River (Town of)*, 2021 NWTCA 1, par. 21-44 (CanLII); *Ontario First Nations (2008) Limited Partnership c. Ontario Lottery And Gaming Corporation*, 2020 ONSC 1516, par. 62-75 (CanLII); *Cove Contracting Ltd c. Condominium Corporation No 012 5598 (Ravine Park)*, 2020 ABQB 106, 10 Alta. L.R. (7th) 178, par. 3-12; *Allstate Insurance Co. c. Ontario (Minister of Finance)*, 2020 ONSC 830, 149 O.R. (3d) 761, par. 12-19; *Buffalo Point First Nation c. Cottage Owners Association*, 2020 MBQB 20, par. 46-48 (CanLII); *Clark c. Unterschultz*, 2020 ABQB 338, 41 R.F.L. (8th) 28, par. 55-56). Cette question doit être réglée.

[118] Dans l'arrêt *Vavilov*, la Cour a conclu que les normes de contrôle applicables en appel établies dans l'arrêt *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, s'appliquent aux droits d'appel à l'encontre de décisions administratives prévus par la loi (par. 37). Certains tribunaux de première instance ont toutefois résisté à l'application de ce principe

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this. First, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, do not support the application of appellate standards of review to arbitration appeals, and *Vavilov* did not expressly overrule those decisions (*Ontario First Nations*, at para. 71; *Cove Contracting Ltd.*, at paras. 10-12). Secondly, *Vavilov* was driven by "constitutional considerations that justify deference by the judiciary to the legislature" (*Ontario First Nations*, at para. 72). In contrast, the standard of review that applies to appeals from private arbitration awards is "guided by commercial considerations about respect for the decision-makers chosen by the parties. As a result, deference is justified by the parties' contractual intent" (*Ontario First Nations*, at para. 72).

[119] There are important differences between commercial arbitration and administrative decision-making (*Sattva*, at para. 104). Those differences do not, however, affect the standard of review where the legislature has provided for a statutory right of appeal. Appellate standards of review apply as a matter of statutory interpretation. As this Court explained in *Vavilov*, "a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts" (para. 39). This interpretive principle applies in similar manner to statutory rights of appeal from arbitral awards:

> More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute than they do in, for example, a criminal or commercial law context. Accepting that the word "appeal" refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes: R. Sullivan,

aux appels interjetés contre des sentences arbitrales. Deux raisons sont offertes pour expliquer cela. D'abord, les arrêts *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633, et *Teal Cedar Products Ltd. c. Colombie-Britannique*, 2017 CSC 32, [2017] 1 R.C.S. 688, ne supportent pas l'application aux appels en matière d'arbitrage des normes de contrôle applicables en appel, et l'arrêt *Vavilov* n'a pas expressément écarté ces décisions (*Ontario First Nations*, par. 71; *Cove Contracting Ltd.*, par. 10-12). Ensuite, l'arrêt *Vavilov* résulte de [TRADUCTION] « considérations constitutionnelles qui justifient la déférence de la magistrature envers le législateur » (*Ontario First Nations*, par. 72). En revanche, la norme de contrôle qui s'applique aux appels interjetés à l'encontre de sentences arbitrales privées est « guidée par des considérations commerciales relatives au respect des décideurs choisis par les parties. Par conséquent, la déférence est justifiée par l'intention contractuelle des parties » (*Ontario First Nations*, par. 72).

[119] Il existe des différences importantes entre l'arbitrage commercial et le processus décisionnel administratif (*Sattva*, par. 104). Ces différences n'ont toutefois pas d'incidence sur la norme de contrôle applicable lorsque le législateur a prévu un droit d'appel dans la loi. Les normes de contrôle applicables en appel s'appliquent suivant les règles d'interprétation législative. Comme l'a expliqué la Cour dans l'arrêt *Vavilov*, le « choix [du législateur] de créer dans la loi un droit d'appel manifeste une intention d'attribuer un rôle de tribunal d'appel aux cours de révision » (par. 39). Ce principe d'interprétation s'applique de la même façon aux droits d'appel de sentences arbitrales prévus par la loi :

> De façon plus générale, il n'y a aucune raison convaincante de présumer que le législateur voulait que le mot « appel » revête un sens tout à fait différent dans une loi à caractère administratif que, par exemple, dans un contexte de droit criminel ou commercial. Accepter que le mot « appel » porte sur le même type de procédure dans tous ces contextes s'accorde également avec la présomption d'uniformité d'expression, selon laquelle le législateur est présumé employer des mots de telle sorte que les mêmes termes ont le même sens, dans une même

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Sullivan on the Construction of Statutes (6th ed. 2014), at p. 217.

(*Vavilov*, at para. 44)

[120] Factors that justify deference to the arbitrator, notably respect for the parties' decision in favour of alternative dispute resolution and selection of an appropriate decision-maker, are not relevant to this interpretive exercise. What matters are the words chosen by the legislature, and giving effect to the intention incorporated within those words. Thus, where a statute provides for an "appeal" from an arbitration award, the standards in *Housen* apply. To this extent, *Vavilov* has displaced the reasoning in *Sattva* and *Teal Cedar*. Concluding otherwise would undermine the coherence of *Vavilov* and the principles expressed therein.

