Court of Appeal File No. M44123
M44124

COURT OF APPEAL FOR ONTARIO

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

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

Applicants

JOINT BOOK OF AUTHORITIES
OF THE DIP LENDERS AND THE AD HOC COMMITTEE
(Motion for Leave to Appeal in writing returnable week of September 8, 2014)

August 29, 2014

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INDEX

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INDEX

TAB	AUTHORITY
13	A.H. Oosterhoff *et al, Oosterhoff on Trusts: Texts, Commentary and Materials*, 6th ed (Toronto: Thomson Canada Limited, 2004)
14	*Outset Media Corp v Stewart House Publishing Inc,* [2003] O.J. No. 2558 (CA)
15	*Salo v Royal Bank of Canada (B.C.C.A.)*, [1998] B.C.J. No. 999
16	*Technicore Underground Inc. v. Toronto (City)*, [2012] O.J. No. 4235 (ON CA)
17	*Blue Range Resource Corp. (Re),* [2000] A.J. No. 1622

TAB 1

Case Name:

ROI Fund Inc. v. Gandi Innovations Ltd.

Between
Return on Innovation Capital Ltd. as agent for ROI Fund Inc., ROI Sceptre Canadian Retirement Fund, ROI Global Retirement Fund and ROI high Yield Private Placement Fund and Any Other Fund Managed by ROI from time to time, Applicants/Respondents, and Gandi Innovations Limited, Gandi Innovations Holdings LLC and Gandi Innovations LLC, Respondents/Appellants

[2012] O.J. No. 31

2012 ONCA 10

90 C.B.R. (5th) 141

2012 CarswellOnt 103

211 A.C.W.S. (3d) 264

Docket: M40553

Ontario Court of Appeal
Toronto, Ontario

R.J. Sharpe, R.A. Blair and P.S. Rouleau JJ.A.

Heard: January 3, 2012 by written submissions.
Judgment: January 9, 2012.

(13 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Claims against directors -- Motion by officers, directors and shareholders in Gandi Group for leave to appeal from order determining their entitlement to indemnity from Gandi Group companies arising out of arbitration proceedings brought against them by TA Associates dismissed -- TA Associates was major unsecured creditor in

CCAA proceedings -- Issues raised by appeal were of no significance to practice -- Further, appeal with respect to these issues had little merit.

Motion by the officers, directors and shareholders in the Gandi Group for leave to appeal from an order determining their entitlement to indemnity from the Gandi Group companies arising out of arbitration proceedings brought against them by TA Associates, the major unsecured creditor in the CCAA proceedings. The Gandi Group companies were under CCAA protection. The order provided that the claimants were only entitled to indemnity from the direct and indirect parent company, that any claim of James Gandy was subordinated to the claim of TA Associates because of an earlier existing Subordination Agreement, and that the claims for indemnification in respect of the TA Associates claim in the arbitration were equity claims for purposes of the CCAA and therefore subsequent in priority to the claims of unsecured creditors.

HELD: Motion dismissed. The indemnification issue and subordination issues raised by the appeal were of no significance to the practice and the appeal with respect to these issues had little merit. The application judge's determination of the claimants' indemnity claims as equity claims was also not of significance to the practice since all insolvency proceedings commenced after the new provisions of the CCAA came into effect in September 2009 would be governed by those provisions, not by the prior jurisprudence.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 2(1), s. 6(8)

Counsel:

Christopher J. Cosgriffe and Natasha S. Danson, for James Gandy, Hary Gandy and Trent Garmoe.

Matthew J. Halpin and Evan Cobb, for TA Associates Inc.

Harvey Chaiton and Maya Poliak, for the Monitor.

ENDORSEMENT

The following judgment was delivered by

THE COURT:--

Overview

1 The moving parties (James Gandy, Hary Gandy and Trent Garmoe) are officers, directors and shareholders in the Gandi Group, a series of related companies currently under CCAA protection. In those proceedings they assert indemnity claims in the range of $75 - 80 million against each of the companies in the Gandi Group. The indemnity claims arise out of arbitration proceedings brought against them individually, as officers and directors, by TA Associates, a disgruntled investor in the Gandi Group. TA Associates is the major unsecured creditor in the CCAA proceedings.

2 The assets of the Gandi Group have been sold and what remains to be done in the CCAA process is the finalization of a plan of compromise and arrangement for the distribution of the proceeds among the various creditors. Before settling on the most effective type of plan for such a distribution - a consolidated plan, a partial consolidation plan, or individual corporate plans - the Monitor and the creditors sought to have two preliminary issues determined by the Court:

a) whether the moving parties (the Claimants) are entitled to indemnity from all of the entities which comprise the Gandi Group, and, if so,
b) whether those indemnification claims are "equity" or "non-equity" claims for purposes of the CCAA (non-equity claims have priority).

3 On August 25, 2011, Justice Newbould, sitting on the Commercial List, ruled:

a) that the Claimants were only entitled to indemnity from the direct and indirect parent company, Gandi Holdings (except that the Claimant, James Gandy only was also entitled to indemnification from a second entity in the Group, Gandi Canada);
b) that any claim of James Gandy was subordinated to the claim of TA Associates because of an earlier existing Subordination Agreement; and
c) that the claims for indemnification in respect of the TA Associates claim in the arbitration were equity claims for purposes of the CCAA and therefore subsequent in priority to the claims of unsecured creditors.

4 The Claimants seek leave to appeal from that order.

5 We deny the request.

Analysis

The Test

6 Leave to appeal is granted sparingly in CCAA proceedings and only when there are serious and arguable grounds that are of real and significant interest to the parties. The Court considers four factors:

(1) Whether the point on the proposed appeal is of significance to the practice;

(2) Whether the point is of significance to the action;
(3) Whether the appeal is prima facie meritorious or frivolous; and
(4) Whether the appeal will unduly hinder the progress of the action.

See *Re Stelco (Re)*, (2005), 75 O.R. (3d) 5, at para. 24 (C.A.).

7 The Claimants do not meet this stringent test here.

The Indemnification Issue

8 Whether the Claimants are entitled to indemnification from all or just one or some of the entities in the Gandi Group was essentially a factual determination by the motion judge, is of no significance to the practice as a whole, and the proposed appeal on that issue is of doubtful merit in our view. We would not grant leave to appeal on that issue.

The Subordination Issue

9 The same may be said for the Subordination Agreement issue. The Claimants argue that by declaring that the indemnity claim of James Gandy is subordinate to the CCAA claim of TA Associates, the motion judge usurped the role of the pending arbitration. We do not agree. The subordination issue needed to be clarified for purposes of the CCAA proceedings. None of the criteria respecting the granting of leave is met in relation to this proposed ground.

The "Equity Claim" Issue

10 Nor do we see any basis for granting leave to appeal on the equity/non-equity claim issue.

11 "Equity" claims are subsequent in priority to non-equity claims by virtue of s. 6(8) of the CCAA. What constitutes an "equity claim" is defined in s. 2(1) and would appear to encompass the indemnity claims asserted by the Claimants here. Those provisions of the Act did not come into force until shortly after the Gandi Group CCAA proceedings commenced, however, and therefore do not apply in this situation. Newbould J. relied upon previous case law suggesting that the new provisions simply incorporated the historical treatment of equity claims in such proceedings: see, for example, *Re Nelson Financial Group Ltd.*, 2010 ONSC 6229 (CanLII), (2010), 75 B.L.R. (4th) 302, at para. 27 (Pepall J.). He therefore concluded that TA Associates was in substance attempting to reclaim its equity investment in the Gandi Group through the arbitration proceedings and that the Claimants' indemnity claims arising from that claim must be equity claims for CCAA purposes as well.

12 This issue in the proposed appeal is not of significance to the practice since all insolvency proceedings commenced after the new provisions of the CCAA came into effect in September 2009 will be governed by those provisions, not by the prior jurisprudence. The interpretation of sections 6(8) and 2(1) does not come into play on this appeal. To the extent that existing case law continues

to govern whatever pre-September 2009 insolvency proceedings are still in the system, those cases will fall to be decided on their own facts. We see no error in the motion judge's analysis of the jurisprudence or in his application of it to the facts of this case, and therefore see no basis for granting leave to appeal from his disposition of the equity issue in these circumstances.

Disposition

13 The motion for leave to appeal is therefore dismissed. Costs to the Monitor and to TA Associates fixed in the amount of $5,000 each, inclusive of disbursements and all applicable taxes.

R.J. SHARPE J.A.
R.A. BLAIR J.A.
P.S. ROULEAU J.A.

cp/e/qllxr/qljxr/qlmll/qlana/qlcas

TAB 2

Case Name:

Blue Note Caribou Mines Inc. (Re)

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF the Application of Blue Note Caribou Mines Inc., a body corporate
AND IN THE MATTER OF the Application of Pricewaterhousecoopers Inc., Trustee in Bankruptcy of Blue Note Caribou Mines Inc.
AND IN THE MATTER OF an Application by Breakwater Resources Ltd. and Canzinco Ltd. for various orders relating to the Stay of Proceedings against Blue Note Caribou Mines Inc.
AND IN THE MATTER OF the Application By J.S. Redpath Limited (Court File No. N/C/69/08) and Longyear Canada, ULC and Boart Longyear Alberta Limited, doing business under the name and style of Boart Longyear Canada (Court File No. N/C/68/08), Lien Claimants, for an Order lifting the Stay Order and continuing the said Lien Claimants' Action
Between
Royal Bank of Canada and Certain Other Noteholders, pursuant to the Trust Indenture between Computershare Trust Company of Canada and Blue Note Mining Inc., dated May 4, 2007, Intended Appellants (Applicants), and
Pricewaterhousecoopers Inc., in its capacity as Monitor of Blue Note Caribou Mines Inc. and in its capacity as Trustee in Bankruptcy of Blue Note Caribou Mines Inc., Diorite Securities Limited in its capacity as Trustee of the Fern Trust, Breakwater Resources Ltd., Canzinco Ltd., J.S. Redpath Limited and Longyear Canada, ULC and Boart Longyear Alberta Limited, doing business under the name and style of Boart Longyear Canada, Provincial Holdings Limited, Computershare Trust Company of Canada, Intended Respondents (Respondents)
And between
Maple Minerals Corporation, Intended Appellant (Applicant), and
Pricewaterhousecoopers Inc., in its capacity as Monitor of Blue Note Caribou Mines Inc. and in its capacity as Trustee in Bankruptcy of Blue Note Caribou Mines Inc., Diorite Securities

Limited in its capacity as Trustee of the Fern Trust, Breakwater Resources Ltd., Canzinco Ltd., J.S. Redpath Limited and Longyear Canada, ULC and Boart Longyear Alberta Limited, doing business under the name and style of Boart Longyear Canada, Provincial Holdings Limited, Computershare Trust Company of Canada, Intended Respondents (Respondents)

[2010] N.B.J. No. 267

[2010] A.N.-B. no 267

360 N.B.R. (2d) 67

69 C.B.R. (5th) 298

2010 CarswellNB 388

File Nos. 41-10-CA and 42-10-CA

New Brunswick Court of Appeal

B.R. Bell J.A.

Heard: April 12, 2010.
Judgment: May 19, 2010.

(21 paras.)

Bankruptcy and insolvency law -- Proceedings -- Appeals and judicial review -- Leave to appeal -- Applications by Maple Minerals and others for leave to appeal from an order that Fern Trust's net profit interest remained in force as it was not affected by Blue Note Caribou Mines' bankruptcy, and that Breakwater Resources held a 20 per cent proprietary interest in the real property of Blue Note's mine dismissed -- The issues were not significant to the practice and the proposed appeals were not meritorious.

Civil litigation -- Civil procedure -- Appeals -- Leave to appeal -- Applications by Maple Minerals and others for leave to appeal from an order that Fern Trust's net profit interest remained in force as it was not affected by Blue Note Caribou Mines' bankruptcy, and that Breakwater Resources held a 20 per cent proprietary interest in the real property of Blue Note's mine dismissed -- The issues were not significant to the practice and the proposed appeals were not meritorious.

Applications by Maple Minerals and others for leave to appeal from an order that Fern Trust's net

profit interest remained in force as it was not affected by Blue Note Caribou Mines' bankruptcy, and that Breakwater held a 20 per cent proprietary interest in the real property of Blue Note's mine. In July 2009, Blue Note made an assignment in bankruptcy. In September 2009, PricewaterhouseCoopers ("PWC"), in its capacity as monitor and trustee of Blue Note, entered into an agreement with the predecessor of Maple Minerals for the sale of Blue Note's assets. Two of the encumbrances which PWC and Maple Minerals sought to extinguish were a 10 per cent net profit interest held by Diorite Securities in its capacity as trustee of Fern Trust, and a 20 per cent interest in the real estate claimed by Breakwater Resources.

HELD: Applications dismissed. There was overwhelming evidence to support the motion judge's conclusions. The issues raised on appeal were limited to the facts of the case and were not significant to the practice. Furthermore, the proposed appeals were not prima facie meritorious, and they would have unduly hindered the progress of the matter.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.02(2)(b)

New Brunswick Rules of Court, Rule 62.03(4)

Counsel:

For the Intended Appellants: Steven L. Graff and Aaron T. Collins, for Royal Bank of Canada and Certain Other Noteholders.

Howard A. Gorman, for Maple Minerals Corporation.

For the Intended Respondents:

George L. Cooper, for PricewaterhouseCoopers Inc., as Monitor and Trustee in Bankruptcy of Blue Note Caribou Mines Inc.

Thomas G. O'Neil, Q.C., for Diorite Securities Limited as Trustee of the Fern Trust.

Stephen J. Hutchinson, for Breakwater Resources Ltd. and Canzinco Ltd.

DECISION

B.R. BELL J.A.:--

I. Introduction

1 On July 14, 2009 Blue Note Caribou Mines Inc. (Blue Note), the owner of the Caribou mines, made an assignment in bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. On September 30, 2009, PricewaterhouseCoopers Inc. (PWC), in its capacity as monitor and trustee of Blue Note, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 entered into an agreement with the predecessor of Maple Minerals Corporation (Maple Minerals) for the sale of Blue Note's assets. The sales agreement contemplated the sale of the assets in two stages. Stage I involved the sale of the personal property at a price of $3 million CDN and stage II involved the sale of the real property for $1.25 million CDN. The stage I sale closed on October 7, 2009. The stage II sale was contingent upon a court order to permit the transfer free and clear of all interests, claims and encumbrances on the real estate. Two of the encumbrances which PWC and Maple Minerals sought to extinguish were: a 10% net profit interest (NPI) held by Diorite Securities Limited in its capacity as trustee of the Fern Trust (Fern Trust), and a 20% interest in the real estate claimed by Breakwater Resources Ltd. (Breakwater). In response to PWC's motion to extinguish liens and encumbrances, Breakwater moved for a declaration that it was entitled to a 20% interest in the mine (this claim originally was for the whole of the mine, including personal property, but was later amended to claim an interest in real estate only).

2 The motions by PWC and Breakwater were consolidated by the motion judge and heard in Bathurst, N.B. on January 12, 13, 14, 15 and 16, 2010. Following a lengthy analysis of the relevant facts and jurisprudence, the motion judge concluded: (1) Fern Trust's NPI remains in force as it was not affected by Blue Note's bankruptcy; and (2) Breakwater holds a 20% proprietary interest in the real property of the mine. In addition, the motion judge refused a request by Breakwater and some of the lien claimants to lift the stay of proceedings then in place pursuant to s. 11.02(2)(b) of the *Companies' Creditors Arrangement Act*.