[121] The appeal in this case was brought pursuant to s. 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55,[2] which provides that, either by consent of the parties or with leave of the Supreme Court of British Columbia, a party to an arbitration "may appeal to the court on any question of law arising out of the award". In light of *Vavilov*, it follows that the standard of review to be applied by this Court in this case is correctness (*Housen*, at para. 8). Our conclusion on this point is limited to the specific statutory provision at issue. In every case, the question is one of legislative intention, as reflected in the language of the statute.

[122] Instead of responding substantively, our colleague invokes an unfortunate passage from the majority judgment in *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, [2020] 1 S.C.R. 15, at para. 15, explicitly dismissing opposing views of colleagues as unworthy of answer. Of no less concern are the implications of his refusal to decide the appropriate standard of review, which risks undermining this Court's decision in *Vavilov* as it

[2] Since repealed, and replaced by the appeal clause in the *Arbitration Act*, S.B.C. 2020, c. 2, s. 59.

loi ainsi que d'une loi à l'autre : R. Sullivan, *Sullivan on the Construction of Statutes* (6e éd. 2014), p. 217.

(*Vavilov*, par. 44)

[120] Les facteurs justifiant la déférence envers l'arbitre, notamment le respect de la décision des parties en faveur d'un mode alternatif de résolution des conflits et la sélection d'un décideur compétent, ne sont pas pertinents dans le cadre de cet exercice d'interprétation. Ce qui importe, ce sont les mots choisis par le législateur, et de donner effet à l'intention que reflètent ces mots. Ainsi, lorsqu'une loi prévoit un « appel » d'une sentence arbitrale, les normes énoncées dans l'arrêt *Housen* s'appliquent. Dans cette mesure, l'arrêt *Vavilov* a remplacé le raisonnement exposé dans les arrêts *Sattva* et *Teal Cedar*. Tirer une conclusion contraire minerait la cohérence de l'arrêt *Vavilov* et des principes qui y sont énoncés.

[121] Le présent pourvoi a été interjeté en vertu de l'art. 31 de l'*Arbitration Act*, R.S.B.C. 1996, c. 55[2], qui prévoit que, sur consentement des parties ou sur autorisation de la Cour suprême de la Colombie-Britannique, une partie à un arbitrage [TRADUCTION] « peut interjeter appel au tribunal sur toute question de droit découlant de la sentence ». Au vu de l'arrêt *Vavilov*, il s'ensuit que la norme de contrôle que doit appliquer notre Cour en l'espèce est celle de la décision correcte (*Housen*, par. 8). Notre conclusion sur ce point ne vise que la disposition législative précise dont il est question. Dans chaque cas, la question en est une d'intention législative, qui se dégage du libellé de la loi.

[122] Plutôt que de répondre sur le fond, notre collègue invoque un passage regrettable des motifs des juges majoritaires dans l'arrêt *Terre-Neuve-et-Labrador (Procureur général) c. Uashaunnuat (Innus de Uashat et de Mani-Utenam)*, 2020 CSC 4, [2020] 1 R.C.S. 15, au par. 15, où ceux-ci ont expressément rejeté les avis contraires de leurs collègues comme s'ils ne méritaient pas de réponse. Les conséquences de son refus de se prononcer sur la norme de contrôle appropriée sont tout aussi préoccupantes, et

[2] Maintenant abrogé et remplacé par la disposition établissant le droit d'appel dans l'*Arbitration Act*, S.B.C. 2020, c. 2, art. 59.

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relates to statutory appeals. To leave this undecided is to invite conflict and confusion.

risquent de miner la décision de la Cour dans l'arrêt *Vavilov* en ce qui a trait aux appels prévus par la loi. Laisser cette question sans réponse risque de causer de la confusion et de susciter des conflits.

III. Background

III. Contexte

[123] This appeal arises from a 20-year comprehensive agreement ("Agreement") between the Greater Vancouver Sewerage and Drainage District ("Metro") and Wastech Services Inc. ("Wastech") to deal with the management of municipal solid waste. Specifically, the Agreement contemplated that Wastech or its subcontractors would deliver solid waste to transfer stations in Cache Creek, Vancouver and Burnaby. Wastech operated the Cache Creek transfer station. Metro had discretion under the Agreement to determine the allocation of waste each year among these stations. The volume of waste distributed to each facility would impact the costs, revenues, and, accordingly, Wastech's ability to earn a profit. In particular, Wastech received a higher rate of pay for disposals at Cache Creek. Wastech's total compensation under the Agreement was structured around a target operating ratio of 0.890 ("Target OR"), meaning that, in any given year, operating costs should comprise 89 percent of revenue so that Wastech would receive the remaining 11 percent of revenue as profit.

[123] Le présent pourvoi tire son origine d'un accord exhaustif de 20 ans (« accord ») conclu entre Greater Vancouver Sewerage and Drainage District (« Metro ») et Wastech Services Inc. (« Wastech ») visant la gestion des déchets solides municipaux. Plus précisément, l'accord prévoyait que Wastech ou ses sous-traitants transporteraient les déchets solides aux stations de transfert de Cache Creek, de Vancouver et de Burnaby. Wastech gérait la station de transfert de Cache Creek. Aux termes de l'accord, Metro pouvait, en vertu de son pouvoir discrétionnaire, décider chaque année de la répartition des déchets entre ces stations. Le volume de déchets transportés à chaque installation avait une incidence sur les coûts et les revenus de Wastech et, par conséquent, sur sa capacité de faire des profits. En particulier, Wastech recevait un taux de rémunération plus élevé pour le transport des déchets à Cache Creek. Toujours selon l'accord, la rémunération totale de Wastech était structurée selon un ratio d'exploitation cible de 0,890 (« RE cible »), ce qui signifie que, lors d'une année donnée, les coûts d'exploitation devaient correspondre à 89 pour 100 des revenus, de sorte que Wastech puisse toucher un profit de 11 pour 100.