3 Maple Minerals seeks leave to appeal the decision in respect of both Breakwater's and Fern Trust's interest. Royal Bank of Canada and certain other Note Holders pursuant to a Trust Indenture between Computer Share Trust Company Canada and Blue Note dated May 4, 2007 (RBC & other Note Holders) seek leave to appeal only with respect to the motion judge's conclusions regarding Fern Trust's interest.

4 Breakwater challenges both Maple Minerals' and the RBC & other Note Holders' standing to seek leave to appeal. Fern Trust joins Breakwater in its challenge to Maple Minerals' standing.

II. Standing

A. *Standing -- Maple Minerals*

5 Breakwater and Fern Trust assert that Maple Minerals is in the same position as a losing bidder at an auction. They rely, in part, upon *Re Consumers Packaging Inc.* (2001), 150 O.A.C. 384, [2001] O.J. No. 3908 (C.A.) (QL) where an unsuccessful bidder sought leave to appeal an order

under the *CCAA* approving a sale to a competing bidder. The Court, *per curiam*, held:

> [...] despite its protestations to the contrary, it is evident that Ardagh is a disappointed bidder [...]. There is authority from this court that an unsuccessful bidder has no standing to appeal or to seek leave to appeal. As a general rule, unsuccessful bidders do not have standing [...] (or to appeal from an order approving the sale) because the unsuccessful bidders "have no legal or proprietary right as technically they are not affected by the order" [...] [para. 7]

6 Similar jurisprudence is found in the recent case of *BDC Venture Capital Inc. v. Natural Convergence Inc*., [2009] O.J. No. 3611 (QL), 2009 ONCA 637. The debtor developed software enabling its licensees to sell services to their customers. The debtor's business was in financial distress. One of its licensees provided the debtor with initial financial support, and then offered to purchase its assets. The debtor accepted the offer, which was supported by its secured creditors. The debtor obtained orders appointing an interim receiver and authorizing the sale. After the orders were made, another of the debtor's licensees tendered a comparable offer for the purchase of the debtor's assets and appealed from the order authorizing the sale to the first licensee. As a result of the appeal, the order authorizing the sale to the first licensee was automatically stayed pursuant to s. 195 of the *Bankruptcy and Insolvency Act*. The first licensee (the purchaser) applied for an order lifting the stay. In granting the motion, Lang J.A., for the Court, stated:

> [...] on the material before me, BluArc's main interest in the sale appears to be that of a belated and disappointed potential purchaser. It does not appear to have a legal or proprietary right to either participate in the sale process or attack that process. [...] [para. 20]

7 Despite the stay having been lifted, BluArc proceeded with its appeal. In *BDC Venture Capital Inc v. Natural Convergence Inc.*, [2009] O.J. No. 3896 (QL), 2009 ONCA 665 the Court concluded BluArc had no standing to bring the appeal.

8 With respect, the circumstances in the present case are not at all similar to those in which one is faced with an appeal by a 'bitter bidder'. In the present case, the proposed appellant was not a 'bidder'. Following intensive negotiations, it entered into a two stage agreement for the purchase of all of the assets of Blue Note. The parties had completed Stage I of that agreement. Maple Minerals acquired a proprietary interest in the whole of the agreement, regardless of the fact that part of it contemplated a court order that would permit the transfer of rights, free and clear of all encumbrances. It had argued its case fully before the motion judge. The motion judge did not limit Maple Minerals' standing before him; nor, was any challenge made before him to its standing. In my view, this is one of those cases in which a prospective purchaser has acquired a legal right or interest which could be adversely affected by a court order. It should therefore have standing to make its case (see *Skyepharma PLC v. Hyal Pharmaceutical Corp*. (2000), 47 O.R. (3d) 234, [2000] O.J. No. 467 (C.A.) (QL), at para 19.)

B. *Standing -- RBC & other Note Holders*

9 All parties agree that the formal name of one of Blue Note's secured creditors is Computer Share Trust Company of Canada. However, all parties also acknowledge, and the evidence in the record demonstrates, that pursuant to a trust indenture Computer Share represents a number of secured creditors, RBC being one of them. Computer Share can only act upon the authorization of a fixed percentage of the secured creditors represented by it. Due to the limited time available to react in the present case, sufficient numbers of the secured creditors bound by the trust indenture were unable to collectively provide instructions to Computer Share on the leave application. For that reason, RBC & other Note Holders, all of whom are secured creditors affected by the motion judge's decision, seek leave to appeal. In my view, this Court would be putting form over substance in the event it were to conclude that RBC & other Note Holders should be denied standing because of the language of the trust indenture. I conclude they have standing to appeal the decision.

III. Merits of the leave application

10 The leave provisions under Rule 62.03(4) of the *Rules of Court* and the *CCAA* are set out below:

APPEALS
RULE 62
CIVIL APPEALS TO THE COURT OF APPEAL

62.03 Leave to Appeal

(4) In considering whether or not to grant leave to appeal, the judge hearing the motion may consider the following:

(a) whether there is a conflicting decision by another judge or court upon a question involved in the proposed appeal;
(b) whether he or she doubts the correctness of the order or decision in question; or
(c) whether he or she considers that the proposed appeal involves matters of sufficient importance.

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

Leave to appeal

> **13.** Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.
>
> R.S., 1985, c. C-36, s. 13; 2002, c. 7, s. 134.

Court of appeal

> **14.**(1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.
>
> **Practice**
>
> (2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal.
>
> R.S., 1985, c. C-36, s. 14; 2002, c. 7, s. 135.

11 While there is no apparent conflict between the two enactments, courts do take a different approach to their interpretation. Given the very broad language of the New Brunswick codification of the test, I will limit my assessment to the *CCAA* jurisprudence. Generally, leave to appeal in *CCAA* proceedings is granted sparingly. In *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5, [2005] O.J. No. 1171 (C.A.) (QL), Blair J.A. discussed the criteria to be applied in determining whether to grant leave to appeal under the *CCAA*. He observed as follows:

> This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": *Country Style Food Services Inc. (Re)* (2002), 158 O.A.C. 30; [2002] O.J. No. 1377 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test,

namely,

> (a) whether the point on appeal is of significance to the practice;
> (b) whether the point is of significance to the action;
> (c) whether the appeal is prima facie meritorious or frivolous;
> (d) whether the appeal will unduly hinder the progress of the action.

(para. 24)

12 Similar statements of the law are found in Manitoba, Alberta and British Columbia jurisprudence, as is evident in the following excerpt from the decision of Monnin J.A. in *Re Winnipeg Motor Express Inc*. (2008), 236 Man.R. (2d) 3, [2008] M.J. No. 392 (QL), 2008 MBCA 133:

> [...] the test to be applied on a leave application under the *CCAA* is a narrow one and, as will be demonstrated, it is to be applied selectively and sparingly. Wittmann J.A. of the Alberta Court of Appeal sets out the test in *Canadian Airlines Corp., Re*, 2000 ABCA 149, 80 Alta. L.R. (3d) 213, in these words (at paras. 6-7):
>
> > The criterion to be applied in an application for leave to appeal pursuant to the *CCAA* is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: *Multitech Warehouse Direct Inc., Re* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Smoky River Coal Ltd., Re* (1999), 237 A.R. 83 (Alta. C.A.); *Blue Range Resource Corp., Re* (1999), 244 A.R. 103 (Alta. C.A.); *Blue Range Resource Corp., Re* (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Blue Range Resource Corp., Re* (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).
>
> Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C.C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p. 397:
>
> > (1) whether the point on appeal is of significance to the practice;
> > (2) whether the point raised is of significance to the action itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
(4) whether the appeal will unduly hinder the progress of the action.

These elements have been considered and applied by this Court, and were not in dispute before me as proper elements of the applicable criterion.

It is also useful to consider what was said in *Smoky River Coal* with respect to the granting of leave to appeal. We find (at paras. 61-62):

> The fact that an appeal lies only with leave of an appellate court (s. 13, *CCAA*) suggests that Parliament, mindful that *CCAA* cases often require quick decision making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases. [paras. 14-15]

13 It is against that legal backdrop that one must consider the findings of fact and the analysis undertaken by the motion judge in relation to both Breakwater and Fern Trust.

IV. Breakwater's 20% Interest in the mines

14 The motion judge concluded that Blue Note, as part of its consideration for acquiring the mines, issued to Breakwater an Unsecured Subordinated Convertible Debenture in the amount of $15 million CDN. The parties (Blue Note and Breakwater) also entered into a Marketing Agency Agreement and a Net Smelter Royalty Agreement. The debenture granted to Breakwater an option to convert the debenture into a 20% interest in the mines. On August 29, 2008 Breakwater exercised its conversion option. On September 3, 2008 Blue Note issued a press release entitled "Blue Note's Caribou has a new partner". In the press release Blue Note stated:

> Montreal, QC -- September 3, 2008 -- Blue Note Mining is pleased to report that Breakwater Resources has exercised its right pursuant to the terms of the Unsecured Subordinated Convertible Debenture issued by Blue Note dated August 1st, 2006 to convert the Debenture in exchange for a twenty percent (20%) interest in the mineral properties and mine facilities which comprise the Carbibou and Restigouche mines in New Brunswick now owned by Blue Note's subsidiary, Blue Note Caribou Mines Inc.
>
> Having the Debenture surrendered by Breakwater, Blue Note Caribou Mines and Breakwater are now contractually obligated to enter into a joint venture

> agreement which releases Blue Note and Blue Note Caribou Mines from all liability under the Debenture.
>
> "We feel that this decision validates everything we always have believed about the Caribou mines," Said Michael Judson, President and Chief Executive Officer of Blue Note Mining, "it is a high quality asset, and Breakwater understands its value."

15 In notes to financial statements for the years ended December 31, 2007 and December 31, 2008, Blue Note's auditors, Ernst & Young reported as follows:

> [...]
>
> As at August 29, 2008, Breakwater Resources Ltd. exercised the conversion option to obtain a 20% interest in the Caribou Mines. This conversion resulted in a loss on conversion of $14,949,162 which represents the difference between 20% of the carrying value of the Caribou Mines as of August 29, 2008 and $11,229,285 the carrying value of the Debenture at that date ... The Corporation has accounted for this conversion as a sale of a portion of their mining properties, constituting a business and therefore has accounted for the investment in the Caribou Mines by Breakwater Resources Ltd. as a non controlling interest.

16 Finally, on July 17, 2009, PWC, acting as monitor, advised Breakwater that it could not claim to be a creditor of Blue Note since it had converted its interests into a proprietary one.

17 While litigation has arisen between Blue Note and Breakwater concerning some of the terms of the conversion, including a joint venture agreement, there is overwhelming evidence to support the motion judge's conclusion that Breakwater holds a 20% interest in the mines.

18 Having considered the motion judge's conclusions, I am of the view the issue raised on appeal regarding Breakwater is one limited to the facts of the case. While of significance to the parties, the issue raised is not significant to the practice. I am also of the view the proposed appeal is not *prima facie* meritorious, and would unduly hinder the progress of the matter. I therefore deny leave to appeal the motion judge's decision regarding Breakwater's interest in the mines.

V. Fern Trust's NPI in the mines

19 In August 1990, East West Caribou Mining Limited (Caribou) owned the mines. During a refinancing of the mines at that time, Caribou executed a document which included the granting of a "freely assignable 10% net profits interest [NPI]" to East West Minerals N.L. Fern Trust is the successor to East West Minerals N.L. The NPI runs with the land. In this regard see *Blue Note*

Mining Inc. v. Fern Trust (Trustee of) (2008), 337 N.B.R. (2d) 116, [2008] N.B.J. No. 360 (QL), 2008 NBQB 310; aff'd (2009), 342 N.B.R. (2d) 151, [2009] N.B.J. No. 75 (QL); 2009 NBCA 17. The document defines Caribou as being East West Caribou Mining Limited. Paragraph 7 of the document provides that the NPI will terminate upon the bankruptcy of Caribou. Maple Minerals and the RBC & other Note Holders contend that because Blue Note, the successor to Caribou is bankrupt, it follows that the NPI is no longer in effect. They say the requirement to pay the 10% NPI died with the bankruptcy of Blue Note. In deciding that the NPI remained in full force and effect, the motion judge applied conventional contractual interpretation techniques, including the plain and ordinary meaning rule. He noted that the clause in question referred to the bankruptcy of "Caribou", and not its "successor and assigns". He noted that "Caribou" is a defined term in the contract. Furthermore, he noted that the NPI is to be read in conjunction with a subordination agreement which makes provision for, *inter alia*, the insolvency of the "borrower"; the borrower being Caribou. Given the NPI is intended to be read in conjunction with the subordination agreement, the only logical conclusion is that neither "Caribou" nor "the borrower" refer to any entity other than Caribou.

20 With respect to Fern Trust's NPI in the mines, I am led to the same conclusion I reached in relation to Breakwater. While the issue raised in the proposed appeal is of significance to the parties, it is largely factually driven and therefore not of significance to the practice. I am also of the view the proposed appeal is not *prima facie* meritorious, and would unduly hinder the progress of the matter. I therefore deny leave to appeal the motion judge's decision regarding Fern Trust's NPI in the mines.

21 In view of the positions taken on the issue of standing, and the results on the merits of the leave applications, each party shall bear its own costs on the leave application.

B.R. BELL J.A.

cp/e/qlrxg/qljxr/qlced/qljyw

TAB 3

Case Name:

Winnipeg Motor Express Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a proposed plan of compromise or arrangement of Winnipeg Motor Express Inc., 4975813 Manitoba Ltd., and 5273634 Manitoba Ltd.

[2008] M.J. No. 392

2008 MBCA 133

[2009] 7 W.W.R. 104

48 C.B.R. (5th) 202

15 P.P.S.A.C. (3d) 1

2008 CarswellMan 564

236 Man.R. (2d) 3

174 A.C.W.S. (3d) 25

Docket: AI08-30-07003

Manitoba Court of Appeal

M.A. Monnin J.A.

Heard: October 30, 2008.
Judgment: November 21, 2008.

(25 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCCA) matters -- Application of Act -- Application by creditor for leave to appeal an order made under the provisions of the Companies' Creditors Arrangement Act dismissed -- The evidence that was before the motions judge was clear that the appellant was attempting to set off the amount it owed, and that it

was barred from doing so by a No Offset Agreement it had executed -- Companies' Creditors Arrangement Act.

Application by Totalline Transport for leave to appeal an order made under the provisions of the Companies' Creditors Arrangement Act. Winnipeg Motor Express Inc. (WME) and its related companies operated a truck transportation business out of Winnipeg. On May 15, 2008, WME came under the protection of the Act in an attempt to restructure its business operations and thereby avoid either bankruptcy or liquidation. Totalline was a long-standing customer of WME. After WME came under the protection of the Act, Totalline took the position that the amounts it had advanced to WME were not loans, but advances against amounts that were either owing or soon to be owing to WME for the provision of transportation services.

HELD: Application dismissed. Totalline had not shown meritorious grounds of appeal within the context of the guiding principles of the Act or that it had raised issues that were significant to practice under the Act. The evidence that was before the motions judge was clear that Totalline was attempting to set off the amount it owed, and that it was barred from doing so by a No Offset Agreement it had executed.

Statutes, Regulations and Rules Cited:

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

Counsel:

J.S. Kennedy *and* ***S.A. Zinchuk*** *for Totalline Transport Inc.*

G.B. Taylor *for Winnipeg Motor Express Inc.*

H.G. Chaiton *for Heller Financial Canada Holding Company.*

D.G. Ward, Q.C. *for Business Development Bank of Canada.*

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1 **M.A. MONNIN J.A.**:-- This is an application seeking leave to appeal from an order made under the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the *CCAA*).

2 Winnipeg Motor Express Inc. (WME) and its related companies, as set out in the style of cause, operated a truck transportation business out of Winnipeg. On May 15, 2008, WME came under the protection of the *CCAA* in an attempt to restructure its business operations and thereby avoid either

bankruptcy or liquidation.

3 Totalline Transport Inc. (Totalline) was a long-standing customer of WME.

4 Heller Financial Canada Holding Company (Heller) is the representative of a number of financial companies from the General Electric group of companies that provided financing to WME. Specifically, Heller extended a demand operating loan to WME, marginalized against 85 per cent of eligible accounts receivable pursuant to the terms of a Transportation Accounts Financing and Security Agreement (Operating Loan Agreement). To secure its indebtedness to Heller under that agreement, WME had granted a security interest to Heller, amongst other things, in all of its accounts receivables, which interest had been registered under *The Personal Property Security Act*, C.C.S.M., c. P35, of Manitoba.

5 Because of the financial difficulties WME was encountering and because of the long-standing business relationship with WME, Totalline had made a series of advances to WME to help it through those financial difficulties, commencing in September of 2007 and following through until February of 2008. In total during that period of time, it had advanced $1.85 million. At the time WME came under the protection of the *CCAA*, it owed Totalline $494,841.51. Whether that amount was to be classified as a loan or a pre-payment advance is at the heart of this leave application.

6 In December of 2007, at Heller's urging and to insure that the advances being made by Totalline would not reduce the funds available to it under the Operating Loan Agreement, WME requested that Totalline enter into a No Offset Agreement in favour of Heller, which Totalline did.

7 Pursuant to the No Offset Agreement, Totalline agreed to subordinate and postpone payment of all debts, liabilities and obligations of WME to it to the payment of all debts, liabilities and obligations of WME to Heller. It further waived in favour of Heller any right to set off any amount owing by WME to Totalline against any amounts owing by Totalline to WME from the sale of goods or the rendering of services.

8 After WME came under the protection of the *CCAA*, Totalline took the position that the amounts it had advanced to WME were not loans, but advances against amounts that were either owing or soon to be owing to WME for the providing of transportation services. If Totalline's position was correct, it would seriously impact WME's prospect of advancing their restructuring proposal as it would limit the amount of funds that WME could access under Heller's accommodation. In his third report to the court, dated July 16, 2008, the Monitor appointed under the *CCAA* wrote:

> 13. If the Totalline Accounts were to be treated as ineligible, this would negatively impact WME's ability to draw against the Heller facility, and therefore negatively impact WME's cash flow, by a further amount of approximately $421,000 (.85 x $495,000). The result of such a change in margining would immediately place WME in an overdrawn position under

the Heller Facility, and WME would be unable to draw further funds against the Heller Facility until the deposits eliminated the overdraft.

14. While WME can access the DIP Facility to bridge the gap in its funding requirements, the DIP Facility is currently utilized to $797,043; as the DIP Loan is limited to $1,000,000 WME only has available funds of $202,957 under this Facility. Absent Heller continuing to treat the Totalline Account as an Eligible Account, an increase in the DIP Facility, or satisfactory resolution otherwise of the Totalline Account, WME would not have sufficient funds available to it to meet its projected obligations next week.

CONCLUSION

15. If Heller continues to treat the Totalline Accounts as Eligible Accounts, or if the Totalline Accounts are collected, it is our view that WME would be able to continue to operate within the cash limits of the Heller Facility and current DIP Facility. If not, the Monitor would view this as a material adverse change to WME's cash position and promptly report accordingly.

9 With the consent of both WME and the Monitor, Heller brought a motion seeking an order requiring Totalline to pay the sum of $494,841.51 to WME. Pursuant to the terms of the consent from WME and the Monitor, Heller was obliged to treat any funds recovered as if they were deposited by WME in the normal course under the Operating Loan Agreement. As a result, the recovered funds would not become the property of Heller but would simply be treated as payment on account of receivables owing to WME so as to not reduce the availability of funds to WME under the terms of the Operating Loan Agreement.

10 The motions judge determined that the Totalline advances were loans as opposed to pre-payments and that therefore, pursuant to the No Offset Agreement Totalline had executed in favour of Heller, Totalline was precluded from setting off the amount outstanding. She stated:

> ... I have no hesitation in concluding that therein Totalline contracted out of its right to set off its accounts from W.M.E. against the advances it had earlier made to W.M.E. By virtue of the agreement, it has been relegated to the position of an unsecured creditor.

11 And further:

> ... As a result, I conclude that a triable issue has not been raised by the evidence presented by Totalline on this motion. I am satisfied that the receivable alleged by Heller is, as a result of the No Setoff [*sic*] Agreement, properly the property of W.M.E. and thus is a matter within the scope of these proceedings. It must be

paid by Totalline, and I am making an order to that effect.

12 Totalline now seeks to appeal the decision of the motions judge, alleging that she made two errors in disposing of the matter. Firstly, Totalline argues that the motions judge lacked jurisdiction to hear the motion because it was not a matter involving the company under *CCAA* protection -WME - but a dispute between two creditors - Totalline and Heller -unrelated to any *CCAA* plan of reorganization. Secondly, if the motions judge had jurisdiction to hear the matter, Totalline argues that she erred in the proper application of summary judgment principles.

13 Prior to dealing with the merits of the leave application itself, it is useful to briefly review the underlying principles of the *CCAA*. Such guidance can be found in the Alberta Court of Appeal decision of *Smoky River Coal Ltd. (Re)*, 1999 ABCA 179, 175 D.L.R. (4th) 703. Writing for the court, Hunt J.A. said (at paras. 51-53):

> This interpretation is supported by the legislative objectives underlying the *CCAA*. The purpose of the *CCAA* and the proper approach to its interpretation have been described as follows:
>
> > The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order [*sic*] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. [*Per* Farley J. in *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 (Ont. Ct. (Gen. Div.)) at 31.]
>
> As has been noted often, the *CCAA* was enacted by Parliament in 1933 during the height of the Depression. At that time, corporate insolvency led almost inevitably to liquidation because that was the only option available under legislation such as the *Bankruptcy Act*, R.S.C. 1927, c. 11, and the *Winding-Up Act*, R.S.C. 1927, c. 213. In the result, shareholder equity was destroyed, creditors received very little, and the social evil of unemployment was exacerbated. The *CCAA* was intended to provide a means of enabling the insolvent company to remain in business: *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311

(B.C.C.A.); *Quintette Coal*, [(1991), 7 C.B.R. (3d) 165 (B.C.S.C.)].

The courts have underscored that the *CCAA* requires account to be taken of a number of diverse societal interests. Obviously, the *CCAA* is designed to "provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both": *Lehndorff General Partner Ltd. (Re), supra*, at 31. It is intended to "prevent any manoeuvers for positioning among creditors during the interim period which would give the aggressive creditor an advantage to the prejudice of others who were less aggressive and would further undermine the financial position of the company making it less likely that the eventual arrangement would succeed": *Meridian*, [(1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.)], at 114. But the *CCAA* also serves the interests of a broad constituency of investors, creditors and employees: *Chef Ready, supra*, at 320; *Quintette Coal, supra*, at 314. These statements about the goals and operation of the *CCAA* support the view that the discretion under s. 11(4) should be interpreted widely.

14 Within the general context just described, the test to be applied on a leave application under the *CCAA* is a narrow one and, as will be demonstrated, it is to be applied selectively and sparingly. Wittmann J.A. of the Alberta Court of Appeal sets out the test in *Canadian Airlines Corp., Re*, 2000 ABCA 149, 80 Alta. L.R. (3d) 213, in these words (at paras. 6-7):

The criterion to be applied in an application for leave to appeal pursuant to the *CCAA* is not in dispute. The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: *Multitech Warehouse Direct Inc., Re* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.) at 63; *Smoky River Coal Ltd., Re* (1999), 237 A.R. 83 (Alta. C.A.); *Blue Range Resource Corp., Re* (1999), 244 A.R. 103 (Alta. C.A.); *Blue Range Resource Corp., Re* (2000), 15 C.B.R. (4th) 160 (Alta. C.A. [In Chambers]); *Blue Range Resource Corp., Re* (2000), 15 C.B.R. (4th) 192 (Alta. C.A. [In Chambers]).

Subsumed in the general criterion are four applicable elements which originated in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A.), and were adopted in *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279 (B.C.C.A.). McLachlin, J.A. (as she then was) set forth the elements in *Power Consolidated* as follows at p. 397:

(1) whether the point on appeal is of significance to the practice;
(2) whether the point raised is of significance to the action itself;
(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
(4) whether the appeal will unduly hinder the progress of the action.

These elements have been considered and applied by this Court, and were not in dispute before me as proper elements of the applicable criterion.

15 It is also useful to consider what was said in *Smoky River Coal* with respect to the granting of leave to appeal. We find (at paras. 61-62):

> The fact that an appeal lies only with leave of an appellate court (s. 13, *CCAA*) suggests that Parliament, mindful that *CCAA* cases often require quick decision making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.
>
> A similar opinion was expressed by Macfarlane J.A. in *Pacific National Lease Holding Corp. (Re)* (1992), 15 C.B.R. (3d) 265 (B.C.C.A.). In considering whether to grant leave to appeal, he observed at 272:
>
> > ... I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made.
> >
> > ...
> >
> > Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A.

16 As set out earlier in these reasons, Totalline argues that the motions judge lacked jurisdiction to grant the order that she did because, in doing so, she exceeded the jurisdiction that the *CCAA* provided. Totalline argues that the matter in dispute is unrelated to the *CCAA* proceedings with respect to WME and is in fact a separate application between two creditors.

17 In order to be successful on its application, Totalline must convince me that in fact the two

parties to the motion, namely Heller and Totalline, are unrelated to the *CCAA* proceedings and that what the motions judge found to be receivables were not the property of WME, but of Heller as the assignee of WME's book debts. This Totalline was not able to achieve.

18 Based on the consents of both the Monitor and WME, I have little difficulty in disposing of the argument that the Totalline advances were an issue of dispute between two creditors. To the contrary, it is clear and unarguable that Heller was proceeding on behalf of WME and was standing in its stead. In reality, the application dealt with a dispute between WME and Totalline. There is little merit to this argument; if permitted to be argued on appeal it would add very little of significance to the practice in *CCAA* proceedings.

19 I reach the same conclusion with respect to the ownership of the receivables. Heller had a security interest in those receivables, but never obtained an absolute assignment of them. The nature and definition of a general assignment of book debts, a document similar to the Operating Loan Agreement provided to Heller by WME, is discussed by the Supreme Court of Canada in its decision in *Alberta (Treasury Branches) v. M.N.R.; Toronto-Dominion Bank v. M.N.R.*, [1996] 1 S.C.R. 963. In my opinion, what Cory J. stated confirms the position being argued by Heller. In writing for the majority he said (at paras. 19-22):

> What is the Nature of a General Assignment of Book Debts?
>
> Like Major J., I am of the view that a GABD is a form of security for a loan which is always subject to the right of the debtor to redeem. It will be remembered that s. 224(1.3) defines the "security interest" in these words:
>
> > "security interest" means any interest in property that secures payment or performance of an obligation and includes an interest created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for;
>
> This definition encompasses the general assignments of book debts which are at issue in these appeals. However, I cannot agree with Major J.'s conclusion that the creditors are not secured creditors. I find it difficult, indeed impossible, to conclude that the same document can be both a security interest and an absolute assignment. The same document cannot, simultaneously, embrace two such conflicting concepts.
>
> Basically, security is something which is given to ensure the repayment of a loan.

Black's Law Dictionary (6th ed. 1990), at p. 1357, gives a clear definition of a "security interest" in these terms:

> The term "security interest" means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time, (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.

This definition is consistent with that set out in the [*Income Tax Act*]. It is in sharp contrast to the definition of the word "absolute" set out in the same source at p. 9 in these terms:

> Complete; perfect; final, without any condition or incumbrance; as an absolute bond (*simplex obligatio*) in distinction from a conditional bond. Unconditional; complete and perfect in itself; without relation to or dependence on other things or persons.

These definitions are, in my view, correct. If that is the case, then it can be seen that the same instrument cannot be both a "security interest" and an "absolute assignment". If an instrument is an absolute assignment, then since it is complete and perfect in itself, there cannot be a residual right remaining with the debtor to recover the assets. By definition, a complete and perfect assignment cannot recognize the concept of an equity of redemption. An absolute assignment cannot function as a means of "securing" the payment of a debt since there would be no basis for the debtor to recover that which has been absolutely assigned. An absolute assignment is irrevocable. To say that the same instrument can operate both as an absolute assignment and as a security interest is to simultaneously put forward two incompatible positions. The two conflicting concepts cannot live together in the same document.

20 The evidence that was before the motions judge was clear that Totalline was attempting to set off the amount it owed. It is just as clear that Totalline was barred from doing so by the No Offset Agreement it executed. In addition, it was also barred from doing so by para. 19 of the initial order according the protection of the *CCAA* to WME. That paragraph provides:

> 19. THIS COURT ORDERS that Persons may exercise only such rights of set-off as

> are permitted by section 18.1 of the CCAA as of the date of this Order. For greater certainty all Persons having deposits or other similar amounts received from the Applicants or any of them are hereby restrained from applying or setting-off such deposit against any amounts owing to the date of this Order without the written consent of the Applicants, and the Monitor, or as may be ordered by this Court, providing that nothing herein shall or shall be deemed to affect or restrain the usual operation of the Heller Facility.

21 With respect to this argument being advanced by Totalline, I have not been convinced that it is *prima facie* meritorious or that it raises issues that are significant to proceedings under the *CCAA*.

22 This brings me to Totalline's alternate argument that the motions judge erred in her application of the principles applicable to summary judgment proceedings which led her to the conclusion that the advances made by Totalline to WME were loans as opposed to advances against receivables. More precisely, Totalline argues that the judge erred in arriving at a determination of material facts in the absence of *viva voce* evidence and that her decision was unreasonable because of the conflict in the evidence before her.

23 In dealing with this aspect of the leave application, one must be mindful of the fact that an order such as the one under appeal, based on summary judgment principles, is a discretionary order and is to be interfered with by an appellate court only if palpable or overriding error can be shown. See *Homestead Properties (Canada) Ltd. v. Sekhri et al.*, 2007 MBCA 61, 214 Man.R. (2d) 148. In my view, Totalline has failed to do so.

24 It was incumbent on Totalline to put before the motions judge evidence that could convince her that there was a genuine issue to be tried. It failed to do so. There was evidence before the motions judge on which she could rely to come to the conclusion that she did. She committed no palpable and overriding error. There is no merit to this ground of appeal and it certainly will not advance the general practice under the *CCAA* to have this matter argued on appeal.