[124] Significantly, the Agreement did not guarantee that Wastech would achieve its Target OR; rather, it addressed what would happen if the Target OR was not achieved. If the actual operating ratio ("Actual OR") fell between 0.860 and 0.920 at year end, the Agreement provided for a retroactive payment by or to Wastech of 50 percent of the difference between the Target OR and the Actual OR. Effectively, the parties would share the financial consequences of any deviation of 0.300 or less from the Target OR. In addition, the Agreement contained a prospective adjustment, which was applied if the Actual OR fell outside of the "target band" between 0.860 and 0.920 ("Outside Band Adjustment"). The Outside Band Adjustment was intended to be sufficient to return the operating ratio to just outside the target band.

[124] Il importe de noter que l'accord ne garantissait pas que Wastech atteindrait le RE cible; il indiquait plutôt ce qui se passerait si le RE cible n'était pas atteint. Si le ratio d'exploitation réel (« RE réel ») se situait entre 0,860 et 0,920 à la fin de l'année, un paiement rétroactif à l'une ou l'autre des parties correspondant à 50 pour 100 de la différence entre le RE cible et le RE réel était prévu dans l'accord. Dans les faits, les parties se partageraient les conséquences financières de tout écart de 0,300 ou moins du RE cible. En outre, l'accord prévoyait un rajustement prospectif applicable si le RE réel se situait à l'extérieur de la « fourchette cible » de 0,860 à 0,920 (« rajustement hors de la fourchette »). Ce rajustement se voulait suffisant pour ramener le ratio d'exploitation tout juste à l'extérieur de la fourchette

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Further, if Wastech's Actual OR fell outside of the target band for three consecutive years, the rates were subject to re-calculation.

cible. Par ailleurs, si le RE réel de Wastech se trouvait à l'extérieur de la fourchette cible pendant trois années consécutives, les taux faisaient l'objet d'un nouveau calcul.

[125] The total waste hauled by Wastech under the Agreement had declined steadily since 2007. Metro therefore decided to redirect flows of waste from Cache Creek to Vancouver for the 2011 year to "maximize the remaining life of the Cache Creek Landfill" (Arbitrator's decision, A.R., vol. I, p. 1 ("Award"), at para. 52) and because of Metro's own budget concerns. Metro was aware that Wastech might not be able to reduce its costs to account for the change in allocation, which ultimately caused delivery volumes at Cache Creek to drop by 31 percent in 2011, relative to 2010. Because of Metro's decision, Wastech had no possibility of achieving the Target OR in 2011.

[125] Le volume total de déchets transportés par Wastech dans le cadre de l'accord avait diminué de façon constante depuis 2007. Metro a donc décidé de rediriger vers Vancouver une partie des déchets devant être envoyés à Cache Creek en 2011 afin [TRADUCTION] « [d']optimiser la durée de vie utile restante du site d'enfouissement de Cache Creek » (sentence arbitrale, d.a., vol. I, p. 1, par. 52) et en raison de préoccupations budgétaires. Metro savait qu'il était possible que Wastech ne soit pas en mesure de réduire ses coûts pour tenir compte du changement dans la répartition des déchets, lequel a finalement causé une baisse du volume de déchets transportés à Cache Creek de 31 pour 100 en 2011 par rapport à 2010. En raison de la décision de Metro, Wastech n'a pas eu la possibilité d'atteindre le RE cible en 2011.

[126] The arbitrator expressly declined to imply a term in the Agreement guaranteeing the Target OR, finding that the parties had considered such a term and rejected it. He also concluded, however, that Metro was bound by its duty of good faith to have appropriate regard for Wastech's legitimate interests. While the 2011 allocation decision was honest and reasonable when considered from Metro's perspective, it also "had significant financial implications [for Wastech] beyond those addressed by the [Agreement's] adjustment mechanisms" (para. 86). The arbitrator concluded that Metro's decision was "dishonest" because it inappropriately negated Wastech's legitimate expectation of at least having the opportunity to earn the Target OR in each year of the Agreement.

[126] L'arbitre a expressément refusé de conclure à l'existence dans l'accord d'une condition implicite garantissant le RE cible, et a plutôt jugé que les parties avaient envisagé une telle condition mais l'avaient rejetée. Toutefois, il a également conclu que Metro était assujettie à une obligation de bonne foi selon laquelle elle devait prendre en compte comme il se doit les intérêts légitimes de Wastech. Même si la décision de 2011 concernant la répartition des déchets était honnête et raisonnable lorsqu'on l'envisage du point de vue de Metro, elle a également [TRADUCTION] « eu des répercussions financières importantes [pour Wastech] excédant celles prévues par les mécanismes de rajustement [de l'accord] » (par. 86). L'arbitre a conclu que la décision de Metro était « malhonnête » parce qu'elle écartait indûment l'attente légitime de Wastech d'avoir au moins la possibilité d'atteindre le RE cible chaque année de l'accord.

IV. Issues

IV. Questions

[127] Metro was granted leave to appeal the arbitrator's decision on two questions of law:

[127] Metro s'est vu accorder l'autorisation d'interjeter appel de la décision de l'arbitre à l'égard de deux questions de droit :

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1. Did the Arbitrator err in law in failing to apply proper principles in holding that the exercise of a bargained-for right could be "dishonest" and an act undertaken in bad faith simply because it was wholly at odds with the expectations of the counter-party, which expectations were not embodied in the contract?

2. Did the Arbitrator err in law by confusing the "organizing principle" stated in *Bhasin* with a free-standing obligation of contractual good faith, disregarding the applicable principles of good faith as found in the authorities?

(2016 BCSC 68, 409 D.L.R. (4th) 9, at para. 40)

Ultimately, these questions both raise one straightforward issue: what is the standard applicable when determining whether a contractual discretion has been exercised in good faith?

V. Analysis

A. *The Duty to Exercise Discretionary Powers in Good Faith*

[128] The first step in deciding a common law good faith claim is to consider whether any established good faith doctrines apply (*C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, [2020] 3 S.C.R. 908, at para. 129). In *Bhasin*, this Court recognized in the common law four distinct doctrines, each with corresponding duties, that manifest a "general organizing principle" of good faith: (1) a duty of cooperation between the parties to achieve the objects of the contract (para. 49); (2) a duty to exercise contractual discretion in good faith (para. 50); (3) a duty not to evade contractual obligations in bad faith (para. 51); and (4) a duty of honest performance (para. 73). This appeal draws from one of them — the duty to exercise contractual discretion in good faith.

[TRADUCTION]

1. L'arbitre a-t-il commis une erreur de droit en omettant d'appliquer les principes appropriés lorsqu'il a jugé que l'exercice par une partie d'un droit négocié pouvait être [TRADUCTION] « malhonnête » et constituer un acte de mauvaise foi simplement parce qu'il était totalement incompatible avec les attentes de l'autre partie contractante, lesquelles n'étaient pas énoncées dans le contrat?

2. L'arbitre a-t-il commis une erreur de droit en confondant le « principe directeur » énoncé dans l'arrêt *Bhasin* avec une obligation distincte de bonne foi contractuelle, omettant par le fait même de tenir compte des principes de bonne foi applicables tels qu'ils sont énoncés dans la jurisprudence?

(2016 BCSC 68, 409 D.L.R. (4th) 9, par. 40)

En définitive, ces questions soulèvent toutes deux une autre question simple : quelle est la norme applicable pour établir si un pouvoir discrétionnaire contractuel a été exercé de bonne foi?

V. Analyse

A. *L'obligation d'exercer les pouvoirs discrétionnaires de bonne foi*

[128] La première étape à suivre pour trancher une demande fondée sur le principe de bonne foi en common law est de se demander si certaines doctrines de la bonne foi reconnues trouvent application (*C.M. Callow Inc. c. Zollinger*, 2020 CSC 45, [2020] 3 R.C.S. 908, par. 129). Dans l'arrêt *Bhasin*, notre Cour a reconnu qu'il existe en common law quatre doctrines distinctes, chacune ayant des obligations correspondantes, qui sont des manifestations du « principe directeur général » de bonne foi : (1) une obligation de collaboration entre les parties en vue de la réalisation des objectifs du contrat (par. 49); (2) une obligation d'exercer un pouvoir discrétionnaire de nature contractuelle de bonne foi (par. 50); (3) une obligation de ne pas éluder de mauvaise foi des obligations contractuelles (par. 51); et (4) une obligation d'exécution honnête (par. 73). Le présent pourvoi découle de l'une d'elles — l'obligation d'exercer un pouvoir discrétionnaire contractuel de bonne foi.

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[129] While this Court has recognized the existence of this good faith doctrine, it has never opined on the applicable standard (see *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187; *Bhasin*, at paras. 47 and 50). We agree with our colleague that the appellate jurisprudence supports the notion that discretion must be exercised reasonably, and that this standard simply requires that a party exercise discretion in accordance with the purpose for which it was granted. We would, however, emphasize two points to bear in mind in applying it.

[129] Bien que notre Cour ait reconnu l'existence de cette doctrine de la bonne foi, elle ne s'est jamais prononcée sur la norme applicable (voir *Mitsui & Co. (Canada) Ltd. c. Banque Royale du Canada*, [1995] 2 R.C.S. 187; *Bhasin*, par. 47 et 50). Nous sommes d'accord avec notre collègue pour dire que la jurisprudence des cours d'appel appuie l'idée que le pouvoir discrétionnaire doit être exercé de façon raisonnable, et que cette norme exige simplement qu'une partie exerce son pouvoir discrétionnaire conformément à la fin pour laquelle il a été conféré. Nous voulons toutefois mettre l'accent sur deux points qu'il faut garder à l'esprit lors de son application.

[130] First, the purpose of good faith is to "secur[e] the performance and enforcement of the contract made by the parties" (*Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.), at para. 53). It cannot be used as a device to "create new, unbargained-for rights and obligations", or "to alter the express terms of the contract reached by the parties" (*Transamerica*, at para. 53). Contracting parties cannot be held to a standard that is "contrary to the plain wording of the contract, or that involve[s] the imposition of subjective expectations" (*Styles v. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214, at para. 45).