25 In summary, Totalline has failed to convince me that it has meritorious grounds of appeal within the context of the guiding principles of the *CCAA* or that it raises issues that are significant to the practice under the *CCAA*. Accordingly, its application for leave is denied with costs.

M.A. MONNIN J.A.

cp/e/qlbxm/qlcnt/qlhcs/qlhcs/qlced/qlgpr

TAB 4

Case Name:

Statoil Canada Ltd. (Arrangement relatif à)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:
STATOIL CANADA LTD., Petitioner - Impleaded party
v.
HOMBURG INVEST INC., Respondent - Debtor-Petitioner
and
THE CADILLAC FAIRVIEW CORPORATION LIMITED, BOS SOLUTIONS LTD., CANADIAN TUBULAR SERVICES INC., KEYWEST PROJECTS LTD., MHI FUND MANAGEMENT INC., SPT GROUP CANADA LTD. formerly NEOTECHNOLOGY CONSULTANTS LTD., PREMIER PETROLEUM CORP., TUCKER WIRELINE SERVICES CANADA INC., SURGE ENERGY INC., MOE HANNAH MCNEIL LLP, LOGAN COMPLETION SYSTEMS INC., CE FRANKLIN LTD., Impleaded third parties - Impleaded parties
and
SAMSON BELAIR/DELOITTE & TOUCHE INC., Impleaded Party - Monitor

[2012] Q.J. No. 3234

2012 QCCA 665

2012EXP-1531

J.E. 2012-824

EYB 2012-205048

No.: 500-09-022267-116 (500-11-041305-117)

Quebec Court of Appeal
District of Montreal

The Honourable Allan R. Hilton, J.A.

Heard: March 1, 2012.
Judgment: April 12, 2012.

(21 paras.)

Civil procedure -- Appeal -- Leave to appeal -- Questions which ought to be submitted to appeal -- Statoil's motion doesn't satisfy the Court that the judge's findings of fact could be found to be manifestly unfounded with the necessary determinative effect if the Court were to intervene -- The great latitude given Companies' Creditors Arrangement Act supervising judges would weigh heavily against any appeal succeeding given the apparent novelty of some of the questions raised -- Motion dismissed.

Statoil Canada Ltd. (Statoil) seeks leave to appeal a judgment granting Homburg's application for an order confirming the re-assignment and assignment of certain agreements relating to its position as a debtor with respect to commercial real estate premises in Alberta, and Homberg's release from obligations it had contracted thereunder. Statoil argues that the motions judge did not have the power and jurisdiction to grant the orders sought, that Homburg did not have the legal standing and interest to seek the conclusions of the motion and that the motions judge exercise his powers so as to interfere with the contractual rights of third parties as he did.

HELD: Motion dismissed. To obtain leave to appeal under the Companies' Creditors Arrangement Act (CCAA), the court must determine whether the point on appeal is of significance to the practice, whether the point raised is of significance to the action itself, whether the appeal is prima facie meritorious, or, on the other hand, whether it is frivolous, and whether the appeal will unduly hinder the progress of the action. The four recognized criteria are cumulative. Statoil doesn't satisfy the test incumbent upon it to be granted leave. Any appeal would have to proceed based on the trial judge's findings of fact. Whatever could be said of them, Statoil's motion doesn't satisfy the Court that they could be found to be manifestly unfounded with the necessary determinative effect if the Court were to intervene. Moreover, the great latitude given CCAA supervising judges would have weighed heavily against any appeal succeeding given the apparent novelty of some of the questions raised.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. c. C-36, s. 13, s. 14

Counsel:

Mtre Gerald N. Apostolatos, Mtre Stefan Chripounoff, for the Petitioner.

Mtre Éric Préfontaine, Mtre Martin Desrosiers, Mtre Alexandre for the Respondent.

Mtre Mark Meland, for the Impleaded third party THE CADILLAC FAIRVIEW CORPORATION LIMITED.

Mtre Mathieu Lévesque, for the Impleaded third parties BOS SOLUTIONS LTD., CANADIAN

TUBULAR SERVICES INC., PREMIER PETROLEUM CORP., MOE HANNAH MCNEIL LLP.

Mtre Louis Dumont, for the Impleaded third party TUCKER WIRELINE SERVICES CANADA INC.

Mtre Michael John Hanlon, for the Impleaded third party SURGE ENERGY INC.

Mtre Jocelyn Perreault, for the Impleaded party SAMSON BELAIR/DELOITTE & TOUCHE.

JUDGMENT

1 The Debtor Homberg Invest Inc. applied for relief under the *Companies' Creditors Arrangement Act*,[1] and an initial order was issued on September 9, 2011. The supervising judge, the Honourable Mr. Justice Louis J. Gouin, rendered judgment on December 5, 2011 granting Homburg's application for an order confirming the re-assignment and assignment of certain agreements relating to its position as a debtor with respect to commercial real estate premises in Alberta, and Homberg's release from obligations it had contracted thereunder. The effect of the order was to immediately enforce the obligations of Statoil Canada Ltd. under those agreements with respect to the landlord and subtenants of the premises. Statoil now seeks leave to appeal that judgment pursuant to sections 13 and 14 of the *CCAA*.

2 Statoil urges a barrage of reasons why leave should be granted,[2] which are conveniently summarized in paragraph 52 of its motion:

> a) Did the motions judge have the power and jurisdiction to grant the orders sought in the Motion?
> b) Did Homburg have the legal standing and interest to seek the conclusions of the Motion?
> c) Could the motions judge exercise his powers so as to interfere with the contractual rights of third parties (Statoil, Cadillac Fairview and subtenants) in the manner that he did in the judgment?

3 A threshold issue is the criteria to be considered upon such an application for leave. Based on the judgment of Wittman, J.A., as he then was, in *Resurgence Asset Management LLC v. Canadian Airlines Corp.*,[3] there are four such criteria:

> - whether the point on appeal is of significance to the practice;
> - whether the point raised is of significance to the action itself;
> - whether the appeal is prima facie meritorious, or, on the other hand, whether it is frivolous, and;

- whether the appeal will unduly hinder the progress of the action.

4 Judges of this Court to whom such applications have been addressed have held unanimously that the four criteria are cumulative; with the result that an applicant's failure to establish any one of them will result in the dismissal of the application.[4] In addition, it is also generally understood that an applicant carries a heavy burden in order to obtain leave, and that appellate courts will only grant such applications sparingly.

5 Without disputing the applicability of these four criteria, Statoil urges me to consider that they need not be cumulative, but weighed together, even if one or more of them are not established. In this respect, it points to the reasons of Yamauchi, J., of the Alberta Court of Queen's Bench in *Royal Bank of Canada v. Cow Harbour Construction Ltd.*,[5] who was hearing a *CCAA* leave application of the type before me. In doing so, Yamauchi, J. referred to reasons given in Alberta that advocate a different approach than the one that has been unanimously followed by judges of this Court. Here is what he said:

> 24 For DLL to obtain leave to appeal under the CCAA, it must meet the test set out by the Alberta Court of Appeal in *Fairmont Resort Properties Ltd. (Re)*, 2009 ABCA 360 at para. 10, where the court said:
>
> > The test for leave involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; (4) whether the appeal will unduly hinder the progress of the action.
>
> 25 Before this Court considers the factors involved in the "test for leave," it is worthwhile to outline the applicable standard of review that the Court of Appeal will apply if leave were to be granted. In *Canadian Airlines Corp. (Re)*, 2000 ABCA 149 at paras. 28-29, the court held that:
>
> > 28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the CCAA. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p. 95:

> ... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considerable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

26 In *Smoky River Coal Ltd. (Re)* (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., speaking for the unanimous Court, extensively reviewed the CCAA's history and purpose, and observed at p. 341:

> The fact that an appeal lies only with leave of an appellate court (s. 13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.
>
> The standard of review of this Court, in reviewing the CCAA decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

[...]

29 *Fairmont Resort* provides us with the "test for leave." The test is but one test, in which "there must be serious and arguable grounds that are of real and significant interest to the parties." To determine whether DLL has met its onus, we must consider the four factors that *Fairmont Resort* outlines. The question then becomes whether DLL must satisfy all the factors. In other words, if it fails on one (or more), does fail to meet the test? The answer to this question lies in the decision of O'Brien J.A. in *Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of)*, 2005 CarswellAlta 1527, 15 C.B.R. (5th) 235 (C.A.). In that case, Justice O'Brien went through and applied the four factors to the facts with which he was dealing. The applicant in that case had met some of the factors, but not others. Justice O'Brien at para. 15, made his decision not to grant leave after

> "weighing all the factors." In other words, success or failure to prove one or more of the factors does not guarantee that the applicant has met the "test for leave." The court must weigh all the factors.
> [Emphasis added]

6 In analyzing whether I should follow what was suggested in the foregoing extract or the judicial history that has prevailed in this province, I am mindful that the Supreme Court of Canada granted leave to appeal[6] the judgment of my colleague Chamberland, J.A. in *Newfoundland and Labrador v. AbitibiBowater*[7] in which he dismissed an application for leave to appeal. I can only assume the Court decided to hear the appeal to look at the merits of the Superior Court judgment of Gascon, J., as he then was,[8] rather than to decide whether Chamberland, J.A. had erred by refusing leave. Only time will tell once the Court's judgment on the merits is released.[9]

7 That being said, unless and until the Supreme Court determines a different test to apply by an appellate judge hearing a *CCAA* leave application, or until a panel of this Court holds that the test articulated in the extract I have quoted in paragraph [5] above is the one that should be followed, I believe that the better course for me is to apply the principles that have been repeatedly stated by judges of this Court. Counsel in Quebec are entitled to stability in knowing what test they will need to satisfy in bringing a *CCAA* leave application. The parameters of that test should not depend on who, as a matter of chance, happens to be the judge in chambers on the day they present their motion. I will therefore consider Statoil's application on the basis that the four recognized criteria are cumulative.

8 I turn now to the three grounds of appeal mentioned in paragraph [2] above.

9 With respect to the jurisdictional issue, Statoil argues that the motions judge overstepped the limits to which he was subject in a *CCAA* application of the type with which he was seized because the orders issued were not "necessary"[10] to facilitate Homburg's reorganization and to achieve the *CCAA* objectives. Instead, it says that he adopted what it characterizes as a "broad and result-driven" approach that is reflected in paragraph [114] of the judgment to the effect that granting the orders sought in Homburg's motion is a "fair, equitable, practical and efficient solution to HII's[11] default under the Head Lease".

10 To this argument, Homburg replies that Statoil misstates the law, and notes that section 11 *CCAA* refers not to necessity but to the power of a supervising judge "to make any order that it considers appropriate in the circumstances". It adds that by releasing Homburg from financial obligations under the agreements, the judgment promotes the remedial purpose of the *CCAA* by enhancing the possibility of a successful restructuring.

11 Next is the issue of standing.

12 Statoil argues that Homburg had no legal standing, with the exception of one conclusion that it does not contest, to seek declarations that relating to the enforcement of its obligations to Cadillac

Fairview under the Head Lease between it and Statoil, the effect of which is to remove Homburg from the line of fire. Statoil contends that only Cadillac Fairview had the required standing, and that Gouin, J. misconstrued the identity of the proper party before him.

13 As for Homburg, it says that it is at the centre of the various agreements whereby Statoil undertook to step into its shoes in the event of its default under the agreements, which has now happened. All that it sought by the conclusions of the motion, therefore, is a declaration that Statoil live up to the obligations it had contractually undertaken, and acknowledged subsequently in writing.

14 Finally, there is the issue of the interference with the contractual rights of third parties by the effect of the orders, in this case not only Statoil, but also Cadillac Fairview and the subtenants of the premises. All of them are third party non-debtors, and Statoil says that Gouin, J. simply lacked the authority to interfere with the exercise of their respective contractual rights between themselves. Statoil acknowledges what it describes as a "certain jurisprudential controversy on this issue", but says the controlling case is that of the Ontario Court of Appeal in *Stelco Inc. (Re)*.[12] Blair, J.A., for the Court, remarked that the *CCAA* contains "no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves",[13] and that the trial judge had been "very careful to say that nothing in his reasons should be taken to determine or affect the relationship between (categories of debenture holders)."[14]

15 I note immediately that the issue in *Re Stelco* arose in a very different context, namely, the classification of categories of debenture holders for voting purposes on a proposed plan of arrangement or compromise of a debtor company. The proposed classification was dismissed at trial and confirmed on appeal by the same panel that granted leave. The ratio of the judgment does not appear to be of much significance to the resolution of the issues that were before Gouin, J.

16 In a nutshell, while at the same time disputing Statoil's interpretation of the contractual agreements, Homburg argues that the issue is not, in and of itself, of any relevance to the ongoing *CCAA* proceedings, nor likely to be of any precedential value to insolvency practice in Canada.

17 In my view, whether individually or collectively, I do not consider that Statoil has satisfied the test incumbent upon it to be granted leave.

18 Any appeal would have to proceed based on the trial judge's findings of fact. Whatever may be said of them, Statoil's motion does not satisfy me that they could be found to be manifestly unfounded with the necessary determinative effect if the Court were to intervene. Moreover, the great latitude given *CCAA* supervising judges would weigh heavily against any appeal succeeding given the apparent novelty of some of the questions raised. In addition, although some of the legal issues appear interesting from an objective standpoint, they fall short of being significant to the action in the overall scheme of things, nor do they appear to be *prima facie* meritorious, although I would hesitate to characterize them as frivolous.

19 One final point, which is in and of itself dispositive, leads to the motion failing.

20 The judgment of Gouin, J. granted the relief claimed with provisional effect notwithstanding appeal, and no attempt was made to suspend provisional execution of the judgment. To the extent the terms of the judgment may already have been implemented, it would be akin to unscrambling scrambled eggs to put matters back where they were before the orders were implemented, not to mention the uncertainty that would be created by the mere fact of leave being granted.

21 Statoil's motion is accordingly dismissed with costs.

ALLAN R. HILTON, J.A.

1 R.S.C. c.-36.

2 I omit from consideration any grounds that essentially argue questions of interpretation of fact, which, even in the context of complicated commercial real estate transactions, would be highly unlikely to persuade a judge in chambers to grant leave. I also take no account of its argument that it was more or less bulldozed into a hearing that occurred 13 days after the service of the proceeding, thus, it says, preventing it from adequately conducting pre-trial discovery, since it seeks no relief, such as a new trial, that is directly related to the expedited process about which it complains.

3 [2000] A.J. No. 610, 2000 ABCA 149, at paras. 6 and 7.

4 See, for example, *4370422 Canada inc. (Davie Yards inc.) (Arrangement relatif à)*, J.E. 2012-159, 2011 QCCA 2442, at paras. 11 and 12 per Pelletier, J.A.; *Newfoundland and Labrador v. AbitibiBowater inc.* 68 C.B.R. (5th) 57, 2010 QCCA 965, at paras. 25-29 per Chamberland, J.A.; *Papiers Gaspésia inc. (Arrangement relative à)*, 9 C.B.R. (5th) 103, per Bich, J.A. at para. 5; *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, J.E. 2010-568, 2010 QCCA 403, per Bich, J.A., at para 9; and, *Imprimerie Mirabel inc. v. Ernst & Young inc.* J.E. 2010-1256, 2010 QCCA 1244, per Dufresne, J.A., at para. 5.