[130] Premièrement, l'objectif de la bonne foi est de [TRADUCTION] « garantir l'exécution et l'application du contrat conclu par les parties » (*Transamerica Life Canada Inc. c. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.), par. 53). Elle ne peut servir à [TRADUCTION] « créer de nouveaux droits et obligations non négociés », ou à « modifier les termes exprès du contrat conclu par les parties » (*Transamerica*, par. 53). Les parties contractantes ne peuvent être assujetties à une norme qui est [TRADUCTION] « contraire au sens ordinaire des termes du contrat, ou qui comporte l'imposition d'attentes subjectives » (*Styles c. Alberta Investment Management Corp.*, 2017 ABCA 1, 44 Alta. L.R. (6th) 214, par. 45).

[131] Where an agreement reflects a shared, reasonable expectation as to the manner in which a discretion may be exercised, that expectation will be enforced (*Mesa Operating Limited Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (C.A.), at para. 19; J. T. Robertson, "Good Faith as an Organizing Principle in Contract Law: *Bhasin v. Hrynew* — Two Steps Forward and One Look Back" (2015), 93 *Can. Bar. Rev.* 809, at p. 839; J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997), 113 *L.Q.R.* 433, at p. 434). This, in our view, is what it means to exercise discretion reasonably. As our colleague states, parties will usually expect that a discretion will be exercised in accordance with the purposes for which it was conferred. However, this is so only where the purpose of a discretionary power arises from the terms of the contract, construed objectively,

[131] Lorsqu'un accord révèle une attente partagée et raisonnable pour ce qui est de la façon dont un pouvoir discrétionnaire peut être exercé, cette attente doit se voir donner effet (*Mesa Operating Limited Partnership c. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (C.A.), par. 19; J. T. Robertson, « Good Faith as an Organizing Principle in Contract Law : *Bhasin v. Hrynew* — Two Steps Forward and One Look Back » (2015), 93 *R. du B. can.* 809, p. 839; J. Steyn, « Contract Law: Fulfilling the Reasonable Expectations of Honest Men » (1997), 113 *L.Q.R.* 433, p. 434). Voilà, à notre avis, ce que signifie exercer un pouvoir discrétionnaire de façon raisonnable. Comme l'affirme notre collègue, les parties s'attendront habituellement à ce que le pouvoir discrétionnaire soit exercé conformément aux fins pour lesquelles il a été conféré. Cependant, il en est ainsi seulement lorsque l'objet du pouvoir discrétionnaire

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and having regard to the factual matrix. In this way, the obligation to exercise discretion reasonably does not reflect the imposition of external standards on the exercise of discretion, but rather giving effect to the standards inherent in the parties' own bargain.

[132] Accordingly, we do not share our colleague's view that, where a discretion is unfettered on its face, a court must "form a broad view of the purposes of the venture to which the contract gives effect, and of what loyalty to that venture might involve for a party to it, and to take those broad purposes as providing the inherent limits for the exercise of the power" (Kasirer J.'s reasons, at para. 72, quoting P. Sales, "Use of Powers for Proper Purposes in Private Law" (2020), 136 *L.Q.R.* 384, at p. 393). Our colleague's invocation of "loyalty to th[e] venture" suggests that parties must use their discretion, even where it is chosen by the parties to be unfettered, in a way that (from the view of the judge) advances the objectives of the contract. This is not an exercise in interpretation. Rather, it is the imposition, *post facto*, of a judicial view. Approaching the interpretive task from such a starting point risks, even invites, undermining freedom of contract and distorting the parties' bargain by imposing constraints to which they did not agree.

[133] Secondly, our colleague says that the duty to exercise discretion in good faith is a general doctrine of contract law. Consequently, "it need not find its source in an implied term in the contract, but rather it operates in every contract irrespective of the intentions of the parties" (Kasirer J.'s reasons, at para. 91). Whether or not such judge-made rules operate irrespective of the intentions of the parties, we are steadfast in our view that the purpose of a discretion is *always* defined by the parties' intentions, as revealed by the contract. It follows that, where a contract discloses a clear intention to grant a discretion that can be exercised for any purpose, courts, operating within their proper role, *must* give effect to that intention. With careful drafting, parties

découle des modalités du contrat, interprété objectivement, et compte tenu de la matrice factuelle. De cette façon, l'obligation d'exercer un pouvoir discrétionnaire de façon raisonnable ne représente pas des normes externes imposées sur l'exercice du pouvoir discrétionnaire, mais donne plutôt effet aux normes propres au marché conclu par les parties.

[132] En conséquence, nous ne partageons pas l'avis de notre collègue portant que lorsque le pouvoir discrétionnaire est absolu à sa face même, le tribunal doit « se faire une idée générale des objectifs de l'entreprise auxquels donne effet le contrat, et de la loyauté envers cette entreprise que pourrait entraîner celui-ci pour les parties, et de considérer ces objectifs généraux comme établissant les limites inhérentes de l'exercice du pouvoir » (motifs du juge Kasirer, par. 72, citant P. Sales, « Use of Powers for Proper Purposes in Private Law » (2020), 136 *L.Q.R.* 384, p. 393). La mention par notre collègue de la « loyauté envers l'entreprise » donne à penser que les parties doivent exercer leur pouvoir discrétionnaire, même lorsqu'elles ont décidé qu'il serait absolu, d'une façon qui (de l'avis du juge) favorise la réalisation des objectifs du contrat. Il ne s'agit pas d'une opération d'interprétation; il s'agit plutôt de l'imposition, *post facto*, d'une opinion judiciaire. Aborder la tâche d'interprétation sur la base d'un tel point de départ risque de miner la liberté contractuelle et de dénaturer le marché des parties en imposant des contraintes auxquelles elles n'ont pas consenti, et favorise même une telle conséquence.