5 72 C.B.R. (5th) 261, 2010 ABQB 637.

6 [2010] C.S.C.R. no 269, Supreme Court of Canada file 33797.

7 *Supra* note 3.

8 2010 QCCS 1061.

9 The appeal was heard by the full bench on November 16, 2011, after which judgment was reserved.

10 Relying on *Century Services Inc. v. Canada (A.G.)*, [2010] 3 S.C.R. 379, 2010 SCC 60.

11 For ease of understanding, I am using the first name of the company, Homburg, rather than its initials, HII, to identify the respondent.

12 261 D.L.R. (4th) 368; [2005] O.J. No. 4883.

13 *Ibid.*, para. 32.

14 *Ibid.*, para. 33.

TAB 5

Case Name:

Hemosol Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a plan of compromise or arrangement of Hemosol Corp. and Hemosol LP

[2007] O.J. No. 687

2007 ONCA 124

31 C.B.R. (5th) 83

155 A.C.W.S. (3d) 496

2007 CarswellOnt 1083

Docket: (C46598) M34712/M34754

Ontario Court of Appeal
Toronto, Ontario

J. Labrosse, R.J. Sharpe and R.A. Blair JJ.A.

Heard: February 22, 2007.
Judgment: February 26, 2007.

(10 paras.)

Insolvency law -- Practice -- Proceedings in bankruptcy -- Appeal -- Motion to quash appeal of order made relating to company under CCAA protection allowed -- Leave was required for appeal -- Motion for leave to appeal dismissed -- Company seeking to assert rights under memorandum of understanding with parent of bankrupt did not seek extension of agreement, so its rights were extinguished.

Motion by Catalyst to quash the appeal of a numbered company from an order staying proceedings against Hemosol. The numbered company brought a cross-motion for leave to appeal from the

order. Hemosol sought protection under the Companies' Creditors Arrangement Act. The numbered company sought to enforce a Memorandum of Understanding against the parent corporation and first secured creditor of Hemosol. The Memorandum related to a conditional offer by the numbered company to purchase the assets of Hemosol, and provided the company was to fund Hemosol during the CCAA process, this funding being subordinate to the security of the parent. The parent later sold its debt position to Catalyst, who assumed all obligations of the parent under the Memorandum of Understanding. A judge made an order determining the rights of the parties. The judge rejected the numbered company's claim it was entitled to complete the Memorandum of Understanding. He found the Memorandum was no longer in effect as the company had not sought to extend it beyond its termination date. The judge rejected the submission the parent waived the deadline, but did not explicitly deal with the implications of the parent's silence in the face of the numbered company's continued payments under the Memorandum.

HELD: Motion allowed, the appeal was quashed, and the cross-motion for leave to appeal was dismissed. Leave was required for the numbered company's appeal, as the decision from which it appealed was rendered under the CCAA. There was no reason to interfere with the judge's findings regarding the numbered company's failure to obtain an extension for the termination date. A court would be reluctant to find the parent waived its legal rights in the circumstances.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 13

Appeal from:

On appeal from the order of Justice Colin L. Campbell of the Superior Court of Justice, dated January 22, 2007.

Counsel:

Paul J. Pape and John N. Birch for 2092248 Ontario Inc.

Robert S. Harrison and R. Graham Phoenix for MDS Inc.

David C. Moore for Catalyst Capital Group Inc. and Catalyst Fund Limited Partnership II, on behalf of its General Partner, Catalyst Fund General Partner II Inc.

Justin Forgarty and Gavin Finlayson for ProMetic Biosciences Inc.

Julia Falevich and Alan Mersky for the Interim Receiver and Monitor of Hemosol Corp. and Hemosol LP.

The following judgment was delivered by

1 THE COURT:-- The order at issue was made in the context of a proposed plan of arrangement of Hemosol Corp. and Hemosol L.P. (Hemosol) under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA). The appellant, 2092248 (209), sought to enforce a Memorandum of Agreement (MOA) against MDS Inc. and its assignee Catalyst Capital Group Inc. MDS was the parent corporation and the first-ranking secured creditor of Hemosol. The MOA relates to a conditional offer by 209 to purchase the assets of Hemosol and provides that 209 is to fund Hemosol during the CCAA process, this funding being subordinate to MDS's security. MDS later sold its debt position to Catalyst and Catalyst assumed all obligations of MDS under the MOA.

Motion to Quash

2 The respondents move to quash the appeal on the ground that the order was made under the CCAA and that leave to appeal is required by CCAA, s. 13.

3 In our view, the proceeding before the motion judge and the decision under appeal were conducted and rendered under the CCAA within the meaning of s. 13 and therefore leave to appeal is required. The notice of motion and the reasons of the motion judge explicitly state that the matter is a CCAA proceeding. Directions were sought, amongst other things, to determine rights and requirements of voting in relation to the proposed plan of arrangement. There was no independent originating process to justify any other conclusion. The order determined rights arising under an agreement that arose out of and that was related entirely to the CCAA proceeding. We agree that the order finally determines the rights of the parties, but we do not accept the submission that this characterization removes it from the ambit of the CCAA, s. 13 and the requirement for leave to appeal. Accordingly, there is no appeal as of right and, unless leave to appeal is granted, the appeal must be quashed.

Motion for leave to appeal

4 In the event we decide leave to appeal is required, 209 brought a cross-motion for leave to appeal.

5 It is common ground that the test for leave to appeal is:

(a) whether the point on appeal is of significance to the practice;
(b) whether the point is of significance to the action;
(c) whether the appeal is prima facie meritorious or frivolous;
(d) whether the appeal will unduly hinder the progress of the action.

(see *Re Country Style Food Services Inc.* [2002] O.J. No. 1377 (C.A.) at para. 15; *Re Stelco* [2005] O.J. No. 4883 (C.A.) at para. 15-16.

6 209's agreement to purchase the assets of Hemosol was conditional upon 209 reaching a satisfactory agreement with ProMetic Biosciences Inc. (ProMetic) as to Hemosol's licence to use certain intellectual property. MDA agreed to extend the deadline in the MOA to September 18, 2006, but 209 failed to reach agreement with ProMedic by that date. On September 21, 209 waived the ProMetic condition and asserted its right to conclude the MOA and purchase the assets of Hemosol.

7 Central to the motion judge's decision rejecting 209's claim that it was entitled to complete the MOA is a finding that 209 made a deliberate decision not to contact MDS to request an extension of the MOA beyond the September 18 termination date and that 209 knew that MDS had not agreed to an extension. The motion judge found that 209's failure to seek an extension was fatal and that the MOA was no longer in effect after the last deadline agreed to by MDS ended on September 18. The motions judge considered and rejected 209's claim that MDS had waived the September 18 deadline or was estopped from relying on it. He did not, however, explicitly deal with the principal submission advanced before us, namely that MDS's silence in the face of 209's continued payment under the MOA implies that MDS elected to waive 209's breech.

8 We see no basis upon which to interfere with the motion judge's findings that by failing to obtain an extension from MDS prior to the termination date, 209's right to under the MOA to purchase the assets of Hemosol expired. Nor do we see any basis to interfere with his findings as to estoppel. While the motions judge did not deal explicitly with the implied election point, in our view, that argument would be difficult to maintain in the face if his explicit finding that 209 was made aware that MDS was insisting upon the September 21 deadline and had not agreed to any extension. These are sophisticated commercial parties acting to maximize their commercial interests and the question of the deadline and the implications of MDS not agreeing to extend the deadline on 209's rights were very much on the on the table. In these circumstances, a court would be reluctant to imply that one party waived any of its legal rights.

9 However, even assuming that 209 does raise an arguable ground of appeal on the election point, we are not persuaded that 209 can meet the test for leave to appeal. 209's argument rests on well accepted legal principles. The only issue is whether 209 can bring the facts of this case within those legal principles. In our view, there is no point that transcends the interests of these parties and the point on appeal has insufficient significance to the practice to warrant granting leave to appeal.

Conclusion

10 Accordingly, the motion for leave to appeal is dismissed and the appeal is quashed with costs to Catalyst and MDS fixed in the agreed amount of $2,500 each, all inclusive.

J. LABROSSE J.A.
R.J. SHARPE J.A.
R.A. BLAIR J.A.

TAB 6

Indexed as:

Blue Range Resources Corp. (Re)

IN THE MATTER OF the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF Blue Range Resource Corporation
AND IN THE MATTER OF the application of CIBC World Markets Inc.
Between
CIBC World Markets Inc., applicant/appellant, and
Blue Range Resources Corporation, by its creditors' committee, respondent/respondent

[2001] A.J. No. 400

2001 ABCA 86

281 A.R. 172

104 A.C.W.S. (3d) 258

Docket: 01 00015

Alberta Court of Appeal
Calgary, Alberta

Fruman J.A.

Heard: March 14, 2001.
Oral judgment: March 14, 2001. Filed: March 30, 2001.

(4 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Appeals.

Application for leave to appeal a decision made under the Companies' Creditors Arrangement Act.

The trial judge construed two agreements negotiated between sophisticated parties. The agreements involved the same financial advisers, contemplated similar services, overlapped in time and contained trailer clauses. The trial judge found that the agreements could not co-exist and that the second agreement had replaced the first one.

HELD: Application dismissed. The issue raised by the appeal was not of general significance to the insolvency or financial services industry. No serious and arguable grounds were raised in the appeal.

Statutes, Regulations and Rules Cited:

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

Appeal From:

On appeal from the Judgment of LoVecchio J. made December 22, 2000.

Counsel:

P. Pastewka and C.J. Popowich, for the applicant/appellant.
G.H. Poelman and W.K. Johnston, for the respondent.

TRANSCRIPT OF ORAL REASONS

The judgment of the Court was delivered by

1 FRUMAN J.A. (orally):-- To grant leave from a decision made under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, the court must find "serious and arguable grounds that are of real and significant interest to the parties": Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R. (3d) 62 (C.A.). One of the factors to be considered is whether the appeal is of significance to the practice: Blue Range Resource Corp., Re (1999), 244 A.R. 103 (C.A.). I interpret practice broadly, to include not only the insolvency practice but the industry in which the claimant is involved, in this case, the financial services industry.

2 The trial judge construed two agreements negotiated between sophisticated parties, represented by legal advisers. The agreements involve the same financial adviser, contemplate similar services, overlap in time and contain "trailer clauses". The trial judge decided that the agreements could not co-exist and that the second agreement replaced the first. His construction was based on the unique circumstances and specific construction of the two agreements. This issue is not of general significance to the insolvency or financial services industry. Although the interpretation of "contact"

for purposes of determining whether a completion fee is payable under a trailer clause could have industry-wide implications, the determination in this case is fact specific and unlikely to have strong precedential value. In any event, the trial judge's decision on this point appears to be obiter.

3 To determine implied rescission and replacement, the trial judge, at para. 17 of his judgment, applied the test in Industrial Construction Ltd. v. Lakeview Development Co. Ltd. (1976), 16 N.B.R. (2d) 287 (Q.B.): "[...]the parties will be presumed to have intended to rescind the old contract and to have substituted a new one whenever the agreement is inconsistent with the original contract to an extent which goes to the very root of it". The applicant does not take issue with this test, but disagrees with the trial judge's analysis and his conclusion that the inconsistencies go to the very root of the contract.

4 The issue does not raise serious and arguable grounds. Accordingly the application for leave to appeal is dismissed.

FRUMAN J.A.

cp/i/qlrds

TAB 7

ONTARIO REPORTS

(SECOND SERIES)

REPORTS OF CASES DETERMINED IN
THE COURTS OF ONTARIO

Vol. 46

CITED 46 O.R. (2d)

Reported under the authority of

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commercial body of persons did, in fact, have a trading character to protect, and could sue in respect of publications tending to injure that character. The principle of injury to the character of a corporation is, in my view, even more realistic and applicable to a corporate school board.

In Canada, the British Columbia Court of Appeal in *City of Prince George v. British Columbia Television System Ltd.* (1979), 95 D.L.R. (3d) 577, [1979] 2 W.W.R. 404, 10 M.P.L.R. 24, considered the above cases, *inter alia*, and held that a municipal corporation in British Columbia had the capacity to sue for libel. And in *Church of Scientology of Toronto v. Globe & Mail Ltd. et al.* (1978), 19 O.R. (2d) 62, 84 D.L.R. (3d) 239 (Ont. H.C.), Mr. Justice Cory, as he then was, stated at p. 64 O.R., p. 241 D.L.R.:

> Then authorities lead one to the conclusion that there can be no doubt of the right of a non-profit corporation to bring an action for libel or slander without proof of special damages which would affect it in its property or financial position or in the nature of its trade or calling. Where the trade or calling as here is one of "religion" the scope for injury in the trade or calling may be very broad indeed.

For these reasons then, I held that the Board was a proper party, inasmuch as it had both the authority to maintain an action in libel, and a reputation that could be protected by such an action.

Application dismissed.

[COURT OF APPEAL]

Colautti Construction Ltd. v. City of Ottawa

LACOURCIERE, CORY AND TARNOPOLSKY JJ.A. 22ND MAY 1984.

Appeal — Grounds — Question of fact — Trial judge not making clear findings — Whether new trial required.

Contracts — Documents — Extrinsic evidence — Subsequent variation — Building contract requiring all changes to be authorized in writing — Owner making several changes orally and paying for work — Whether contract varied.

The plaintiff contracted to install a new sewer line for the defendant city. The line marked for excavation was too close to a water-main and, after some work had been done, had to be relocated causing additional cost. The plaintiff claimed that the error arose through the defendant's fault in marking the line for excavation, and that the city's project officer had undertaken to pay the additional costs. At trial the judge made no findings of fact in respect of the way in which the error was caused or on the alleged undertaking, but he dismissed the plaintiff's claim. The

contract provided that all changes were to be authorized in writing, but several other changes had been made orally and paid for.

a On appeal to the Ontario Court of Appeal, **held**, allowing the appeal and ordering a new trial, the strict requirement of writing had been varied by the conduct of the parties. Consequently, findings of fact were essential to determine the contractual, or restitutionary, rights of the plaintiff. As the critical findings had not been made a new trial was necessary.

b **Cases referred to**

Lewis v. Todd et al., [1980] 2 S.C.R. 694, 115 D.L.R. (3d) 257, 14 C.C.L.T. 294, 34 N.R. 1; *Charles Sundstrom et al. v. State of New York* (1914), 213 N.Y. 68; *Sir Lindsay Parkinson & Co., Ltd. v. Com'rs of Works Public Buildings*, [1950] 1 All E.R. 208

c APPEAL by the plaintiff from a judgment of Sirois J. in an action on a building contract.

Ronald J. Rolls, Q.C., and *Raymond G. Colautti*, for appellant.
Douglas R. Wallace, for respondent.