[133] Deuxièmement, notre collègue affirme que l'obligation d'exercer le pouvoir discrétionnaire de bonne foi est un principe général du droit des contrats. En conséquence, elle « n'a pas à trouver sa source dans une condition implicite du contrat; elle se manifeste plutôt dans chaque contrat, sans égard aux intentions des parties » (motifs du juge Kasirer, par. 91). Que ces règles judiciaires s'appliquent sans égard aux intentions des parties ou non, nous sommes convaincus que l'objet d'un pouvoir discrétionnaire est *toujours* défini par les intentions des parties, qui se dégagent du contrat. Il s'ensuit que, lorsqu'un contrat révèle une intention claire de conférer un pouvoir discrétionnaire qui peut être exercé à toute fin, les tribunaux, dans le cadre du

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can largely immunize the exercise of discretion from review on this basis. Conversely, they may choose to specify the purpose for which a discretion has been granted in order to provide a clear standard against which the exercise of discretion is to be assessed. In either instance, their intention should be given effect and not subverted.

[134] In this case, the Award was predicated on the view that Metro was to have "appropriate regard" for Wastech's interest in achieving the Target OR every year. But the structure of the Agreement makes it clear that Metro's discretion was subject to no such constraint. Indeed, through the Outside Band Adjustment and the adjustment that applies if Wastech's compensation falls outside of the Target OR for three consecutive years, the Agreement expressly contemplated that there might well be years in which Wastech would be unable to achieve the Target OR. The parties managed this risk by agreeing to formulae that adjusted the total compensation towards the Target OR. Finding that the discretion was constrained in the manner Wastech suggests would ignore these features of the Agreement.

[135] It is for this reason that we say this matter really is quite straightforward. In the bargain struck by the parties, Metro was given wide discretion, and Wastech's interests in the exercise of Metro's discretion were protected by the formulae that adjusted the total compensation towards the Target OR. In effect, the parties contemplated that Metro could exercise the discretion so as to advance its own interests, just as they contemplated protecting Wastech's interests by the adjustment formulae. While good faith requires a party to exercise its contractual discretion for the purpose for which it was given, the arbitrator erred by concluding that Metro was obligated to exercise its discretion in a way that protected Wastech's subjective expectations. To the contrary, Wastech had bargained for the inclusion of the adjustment

rôle qui leur incombe, *doivent* donner effet à cette intention. Grâce à une rédaction minutieuse, les parties peuvent mettre dans une large mesure l'exercice du pouvoir discrétionnaire à l'abri d'un contrôle sur ce fondement. Inversement, elles peuvent choisir de préciser la fin pour laquelle un pouvoir discrétionnaire a été conféré afin de prévoir une norme claire en fonction de laquelle l'exercice du pouvoir discrétionnaire devra être évalué. Dans un cas comme dans l'autre, leur intention devrait se voir donner effet et non être minée.

[134] En l'espèce, la sentence arbitrale était fondée sur l'idée que Metro devait « prendre en compte comme il se doit » l'intérêt de Wastech à atteindre le RE cible chaque année. Toutefois, il était clair selon la structure de l'accord que le pouvoir discrétionnaire de Metro ne faisait pas l'objet d'une telle limite. En effet, au moyen du rajustement hors de la fourchette et du rajustement applicable dans le cas où Wastech n'atteignait pas le RE cible pendant trois années consécutives, l'accord prévoyait expressément la possibilité que Wastech soit incapable d'atteindre le RE cible certaines années. Les parties ont géré ce risque en convenant d'une formule qui rajustait la rémunération totale par rapport au RE cible. Conclure que le pouvoir discrétionnaire était limité de la façon dont Wastech le laisse entendre ferait fi de ces éléments de l'accord.

[135] C'est pour cette raison que nous affirmons que la présente affaire est en fait assez simple. Dans le marché conclu par les parties, un vaste pouvoir discrétionnaire a été conféré à Metro, et les intérêts de Wastech à l'égard de l'exercice de ce pouvoir étaient protégés par la formule qui rajustait la rémunération totale en fonction du RE cible. De fait, les parties avaient envisagé que Metro puisse exercer le pouvoir discrétionnaire de façon à faire valoir ses propres intérêts, tout comme elles avaient envisagé de protéger les intérêts de Wastech au moyen de la formule de rajustement. Bien que la bonne foi exige d'une partie qu'elle exerce son pouvoir discrétionnaire contractuel pour la fin pour laquelle il a été conféré, l'arbitre a commis une erreur en concluant que Metro était tenue d'exercer son pouvoir discrétionnaire

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formulae to protect its interests, while accepting that Metro could exercise its discretion solely in its interests.

B. *Other Issues*

[136] Two other matters arising from our colleague's reasons require comment.

[137] First, our colleague addresses the duty of honest performance in his reasons. The issue of honesty arose here because the arbitrator described Metro's conduct as "dishonest", by which he meant that it was "wholly at odds" with Wastech's "legitimate contractual expectations" (Award, at para. 90). We agree with our colleague that the arbitrator erred. The difficulty, however, is that our colleague goes further in his elaborations regarding honest performance, and risks blurring the boundaries between that duty, and the duty to exercise discretionary powers in good faith. This is a particular concern in his suggestion that the duty of honest performance is a preliminary step in assessing whether there is a breach of the duty to exercise discretionary powers in good faith (at para. 69: ". . . beyond the requirement of honest performance . . ."). This misreads and distorts settled law. The two doctrines are, and should remain, distinct; connecting them in this way fails to comprehend or have regard for how the common law, as set out in *Bhasin*, has distinguished between them. Indeed, the arbitrator's description of Metro's conduct as "dishonest" was a product of the same error as that of our colleague, since it flowed from the arbitrator's failure to appreciate that dishonesty is distinct from good faith, and that the organizing principle is distinct from both of these doctrines. Our colleague's response to this should have been to achieve *greater* clarity with respect to each duty; instead, he has engendered confusion in this aspect of the common law.

d'une façon qui protégeait les attentes subjectives de Wastech. Au contraire, Wastech avait négocié l'inclusion de la formule de rajustement pour protéger ses intérêts, tout en acceptant que Metro puisse exercer son pouvoir discrétionnaire seulement dans son intérêt.

B. *Autres questions*

[136] Deux autres questions découlant des motifs de notre collègue nécessitent d'être commentées.

[137] D'abord, notre collègue aborde l'obligation d'exécution honnête dans ses motifs. La question de l'honnêteté se pose en l'espèce parce que l'arbitre a qualifié la conduite de Metro de [TRADUCTION] « malhonnête », ce qui voulait dire qu'elle était « totalement incompatible » avec les « attentes contractuelles légitimes » de Wastech (sentence arbitrale, par. 90). Nous sommes d'accord avec notre collègue pour dire que l'arbitre a commis une erreur. La difficulté, toutefois, est que notre collègue va plus loin dans ses explications concernant l'exécution honnête, et risque de brouiller les limites entre cette obligation et l'obligation d'exercer les pouvoirs discrétionnaires de bonne foi. Il s'agit d'une préoccupation particulière à son affirmation portant que l'obligation d'exécution honnête est une étape préliminaire pour évaluer s'il y a eu manquement à l'obligation d'exercer les pouvoirs discrétionnaires de bonne foi (par. 69 : « … outre l'exigence d'exécution honnête… »). Cela constitue une interprétation erronée du droit établi et le dénature. Les deux doctrines sont et devraient demeurer distinctes; le fait de les relier de cette manière démontre une incompréhension de la façon dont la common law, comme il est indiqué dans l'arrêt *Bhasin*, établit une distinction entre elles, ou n'en tient pas compte. En effet, la description par l'arbitre de la conduite de Metro comme étant « malhonnête » était le résultat de la même erreur que celle de notre collègue, car elle découlait du défaut par l'arbitre de reconnaître que la malhonnêteté est distincte de la bonne foi, et que le principe directeur est distinct de ces deux doctrines. La réponse de notre collègue à cela aurait dû être de clarifier *davantage* chaque obligation; il a plutôt semé de la confusion relativement à cet aspect de la common law.

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[138] Secondly, our colleague takes up the unfortunate invitation presented by the parties in their submissions to discuss the result that would follow by applying the *Civil Code of Québec*. But this case is from British Columbia. The *Civil Code of Québec* has no relevance here, and our colleague (yet further) confuses matters for no useful purpose by incorporating an analysis thereunder. This is particularly undesirable where the common law of British Columbia, which is the law that applies to the Agreement, readily answers the questions of law posed by this appeal.

[138] Deuxièmement, notre collègue accepte l'invitation malencontreuse des parties d'aborder le résultat que l'on obtiendrait si on appliquait le *Code civil du Québec*. Il s'agit toutefois d'une affaire provenant de la Colombie-Britannique. Le *Code civil du Québec* n'est d'aucune pertinence en l'espèce, et notre collègue crée (encore plus) de confusion pour aucune raison valable en procédant à une analyse du droit en vertu de celui-ci. Cela est particulièrement non souhaitable car la common law de la Colombie-Britannique, qui est le droit qui s'applique à l'accord, répond clairement aux questions de droit que soulève le présent pourvoi.

[139] Furthermore, even if the civil law of Quebec were remotely relevant (which it is not), Wastech did *not* rely on civilian concepts to expand the common law. Rather, it observed in passing that the approach to good faith which it espoused would be consistent with the civilian approach. Having concluded that Wastech's understanding of the common law of good faith was flawed, there is no reason to address the way its claim would be handled under the civil law. And in any event, as our colleague stresses, Wastech's claim would not be treated more favourably under the civil law (para. 108). This leaves us asking why he finds it appropriate to address the requirement of good faith and the doctrine of abuse of right under the civil law of Quebec at great length, or at all. As one of us stated in *Callow*, at para. 170, "unnecessary digression into external legal concepts [creates] practical difficulties on the ground by making the common law governing contractual relationships less comprehensible and therefore less accessible to those who need to know it, thereby increasing costs for all concerned". Respectfully, our colleague's extensive *obiter dicta* here, as in *Callow*, will surely achieve just that.