The judgment of the court was delivered by

d CORY J.A.:—On October 15, 1982, the plaintiff/appellant Colautti Construction Ltd. ("Colautti") was awarded judgment for $9,497.23 and the balance of its claim was dismissed. Colautti is appealing this judgment.

e *The factual background*

Colautti carries on business as a sewer and watermain contractor. On January 3, 1979, it entered into a contract with the Corporation of the City of Ottawa (the "City") for the construction of sanitary sewers along Roosevelt Ave.

f The proposed 18-in. sanitary sewer was to be installed in a north-south direction on Roosevelt Ave. The plans and specifications which were provided to Colautti for the purposes of tendering on the contract indicated that the new sewer was to be installed near the centre of the road and some 10 ft. east of an g existing 12-in. diameter sanitary sewer running parallel to the proposed new sewer. An existing six-inch water-main was also shown on the plans. The water-main was located immediately adjacent to (within two feet) and parallel to the existing sanitary sewer. The position of the proposed new sewer line, the existing h 12-in. sanitary sewer and the water-main are all clearly indicated on the plans.

The contract provided that the layout work was to be done by the City. This involved surveyors setting out the proposed line for the new sanitary sewer by staking or placing monuments or

reference points such as grade stakes or picket nails. The line should have been offset 10 ft. to the east of the proposed new sewer line for it would have been impractical to set the line down the middle of Roosevelt Ave. The contractor was then to set his line by referring to the stakes and projecting the proposed line of the works from those stakes by measuring back 10 ft. The contractor was required to adhere strictly to the lines and grades set out by the City. a b

The surveyors for the City laid out the line on January 15, 1979. The contractor commenced construction the same date. At that time Mr. Weiss, a superintendent for Colautti, set out the proposed centre line for the new sanitary sewer by measuring back a distance of 10 ft. from the line of stakes that had been set out by the surveyors for the City. Weiss testified that he measured over from the line, made his marks on the road to show where the centre line of the proposed sewer was to be located, and commenced drilling operations. c

The plans indicated that the water-main was within one or two feet of the existing 12-in. sanitary sewer. The water-main would thus be approximately eight or nine feet distant from the proposed sewer line. Uncontradicted evidence confirmed that the plans were reasonably accurate as to the location of the existing 12-in. sewer and water-main and that the water-main was located within a foot of the existing 12-in. sanitary sewer. d e

The contractor's method of procedure was to drill the rock along the line of the proposed sewer, blast the rock, and subsequently to excavate the rock and soil to the appropriate depth shown on the plans. A crew would then place a proper bedding material in the trench, lay the pipe on top of that material and backfill the excavated trench. f

On January 15th, when the first blasting was undertaken, it was found that the six-inch water-main had been damaged. The water-main was then exposed. The evidence was that the distance between the centre line of the proposed sewer laid out and the water-main was only three feet instead of the eight or nine feet indicated on the plans. g

The City's project officer, who had the responsibility for the execution of this contract, was informed of the water-main break. He attended at the work site and directed Colautti to continue blasting along the line as laid out. Colautti resumed its drilling and blasting operations on January 16th. The watermain was again ruptured. Once again, the project officer was consulted and once again he directed to Colautti to continue its operations along the h

proposed line as laid out. The drilling and blasting was resumed and yet again the water-main was ruptured.

a The parties then agreed that a new survey line should be set out for the proposed sewer. The new survey line was measured from the westerly side of Roosevelt Ave. Final measurements showed that the sewer, as installed, was 16.73 ft. east of the existing 12-in. sanitary sewer.

b *Correspondence between the parties*

When the contract was completed, the parties exchanged correspondence pertaining to the contract and the additional costs incurred by Colautti. In a letter to the City dated September 12th, Colautti noted that the water-main was located only three c feet from the proposed 18-in. sewer as staked out by the City's surveyors. It was stated that Mr. Spero (the City's project officer responsible for the work) was immediately called and a site meeting was requested. The City, in its reply, did not contest Colautti's estimate of the distance of three feet between the d water-main and the proposed new sewer. Both parties agreed that the line for the proposed new sewer was changed. Colautti said the new line was two feet inside the existing kerb of Roosevelt Ave. The City referred to the new line as being approximately five feet east of the original proposed line for the new sewer.

e The City did confirm that the relocation of the sewer line was a major change in the contract. It was the City's position that the change in the line was undertaken in good faith in order to "mitigate Colautti's costs of the project".

Position of Colautti at trial

f It was the position of Colautti at trial that the City had made a mistake in laying out the position of the line of the proposed new sewer. The plaintiff contended that the error in laying out the line was caused by the fact that the wrong manhole was used as a reference point by the surveyors in measuring out the proposed g centre line and in setting out the offset stakes. The manhole which should have been used as the reference point was covered with snow and ice and had to be removed by members of the Colautti firm.

The evidence of Mr. Barney, who did the surveying for the h City, was to the contrary. Unfortunately he did not keep notes of his surveying for this project contract although that apparently is good practice for surveyors. He based his recollection on the position of a stake in relation to a hydrant and also referred to its position in relation to kerbs in that position on Roosevelt Ave.

Those kerbs were not installed until several years after the contract had been completed so that this segment of his evidence may have been of little assistance.

When the new line was set for the proposed sewer there was a discussion between the representatives of the City and Colautti. Mr. Colautti testified that Mr. Spero said that the City would pay for the additional costs of relocating the line. Mr. Spero, on the other hand, stated that no money claim was made by Colautti nor mentioned by him, but he advised that the City would not be liable for the relocation costs involved in the removal of trees and poles along the new line. This difference in the evidence was referred to by the trial judge but not resolved in his reasons.

The relocation of the line for the new sewer involved additional costs for the plaintiff. It is those additional costs which are the subject-matter of the lawsuit.

Decision at trial

The trial judge did not accept the plaintiff's theory as to how the error in the original excavation occurred. In his reasons he stated:

> The theory of the plaintiff that the error was made when the city started at the wrong manhole, which is five feet closer to the west, does not stand. If this allegation or hypothesis were true, and if we believed that the first trench was dug as a result of that erroneous information, at three feet from the water-line, therefore being either two or four feet from the existing sewer-line, and if we were to assume that the new line as laid out was to be five feet east thereof, the new sanitary sewer would be at eight feet or nine feet from the water-main whereas we also all agreed that it is 16.7 ft. from the old or existing sanitary line.
>
> The court may infer also that because of these distances between the old and the new sanitary sewer one could deduct and find it would be proof that the first digging for the first line was at roughly 11 ft. (as called for by the plans) from the old sanitary sewer and therefore this would destroy the plaintiff's claim as well.
>
> I find therefore that the plaintiff has not established that it was because of the city's action that it dug the first trench at three feet from the water-main which it found was roughly one foot away from the old sanitary sewer.

The learned trial judge did not make any findings of credibility and made no reference in his reasons as to how he resolved the conflicts in the evidence.

The position of counsel on appeal as to the facts

Both counsel agreed that the error in the excavation of the proposed sewer line could only have come about in one of two ways:

(1) The offset line laid out by the City surveyors was in error, or

(2) Colautti was in error in measuring back the 10 ft. from the offset line established by the City's surveyors.

The question for determination

The issue is whether or not the judgment at trial can be maintained based, as it is, not upon a finding of credibility but on a mathematical calculation.

Cases such as *Lewis v. Todd et al.*, [1980] 2 S.C.R. 694, 115 D.L.R. (3d) 257, 14 C.C.L.T. 294, make it very clear that an appellate court must not interfere with the findings of fact of a trial judge absent an error of a palpable and overriding nature.

There could be no question of interference in this case if a finding had been made by the trial judge based on the credibility of the witnesses. Different considerations apply where the decision is based on a mathematical conclusion which may not have a sound factual basis.

Disturbing aspects of the mathematical formula

In arriving at his mathematical conclusion, the trial judge failed to consider that the new line was resurveyed from the west side of Roosevelt Ave. It was a completely new line and was not arrived at by the simple expedient of moving the original line five feet further to the east. This aspect alone would lead to some doubts as to making any mathematical calculations based on the new survey line without some clear finding of fact.

There is an additional worrisome aspect of the situation. The City conceded that it would accept the measurement that the centre of the proposed sewer line was only three feet from the water-main. The evidence confirmed that the existing pipeline was found in the position indicated for it on the plans. If the contractor erred in measuring back 10 ft. from the line set out by the City, then the measurement error was one of seven feet. That is to say, Colautti must have measured back 17 ft. instead of 10 ft. Such an error must have been readily apparent. Spero, who was responsible for the project and frequently on the job site, at no time mentioned such an error nor raised it with Colautti. There is no allegation of negligence on the part of Colautti raised either in any oral statements by City representatives or in the carefully drafted letter from the City.

By that letter the City recognized that the change in the sewer line constituted a material and significant change in the contract. One would expect that if such a change was necessitated by the

negligent measurement of a short distance by Colautti, the City would refer to it. Indeed, it would be such a complete answer to the Colautti claim for extra payment that one would expect the City to announce the negligence with a clarion call and remit the claim to the contractor with a triumphant flourish. The City would say to Colautti, in effect, "don't bother us, any extra expense incurred by you arises from your negligence and inability to measure a distance of 10 ft.!" Not even in the pleadings does there appear any allegation of negligence on the part of the contractor which would put an end to the Colautti claim in this case.

Need for findings of fact in this case

The position of the parties in this case made it essential for the trial judge to make findings of fact. The City conceded that the change of line materially altered the contract and, once that concession was made, certain factual findings had to be made. For example, was the change necessitated by a negligent error in measurement by Colautti or by the negligent positioning of the survey line by the City?

There is, as well, the unresolved question as to whether or not Spero, on behalf of the City, undertook to pay for the additional costs arising from the change in the line. If such a statement was, as alleged, made at the work site, it could lead to an inference that the City's first survey line was incorrectly placed.

Can the City rely upon the strict terms of the contract to avoid liability in this case?

The City relies upon the provisions of the contract which require all additional costs to be duly authorized in writing. It is true that the contract imposes heavy burdens on the contractor.

There is no doubt that this contract, drawn as it was to protect taxpayers, attempted to limit the liability of the City to such an extent that one would expect that not even the ordered rotation of the seasons could be reasonably anticipated by the contractor. The problem with contracts such as these is that they are so rigid and so restricting that the parties tend to amend them by their actions during the course of the contract. That was the situation in this case. There were several significant changes and additions as to the work ordered by the City during the contract. None of these were in writing. All but the items in dispute in this case were paid for by the City.

In these circumstances the parties, by their conduct, have varied the terms of the contract which require extra costs to be authorized in writing. As a result, the City cannot rely on its

strict provisions to escape liability to pay for the additional costs authorized by it and incurred as a result of its errors.

Legal consequences that may flow depending on the findings of fact

Once it is determined that the City cannot rely upon the strict terms of the contract, it becomes apparent that various legal consequences may flow depending upon the factual findings that may be made. The parties are in agreement that the relocation of the line constituted a significant change in the scope of some of the major items of work. If these significant changes resulted from an error by the City then it will, in all probability, be found liable for the resulting additional costs. It has long been established in the United States that if a corporation, such as the City in this case, by its own act, causes the work to be done by its contractor to be more expensive than it otherwise would have been according to the terms of the original contract, then it is liable for those increased costs: see *Charles Sundstrom et al. v. State of New York* (1914), 213 N.Y. 68. The principle is sound and should be applicable in Ontario.

On the other hand, if the additional work was occasioned by the negligence of Colautti, then it should not be entitled to any of the amount in dispute.

Alternatively, the agreement reached between the City and Colautti to change the line of the sewer might be found to result in the completion of a contract under totally different conditions. These altered conditions arose during the course of the contract and it might be found that they could not have been contemplated by the contractor. Under those circumstances the contractor might well be able to recover its extra costs at least on a *quantum meruit* basis: see *Sir Lindsay Parkinson & Co., Ltd. v. Com'rs of Works & Public Buildings*, [1950] 1 All E.R. 208.

Disposition

This case required clear findings of fact to be made upon conflicting evidence. Here there were no findings made as to the credibility of the witnesses. Critical conflicts in the evidence remained unresolved. The mathematical formula used to determine the result does not appear to be based on a firm evidentiary foundation.

The determination as to which party must bear the responsibility for the relocation can only be based upon specific findings of fact. This Court is not in a position to make those findings for it

would involve, in part, a determination as to the credibility of witnesses.

The case must, in my view, be sent back for a new trial. In reaching this decision I can sympathize with the unhappy prospect of further litigation faced by the parties. As well, I can readily appreciate the difficulties this case presented to an able and talented judge very early in his career. Unfortunately, I can find no alternative to this result. I would allow the appeal with costs and reserve costs of the first trial to the judge presiding at the new trial.

Appeal allowed; new trial ordered.

[HIGH COURT OF JUSTICE]
DIVISIONAL COURT

Re Martin Feed Mills Ltd. and Township of Woolwich

VAN CAMP, POTTS AND MCKINLAY JJ. 13TH JUNE 1984.

Planning — Zoning — By-laws — Validity — Municipality passing by-law prohibiting obnoxious or offensive manufacturing operations — Applicant operating pet food plant and having complied with environmental protection legislation — Applicant charged with breach of by-law — Whether by-law valid — Whether improper delegation — Whether in conflict with other statutes — Planning Act, 1983 (Ont.), c. 1, s. 34(1) — Environmental Protection Act, R.S.O. 1980, c. 141 — Public Health Act, R.S.O. 1980, c. 409.

The applicant operated a pet food processing and manufacturing business in the defendant township, for which it obtained the necessary approvals under the *Environmental Protection Act*, R.S.O. 1980, c. 141. The respondent township then passed a zoning by-law which prohibited, *inter alia*, any manufacturing or processing use which is obnoxious or offensive by reason of the presence or emission of odour, fumes and noise. The applicant brought an application to quash the by-law.

Held, the application should be dismissed.

(1) The by-law was not ambiguous and was valid under s. 34(1) of the *Planning Act*, 1983 (Ont.), c. 1, which gives a municipality power to prohibit the use of land generally or for any defined purpose, or generally except for purposes expressly authorized.

(2) The by-law did not authorize an improper delegation of municipal powers. The fact that the applicant had been charged with performing activities that were in breach of the by-law was not such a delegation.

(3) The by-law did not conflict with the *Environmental Protection Act* or the *Public Health Act*, R.S.O. 1980, c. 409. The subject-matter, policies and spheres of operation of the statutes are different. The *Planning Act* regulates land use, whereas the *Environmental Protection Act* regulates assaults on the environment and the *Public Health Act* regulates noxious and offensive trades. Each statute

TAB 8

Indexed as:

Dimensa Corp. v. Tx/Communications Canada Inc.

Between
Dimensa Corporation, plaintiff, and
Tx/Communications Canada Inc., defendant

[1998] O.J. No. 1170

56 O.T.C. 383

Court File No. 94-CU-77942

Ontario Court of Justice (General Division)

Ground J.

Heard: February 2-6, 1998.
Judgment: March 17, 1998.

(12 pp.)

Estoppel -- Estoppel in pais (by conduct) -- Representation, by conduct -- Silence or standing by, business relations.

Action for commissions under a distributorship agreement. The plaintiff claimed that it had not been paid its full commissions by the defendant under a written distributorship agreement. According to the defendant, the parties had orally agreed to different commission and discount arrangements. Although there was no written evidence of the oral agreements, correspondence between the parties indicated that the commissions were calculated on a basis different from that in the written agreement, and that the plaintiff had the relevant price lists and was provided with copies of all running accounts showing all transactions. Between January 1992 and September 1993 the plaintiff did not question or dispute the commissions or the method of calculation.