[139] De plus, même si le droit civil du Québec était un tant soit peu pertinent (ce qu'il n'est pas), Wastech *ne* s'est *pas* fondée sur des concepts civilistes pour élargir les règles de common law; elle a plutôt observé incidemment que l'approche relative à la bonne foi qu'elle a adoptée serait conforme à l'approche civiliste. En raison de la conclusion selon laquelle la compréhension de la common law par Wastech était erronée, il n'y a aucune raison de se pencher sur la façon dont son action serait traitée en droit civil. Et, quoi qu'il en soit, comme le souligne notre collègue, l'action intentée par Wastech ne serait pas traitée plus favorablement sous le régime du droit civil (par. 108). Cela nous amène à nous demander pourquoi il juge approprié d'aborder l'exigence de la bonne foi et la doctrine de l'abus de droit en droit civil québécois de façon exhaustive, voire qu'il le fasse tout court. Comme l'un d'entre nous l'a mentionné dans l'arrêt *Callow*, par. 170, la « digression inutile sur des concepts juridiques externes créera des difficultés pratiques sur le terrain en rendant la common law qui régit les relations contractuelles moins compréhensible, et donc moins accessible à ceux qui doivent la connaître, accroissant ainsi les coûts pour tous les intéressés ». Soit dit en tout respect, la longue remarque incidente de notre collègue en l'espèce, comme dans l'arrêt *Callow*, aura exactement cet effet.

[140] Our colleague's digressions concerning honest performance and Quebec civil law do not reflect, to our mind, appropriate common law methodology. The common law develops best by increments, one brick at a time — as it did in *Bhasin* — carefully,

[140] À notre avis, les digressions de notre collègue concernant l'exécution honnête et le droit civil québécois ne respectent pas la méthodologie devant être appliquée à la common law. Celle-ci se construit graduellement, une brique à la fois — comme c'était

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and in response to the matters presented, and not by expositions on matters that are not. Instead, we say, again respectfully, that our colleague builds an edifice of unknown and untested stability. This is unwise.

le cas dans l'arrêt *Bhasin* — avec circonspection, en réponse aux questions qui se présentent, et non au moyen d'exposés sur des questions qui n'ont pas été soulevées. En toute déférence, nous estimons que notre collègue crée plutôt un édifice dont la stabilité est inconnue et n'a pas été testée. Cela est loin d'être sage.

VI. Conclusion

[141] We would dismiss the appeal, with costs.

VI. Conclusion

[141] Nous sommes d'avis de rejeter le pourvoi avec dépens.

Appeal dismissed with costs.

Pourvoi rejeté avec dépens.

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the respondent: Nathanson, Schachter & Thompson, Vancouver.

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

Solicitors for the intervener the Canadian Chamber of Commerce: Torys, Toronto.

Procureurs de l'appelante : Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intimée : Nathanson, Schachter & Thompson, Vancouver.

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

Procureurs de l'intervenante la Chambre de commerce du Canada : Torys, Toronto.

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appeal.

Decision final

(5) The decision of the Supreme Court of Canada on any appeal under subsection (1) is final and conclusive.

R.S., c. C-25, s. 15; R.S., c. 44(1st Supp.), s. 10.

Order of court of one province

16 Every order made by the court in any province in the exercise of jurisdiction conferred by this Act in respect of any compromise or arrangement shall have full force and effect in all the other provinces and shall be enforced in the court of each of the other provinces in the same manner in all respects as if the order had been made by the court enforcing it.

R.S., c. C-25, s. 16.

Courts shall aid each other on request

17 All courts that have jurisdiction under this Act and the officers of those courts shall act in aid of and be auxiliary to each other in all matters provided for in this Act, and an order of a court seeking aid with a request to another court shall be deemed sufficient to enable the latter court to exercise in regard to the matters directed by the order such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within their respective jurisdictions.

R.S., c. C-25, s. 17.

18 [Repealed, 2005, c. 47, s. 131]

18.1 [Repealed, 2005, c. 47, s. 131]

18.2 [Repealed, 2005, c. 47, s. 131]

18.3 [Repealed, 2005, c. 47, s. 131]

18.4 [Repealed, 2005, c. 47, s. 131]

18.5 [Repealed, 2005, c. 47, s. 131]

PART III

General

Duty of Good Faith

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

1997, c. 12, s. 125; 2005, c. 47, s. 131; 2019, c. 29, s. 140.

Claims

Claims that may be dealt with by a compromise or arrangement

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

Exception

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;

Evidence of lawyer

(32) A party to an assessment of costs or a review of a lump sum bill may put in evidence the opinion of a lawyer as to the nature and importance of the services rendered and of the matter involved and the reasonableness of the charges made, but a party must not put in evidence the opinions of more than 2 lawyers, and a lawyer giving an opinion may be required to attend for examination and cross-examination.

Disallowance of fees and costs

(33) If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following:

(a) disallow any fees and disbursements between the lawyer and the lawyer's client or, if those fees or disbursements have been paid, order that the lawyer repay some or all of them to the client;

(b) order that the lawyer indemnify the lawyer's client for all or part of any costs that the client has been ordered to pay to another party;

(c) order that the lawyer be personally liable for all or part of any costs that the lawyer's client has been ordered to pay to another party;

(d) make any other order that the court considers will further the object of these Supreme Court Civil Rules.

[am. B.C. Reg. 28/2024, Sch. A, s. 20.]

Costs may be ordered without assessment

(34) If the court makes an order under subrule (33), the court may

(a) direct a registrar to conduct an inquiry and file a report with recommendations as to the amount of costs, or

(b) subject to subrule (37), fix the costs with or without reference to the tariff in Appendix B.

Notice

(35) An order against a lawyer under subrule (33) or (34) must not be made unless the lawyer is present or has been given notice.

Order to be served

(36) A lawyer against whom an order under subrule (33) or (34) has been made must promptly serve a copy of the entered order on the lawyer's client.

[am. B.C. Reg. 28/2024, Sch. A, s. 20.]

Limitation

(37) An order by the court under subrule (34) (b) in respect of the costs of an application must not exceed $1 000.