HELD: Action dismissed. The plaintiff's course of action induced detrimental reliance on the part of the defendant, in the reasonable expectation that the plaintiff would not stand on its strict rights. Even if the parties had not actually agreed to the amended terms, the plaintiff's failure to object estopped it from relying on the written agreement.

Counsel:

Francis Floszmann, for the plaintiff.
Alan A. Farrer, for the defendant.

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1 GROUND J.:-- This action arises out of claims by the plaintiff for unpaid commissions pursuant to a distributorship agreement entered into between the plaintiff and the defendant.

BACKGROUND

2 The defendant is a designer and manufacturer of telephone systems located in the Toronto area. The plaintiff entered into a written distribution agreement dated June 1, 1990 (the "Distribution Agreement") with the defendant appointing the defendant its exclusive distributor for telephone systems in Hungary for a period of two years ending May 31, 1992. As a result of difficulties encountered with a Hungarian customer, Telsys KFT. ("Telsys"), an amending agreement dated December 3, 1991 (the "Amending Agreement") was entered into between the plaintiff and the defendant. The Amending Agreement provides as follows:

> This is to confirm the conversation we had yesterday regarding the distribution of Mercury in Hungary.
>
> TX/communications will sell directly to Telsys KFT at the prices listed in TX's price list, Issue 2.1 dated March, 1991. The difference between these prices and those in Issue 2.0, also dated March 1991, will be paid to Dimensa by TX on completion of the transaction. This is to be considered an addendum to the existing Distributorship Agreement and does not negate the status of Dimensa as an Exclusive Distributor in Hungary.
>
> I trust that this is also your understanding of our verbal agreement yesterday. If so, please confirm your acceptance of this by signing below and returning this letter to TX.

3 The parties subsequently agreed orally that sales to another Hungarian company, Systel KFG ("Systel") would be handled on the same basis as sales to Telsys.

4 The plaintiff claims that it has not been paid its full commissions on sales to Telsys or Systel represented by six invoices to Telsys or Systel as follows:

1. Invoice No. 15691 - December 19, 1991 - $26,734.50
2. Invoice No. 15791 - December 19, 1991 - $25,466.40
3. Invoice No. 17192 - February 12, 1992 - $40,664.70
4. Invoice No. 19592 - April 10, 1992 - $1,581.90
5. Invoice No. 20292 - April 22, 1992 - Nil
6. Invoice No. 18792 - May 11, 1992 - $152,882.40

I will refer to the invoices in these reasons by the above numbers.

SUBMISSIONS

5 It is the position of the plaintiff that the commissions payable to the plaintiff on the sales represented by the six invoices in question must be calculated in accordance with the Amending Agreement, that those commissions are based upon the prices for the various products listed in Price Lists 2.0 and 2.1 without applying any discounts, and that the commissions payable are in an amount equal to the difference between the prices in the two Price Lists. The plaintiff takes the position that there was never any agreement between the parties to vary the terms of the Amending Agreement, that such terms could only be varied by an agreement in writing and no such agreement in writing was ever entered into. The plaintiff calculates that, on the basis of the Amending Agreement, the total commissions payable were $77,302, that the total commissions paid to the plaintiff were $35,284.28 and that there is a balance owing to the plaintiff of $42,017.72.

6 With respect to invoice No. 5, it is the position of the defendant that the products covered by this invoice were either obsolete products which were provided to Systel at no cost for purposes of a trade show, or were components that were subsequently billed under invoice No. 6 and that, as the defendant received no payment with respect to this invoice, there is no commission payable to the plaintiff.

7 With respect to invoice No. 4, the position of the defendant is that this invoice has not been paid in full, although it concedes that part payment has been received and that a commission of $317.16 is payable to the plaintiff with respect to the partial payment received.

8 With respect to invoices Nos. 1, 2, 3 and 6, the commissions payable on the sales represented by those invoices were calculated by the defendant alter deducting from the prices on the appropriate price lists the discounts given to Telsys or Systel and to Dimensa and subtracting the net price to Dimensa from the net price to Telsys or Systel. The same method was used to calculate the small commission payable on invoice No. 4.

9 It is the defendant's position that, subsequent to entering into the Amending Agreement, the parties agreed orally to different commission and discount arrangements and that sales were made by the defendant on that basis and commissions paid to the plaintiff, all with the knowledge and agreement of the plaintiff. The defendant further takes the position that, after a full settlement of accounts with the plaintiff in April 1993, there was $1,064.35 owing by the plaintiff to the

defendant and that, after deducting the $317.16 commission owed to the plaintiff on invoice No. 4, there is a balance owing to the defendant of $747.19 which is not being pursued.

REASONS

10 There are no written agreements signed by the parties evidencing the subsequent oral agreements alleged by the defendant to have been entered into between the parties with respect to the sales evidenced by the six invoices in question. The documentary evidence submitted by the parties at trial is not conclusive one way or the other as to whether any such subsequent oral agreements were entered into and the viva voce evidence at trial was completely contradictory as to whether anything was agreed to orally between the parties, as to what information had been conveyed to the plaintiffs president, Mr. Fugedi, and as to what was understood by him.

11 The parties appear to agree that no commission was payable to the plaintiff unless the defendant received money or money's worth as a result of a sale of products to Telsys or Systel. In my view, with respect to invoice No. 5, the evidence is overwhelming that the defendant received no money payment for the product shipped with this invoice. The plaintiff submits that the defendant received a benefit in the sense of forbearance by Systel in bringing a claim against the defendant for delay in shipping. There is no evidence that any such claim was ever brought or threatened against the plaintiff and there is considerable evidence that the delay in shipment was a result of the failure of Systel's agent to forward the required deposit to the defendant. In addition, it is clear that the alleged delayed shipment, which was the shipment evidenced by invoice No. 6, was delivered in May of 1992 and not installed by Systel until toward the end of that year. Dr. Dekany, the general manager of Systel, acknowledged that there had been no claim brought against Systel for delay and that Systel had not brought any claim against the defendant. Accordingly, I find that there is no commission payable to the plaintiff with respect to invoice No. 5.

12 With respect to the other invoices, the evidence of the plaintiff is that he was never aware that commissions were being calculated on a basis different from that set out in the Amending Agreement until he received copies of the various invoices from Systel in the fall of 1993 and that the defendant had provided to him no information with which he could determine how the commissions had been calculated until he obtained copies of the invoices from Systel. The defendants point to various correspondence which clearly indicate that commissions were calculated on a basis different from that set out in the Amending Agreement and state that, at all times, the plaintiff had the relevant price lists, was provided with copies of running accounts showing all transactions between the plaintiff and the defendant, and was provided with back-up sheets which showed the products sold under all the invoices in question. Both Mr. and Mrs. Ghadery, the officers of the defendant, were direct, forthright, businesslike and convincing in their evidence and their evidence seems to me to accord with good business practice and what one would reasonably expect to be the behaviour of business persons. They had no reason to deceive Mr. Fugedi or attempt to withhold information from him; in fact, it is acknowledged by both parties the defendant could have terminated the Distribution Agreement with the plaintiff at any time in view of the

plaintiffs failure to meet the quotas specified in the Distribution Agreement. The running accounts and back-up sheets were, according to the evidence of the defendant's representatives, produced for no purpose other than to provide information to the plaintiff and it is inconceivable to me why such information would be withheld from the plaintiff.

13 In addition, it is clear from the evidence that the invoices included in the plaintiff's productions were not invoices received from Telsy's, as alleged by Mr. Fugedi, but were copies of invoices produced by the defendant for the plaintiff which, according to Mrs. Ghadery's evidence, were produced for purposes of a meeting which was held with Mr. Fugedi in March 1993. It is Mrs. Ghadery's further evidence that such invoices, together with all the running accounts and back-up sheets, were available to Mr. Fugedi when he met with representatives of the defendant to reconcile his accounts and settle his accounts in April of 1993, at which time he made a payment of approximately $6530 to the defendant to settle the plaintiffs accounts. Moreover, I find it incredible that, for a period of more than a year and a half, a business person such as Mr. Fugedi would have not questioned the amount of substantial commissions paid to his company or asked for an explanation as to how such commissions were calculated or responded to letters specifically inviting him to advise the defendant of any questions or discrepancies, particularly when he alleges that he had no information available to him as to what products had been shipped or at what prices or what discounts were granted. Accordingly, insofar as the viva voce evidence is concerned, where there is a conflict in the evidence, I prefer the evidence of Mr. and Mrs. Ghadery, the representatives of the defendant.

14 I find that Mr. Fugedi, the representative of the plaintiff, was well aware of the manner in which commissions were calculated for invoices Nos. 1, 2, 3, 5 and 6 and had ample information available to him to verify how such commissions were calculated and that he failed to question or dispute the amounts of the commissions or the method of calculation at any time between January 1992 and September 1993, although invited on several occasions by letter from the defendant to do so.

15 I further find that the parties did have discussions and orally agreed to the new commission and discount arrangements reflected in the manner in which the commissions were calculated by the defendant.

16 The question then becomes whether such oral agreements are of any force and effect. It is the position of the plaintiff that, in view of the existence of a written agreement between the parties dealing with the calculation of commissions, which written agreement is, in my view, unambiguous, the court can not admit any parol evidence which contradicts the provisions of the written agreement and accordingly can not give any effect to the oral agreements. It appears to be the position of the defendant that the Amending Agreement has been superseded by subsequent oral agreements entered into between the parties and that, if I should find that such oral agreements existed, those agreements have been fully performed and payment pursuant to such agreements accepted by the plaintiff and that the plaintiff can not now seek to rely on strict compliance with the

written Amending Agreement. The defendant further submits that the doctrine of promissory or equitable estoppel is applicable in that the defendant entered into sales transactions with Telsys and Systel relying on the promise of the plaintiff to accept commissions in accordance with their oral agreements and that such reliance would be to the detriment of the defendant if the court should find that the plaintiff is entitled to commissions payable in accordance with the terms of the Amending Agreement. In particular, the evidence of the defendant was that it would never have entered into the sales transaction represented by invoice No. 6, which was based on a 20% discount to Systel, if it had been required to pay a commission to the plaintiff based on the Amending Agreement, which commission could hake been approximately $43,000 as opposed to approximately $15,000 calculated in accordance with the oral agreement which the defendant alleges was entered into between the plaintiff and the defendant with respect to that sale to Systel.

17 In my view,the law is clear that evidence which relates to the parties' conduct after signing the contract can be relevant to a determination as to whether the written contract should be enforced. The parol evidence rule does not affect this determination. As well as being relevant because it may assist a judge in interpreting a contract by helping to choose between two reasonable interpretations of the agreement (see Re: Canadian National Railway and Canadian Pacific Ltd. (1978), 95 D.L.R. (3d) 242 (B.C.C.A.), at p. 262) evidence of subsequent conduct can be used by the courts to conclude there has been a new contract, or a variation or recision of the old, or there has been waiver or estoppel.

18 On the facts of this case it appears that the defendants' submission that the plaintiffs conduct constituted estoppel is a reasonable one, and, indeed, the conduct and/or oral agreements of the parties could support a finding that there has been a new contract.

19 There is, in fact, strong Ontario authority that suggests that it is within the powers of the trial judge, and is indeed the responsibility of the trial judge, to assess whether the parties can rely on explicit contractual terms that appear to have been contradicted by subsequent behaviour. The trial judge is obliged to make findings of fact regarding the credibility of the parties in such a case, and with respect to the correct inferences to be taken from post-contractual conduct.

20 In Colautti Construction Ltd. v. City of Ottawa (1984), 46 O.R. (2d) 236, the Ontario Court of Appeal found that a strict requirement in a contract that any changes to its terms be in writing had been varied by the conduct of the parties, in particular, by a pattern of making other changes orally and paying for them. In such a case, the court held that the trial judge is obliged to make findings of fact to determine the restitutionary or contractual rights of the parties under the new arrangement. Since the trial judge had not made such findings, the court ordered a new trial. In that case, the court relied on correspondence and evidence of past payments to come to a determination that the city could not protect itself by strict reference to the contractual terms.

21 The defendant has also relied upon the doctrine of estoppel. It would appear to me that this case falls within the classic definition of estoppel. The plaintiff by its course of action induced

detrimental reliance on the part of the defendant, in the reasonable expectation that the plaintiff would not stand on its strict rights. A court will give effect to the doctrine of estoppel where to allow one side to insist on strict compliance with the contract would result in an injustice.

22 The decision of Denning J., as he then was, in Central London Property Trust Ltd. v. High Trees House Ltd., [1974] 1 K.B. 130. developed the concept of enforceable promissory estoppel. The case at bar falls within the ratio of that decision as being a circumstance where the courts will refuse to allow a party to act inconsistently with a promise intended to create legal relations, intended to be acted on and in fact acted on.

23 In order to make a finding of estoppel, it is not only permissible but necessary to consider evidence relating to conduct of the parties and such evidence is relevant and admissible.

24 In Beer et al. v. Townsgate I Ltd. et al. (1997), 36 O.R. (3d) 136, the court concluded that a party could be estopped from denying the existence of a contract based on its silence and conduct. The purchasers were attempting to defeat a contract by claiming that they had not communicated acceptance to the vendor. However, they had not said anything to the vendor which would contradict the conclusion that they had indeed indicated agreement, including allowing their deposit cheques to go through. The court concluded that the vendor was allowed to claim that the purchasers were estopped from denying the existence of a contract.

25 Even if I had found that the parties had not actually agreed to the amended commission terms for the transactions in question, the plaintiffs failure to object to the transactions being effected on a basis different from that contained in the Amending Agreement would estop it from relying upon the Amending Agreement.

26 The action is dismissed. Costs to the defendant. The parties may make brief written submissions to me prior to March 31, 1998 as to the scale of costs and, if they wish me to fix costs, as to the quantum of costs.

GROUND J.

qp/s/alp/DRS

TAB 9

Case Name:

Royal Bank of Canada v. Cow Harbour Construction Ltd.

IN THE MATTER OF the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended
AND IN THE MATTER OF Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Cow Harbour Construction Ltd.
Between
Royal Bank of Canada, Plaintiff, and
Cow Harbour Construction Ltd. and 1134252 Alberta Ltd., Defendants

[2010] A.J. No. 1177

2010 ABQB 637

72 C.B.R. (5th) 261

37 Alta. L.R. (5th) 82

504 A.R. 319

2010 CarswellAlta 2027

Dockets: 1003 11241, 1003 05560

BKCY Action No. 24-115359

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

K.D. Yamauchi J.

Heard: September 22, 2010.
Judgment: October 5, 2010.

(62 paras.)

Bankruptcy and insolvency law -- Proceedings -- Appeals and judicial review -- Leave to appeal -- Practice and procedure -- Proceedings -- Courts -- CCAA matters -- Stays -- Application by creditor for leave to appeal and stay pending appeal dismissed -- Court approved sale of protected company as going concern -- Creditor was one of many that disputed nature of equipment lease agreements -- Court ruled that agreements were financing leases rather than true leases -- Sale was approved and closed -- Creditor sought to appeal ruling regarding nature of leases and sought stay to hold back distribution of disputed lease funds -- Tests for leave to appeal and stay were not met given lack of merit and undue hindrance of allocating and distributing funds to multiple creditors -- Companies' Creditors Arrangement Act, s. 13.

Application by DLL for leave to appeal and a stay of an order pending appeal. In April 2010, Cow Harbour Construction obtained a stay of proceedings against it under the Companies' Creditors Arrangement Act (CCAA). Eventually, the court approved restructuring through a sale of Cow Harbour as a going concern facilitated by PWC. The court endorsed PWC's acceptance of a letter of intent submitted by Aecon. One of the assets Aecon sought to purchase was a piece of equipment possessed by Cow Harbour pursuant to a lease agreement with DLL. The lease contemplated a 37-month term and did not contain an option for Cow Harbour to purchase the equipment. Issues arose regarding whether Cow Harbour's lease agreements with certain creditors, including DLL, were true leases or financing leases. In May 2010, Cow Harbour was directed to make payments to the monitor of all disputed lease funds pending resolution of categorization of the disputed lease agreements. Consequently, the disputed lease funds included $900,000 in payments that Cow Harbour would have paid to DLL under their agreement. As part of the sale process, PWC proposed an allocation of the purchase price to creditors. DLL took the position that the equipment could not be sold to Aecon without its consent. In August 2010, the court ruled that the lease agreement constituted a financing lease. RBC was appointed as receiver and the asset purchase agreement and vesting order were approved. The sale closed that month. Five days later, DLL moved for an order staying the August 2010 orders regarding the receivership and CCAA matters and filed a notice of appeal. The motion was dismissed as moot. DLL now applied for leave to appeal the ruling regarding the nature of the lease and sought a stay pending appeal in order to hold back the disputed lease funds from distribution.

HELD: Application dismissed. The point on appeal was not of significance to the practice, as there was nothing novel about construing the whole of the disputed agreement to find that it was a financing lease rather than a true lease. The presence or absence of an option to purchase was merely one factor for consideration. The court's conclusion was a factual finding specific only to that particular lease. The point on appeal was not of significance to the action as a whole given the overriding need to avoid preferential treatment of any one creditor. The proposed appeal was not prima facie meritorious given the court's prior findings. The proposed appeal would unduly hinder the progress of the action in respect of distribution of the disputed lease funds and allocation of the

purchase price to creditors. For similar reasons, the balance of convenience did not favour a stay of proceedings pending appeal or the remainder of the relief sought by DLL.

Statutes, Regulations and Rules Cited:

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

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.01, s. 13

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Memorandum of Decision

K.D. YAMAUCHI J.:--

I. Background

1 On April 7, 2010, Cow Harbour Construction Ltd. ("Cow Harbour") applied for a stay of proceedings against it under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). This Court granted that order (the "Initial Order") in *CCAA* action 1003 05560 (the "CCAA Action"). This Court extended the stay of proceedings from time to time by a number of subsequent orders. It should be noted that this Court did not want to extend the stay for a lengthy period at any given time. Accordingly, this Court required the parties to this action, of which there are many, to appear before it often and regularly, so that Cow Harbour and the various professionals involved in this matter could provide this Court with regular updates on the status and progress of the restructuring.

2 It became clear as this matter progressed that Cow Harbour was not going to be able to restructure it affairs through a refinancing, a compromise or an equity restructuring. Rather, this matter evolved into a liquidation. This Court approved a process that would permit Cow Harbour to restructure by way of a sale of its assets. The process involved inviting potential purchasers to present proposals to purchase Cow Harbour's assets and undertaking. The intent behind this process was to effect a sale of Cow Harbour as a going concern. This process resulted in this Court being presented with three proposals to purchase certain of Cow Harbour's assets.

3 Aecon Group Inc. ("Aecon") presented a letter of intent to purchase a significant portion of Cow Harbour's assets (the "Original Aecon Proposal"). The Original Aecon Proposal was subject to a number of terms and conditions. This Court appointed PricewaterhouseCoopers Inc. ("PWC") to act as a transaction facilitator to assist the various parties' in their negotiations. As the transaction facilitator, PWC successfully negotiated a higher purchase price with Aecon. Aecon eventually presented a Letter of Intent to Purchase (the "LOI").

4 On August 5, 2010, this Court endorsed PWC's acceptance of the LOI, with a view that the parties would return to this Court to seek this Court's approval of an asset purchase agreement and vesting order.

5 One of Cow Harbour's assets that Aecon wanted to purchase was a Hitachi EX5500, serial number FF018NQ001008 (the "Equipment"). The Equipment was in Cow Harbour's possession as a result of an agreement dated April 1, 2009, between De Lage Landen Financial Services Canada Inc. ("DLL") and Cow Harbour (the "Agreement"). In the Agreement, DLL agreed to lease the Equipment to Cow Harbour for a 37-month term. The Agreement contained no option in which Cow Harbour could purchase the Equipment at the end of the term of the Agreement or otherwise.

6 After this Court granted the Initial Order, on May 14, 2010, DLL filed a notice of motion, returnable May 21, 2010. In it, DLL sought a declaration that, for the purposes of *CCAA* s.11.01, the Agreement was a true lease, and not a financing lease.

7 On May 21, 2010, this Court directed that Cow Harbour make certain payments to McLennan Ross LLP, counsel for the monitor this Court appointed pursuant to the Initial Order. Those payments represented all monthly payments from April 1, 2010, that Cow Harbour would have paid

to lessors under leases for which there was a dispute as whether they were true leases or financing leases, or which the monitor's counsel had not been able to categorize as either (the "Disputed Lease Funds"). This Court directed McLennan Ross LLP to hold the Disputed Lease Funds, pending resolution of disputes pertaining to the categorization of the disputed leases.

8 The Agreement was one of the disputed leases. Accordingly, included in the Disputed Lease Funds was approximately $900,000 representing payments that Cow Harbour should have been making to DLL under the Agreement.

9 As part of the sale process, PWC prepared a proposed allocation of Aecon's purchase price, indicating the portion of the overall purchase price that Aecon allocated among Cow Harbour's assets. This Court received that allocation and placed it under seal. It was of the view that the creditors need not know how much of Aecon's purchase price was going to be allocated to the claims of other creditors.

10 DLL did not agree that the Equipment could be sold to Aecon without DLL's consent. At no time did DLL provide its consent to a sale of the Equipment to Aecon or anyone else.

11 The parties returned to court on August 25, 2010, at which time this Court heard a number of applications, including the following:

(a) DLL's application in the CCAA Action for an order declaring that DLL's interest in the Equipment is that of owner and lessor under a true lease. This application was made by way of a notice of motion in the CCAA Action only and was originally returnable May 21, 2010. It had previously been adjourned;
(b) DLL's application for an adjournment of the pending applications for an approval of the sale of Cow Harbour's assets to Aecon and a vesting order;
(c) RBC's application to appoint a PWC as receiver in action number 1003 11241 (the "Receivership Action"); and
(d) PWC's application for approval of the asset purchase agreement among Aecon, PWC, in its capacity as receiver of Cow Harbour and PWC, in its capacity as transaction facilitator (the "Asset Purchase Agreement") and a vesting order, vesting title of Cow Harbour's assets which formed the subject-matter of the Asset Purchase Agreement into Aecon's name (the "Vesting Order").

12 Counsel made their submissions on the DLL application during the morning of August 25, 2010. This Court took a recess of about 3 hours to consider the positions of the respective parties. This Court rendered its judgment, with oral reasons, that the Agreement constituted a financing lease and not a true lease. This Court then granted RBC's application for a receivership order, and granted an order approving the Asset Purchase Agreement and the Vesting Order. The Vesting Order included the Equipment. This Court granted those orders sequentially, in the sense that:

(a) first, it dealt with DLL's applications in the CCAA Action;
(b) second, it dealt with the receivership application; and
(c) third, it dealt with the applications to approve the Asset Purchase Agreement and the Vesting Order.

The second and third orders were dependent on the Court's determination of the nature of the Agreement.

13 Once this Court granted these orders, the transaction contemplated by the Asset Purchase Agreement closed on August 26, 2010.

14 On August 31, 2010, DLL served all parties to these proceedings with a notice of motion returnable September 3, 2010, for an order staying the provisions of the August 25, 2010 orders, as they related to the Equipment, in the Receivership Action and the CCAA Action. On September 2, 2010, DLL filed a Civil Notice of Appeal relating to issues in the Receivership Action and (notwithstanding the absence of leave to appeal) in the CCAA Action. On September 3, 2010, the parties argued the stay application. This Court denied the application on the basis that the issue was moot and further, that DLL had not met the test for a stay pending its appeal. This Court said:

> There was no appeal, there was no seeking of stay of the effect of my orders and this matter has closed. The issue is now moot., Transcript of Proceedings, September 3, 2010, p. 24, ll. 3-6.

II. Nature of the Applications

15 DLL brings two applications, being:

1. An application pursuant to *CCAA* s. 13, for leave to appeal this Court's August 25, 2010 order, which declared that the Agreement was a financing lease and not a true lease (the "Leave Application"); and
2. An application seeking an order in the nature of a stay pending appeal, holding back the Disputed Lease Funds insofar as they relate to funds payable under the Agreement and an order holding back from distribution a portion of the sale proceeds resulting from the Asset Purchase Agreement, equivalent to the net book value of the Equipment (the "Stay Application").

16 The Royal Bank of Canada ("RBC") and PWC, the court-appointed receiver, oppose these applications.

III. Leave Application

17 DLL seeks leave to appeal pursuant to *CCAA* s.13, which provides:

> 13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

18 DLL has the right to seek leave from this Court or from the Court of Appeal or from a judge of the Court of Appeal. The legislation provides for this. If an applicant for leave is not successful at one level, does that preclude the applicant from making a further application to the "next level"? There can be no doubt that if a judge of the court of appeal refuses the applicant's leave to appeal, a judge of the lower court, even the judge who made the original order, could not overturn the court of appeal's decision. The converse, however, was not so clear. In ***Westar Mining Ltd. (Re)***, 1993 CarswellBC 529, 17 C.B.R. (3d) 202 at para. 7 (C.A.), the majority held that "an application for leave to appeal may be commenced in any one of three ways, and that once that choice is made a party does not have any further right to pursue an application for leave to appeal." McEachern C.J.B.C., at para. 45, dissented and analyzed the issue as follows:

> Section 13 of the C.C.A.A. provides for an appeal with leave, and further provides that leave may be obtained from the judge who made the order, from this court, or from a judge of this court. I do not find any support in the language of s. 13 for my colleagues' conclusion that these are exclusive alternatives, so that the refusal of leave at any level precludes an application at another level. Maxwell on *Interpretation of Statutes*, 12th ed. (1969), pp. 232-233, suggests that in some cases "and" and "or" may be substituted for each other. While it is true that the C.C.A.A. must prevail, I see no conflict between it and the *Court of Appeal Act*, or with the practice which is followed in this province to obtain leave from the Court.

19 The Supreme Court of Canada allowed the appeal "for the reasons given by McEachern C.J.B.C.", ***Westar Mining Ltd. (Re)***, 1993 CarswellBC 553, [1993] 2 S.C.R. 448. Thus, if DLL is unsuccessful in its application for leave before this Court, there is nothing preventing it from making a further leave application to "the court or a judge of the court to which the appeal lies."

20 Is this matter properly before this Court? In ***General Publishing Co. (Re)***, 2002 CarswellOnt 2215, 34 C.B.R. (4th) 183 at para. 4 (Sup. Ct. Jus.), Justice Ground said, "the usual and preferred route to appeal an order under the CCAA is to bring the motion for leave before a judge of the Court of Appeal." In fact, in that case, Justice Ground was not prepared to hear the application, "as it would undoubtedly result in a non-productive, additional step in trying to resolve this issue." This Court agrees with the concern Justice Ground expressed for the reasons that follow.

21 Before moving on to consider those reasons, it is worthwhile noting how the Alberta Court of Appeal has dealt with this "concurrent" jurisdiction in another context. In ***R. v. Harness***, 2005 CarswellAlta 963, 200 C.C.C. (3d) 431 (C.A.), the court was considering the effect of the *Criminal*

Code, R.S.C. 1985, c. C-46, s. 678(2), which provides:

> 678(2) The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given.

22 The ***Harness*** court at para. 23, explained how it would deal with this "concurrent jurisdiction" when it said:

> 23 Based on the rules of statutory interpretation and the case authorities, it is clear that s. 678(2) provides concurrent jurisdiction to hear applications to extend time, rather than a right of review or right to appeal the decision of a single judge to a full panel of the court. Both a single judge and the court have jurisdiction to grant a time extension, though often the rules of practice established by the court limit the applicant's right to choose which one will hear the application. Once a decision on an application to extend has been made, whether by a single judge or by a full panel of the court, there is no right of appeal within the court. However, a panel or a judge can consider the application afresh when the interests of justice so require, particularly when circumstances or conditions have changed since the last application. No such change is alleged here, nor does Harness suggest that there are new facts that might affect the outcome of his application. [emphasis added]

23 The *CCAA* permits DLL to apply to this Court to seek leave to appeal this Court's earlier decisions. Accordingly, despite the approach that the ***General Publishing*** court took in similar circumstances, this Court will consider this application. Whether the Alberta Court of Appeal will apply reasonaing similar to that which it applied in ***Harness*** is not a question that this Court needs to answer.

24 For DLL to obtain leave to appeal under the *CCAA*, it must meet the test set out by the Alberta Court of Appeal in ***Fairmont Resort Properties Ltd. (Re)***, 2009 ABCA 360 at para. 10, where the court said:

> The test for leave involves a single criterion subsuming four factors. The single criterion is that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; (4) whether the appeal will unduly hinder the progress of the action.

25 Before this Court considers the factors involved in the "test for leave," it is worthwhile to outline the applicable standard of review that the Court of Appeal will apply if leave were to be

granted. In ***Canadian Airlines Corp. (Re)***, 2000 ABCA 149 at paras. 28-29, the court held that:

> 28 The elements of the general criterion cannot be properly considered in a leave application without regard to the standard of review that this Court applies to appeals under the CCAA. If leave to appeal were to be granted, the applicable standard of review is succinctly set forth by Fruman, J.A. in *Royal Bank v. Fracmaster Ltd.* (1999), 244 A.R. 93 (Alta. C.A.) where she stated for the Court at p. 95:
>
> > .... this is a court of review. It is not our task to reconsider the merits of the various offers and decide which proposal might be best. The decisions made by the Chambers judge involve a good measure of discretion, and are owed considcrable deference. Whether or not we agree, we will only interfere if we conclude that she acted unreasonably, erred in principle or made a manifest error.

26 In ***Smoky River Coal Ltd. (Re)*** (1999), 237 A.R. 326 (Alta. C.A.), Hunt, J.A., spcaking for the unanimous Court, extensively reviewed the *CCAA*'s history and purposc, and observed at p. 341:

> The fact that an appeal lies only with leavc of an appellatc court (s. 13 CCAA) suggests that Parliament, mindful that CCAA cases often require quick decision-making, intended that most decisions be made by the supervising judge. This supports the view that those decisions should be interfered with only in clear cases.
>
> The standard of rcview of this Court, in reviewing the CCAA decision of the supervising judge, is therefore one of correctness if there is an error of law. Otherwise, for an appellate court to interfere with the decision of the supervising judge, there must be a palpable and overriding error in the exercise of discretion or in findings of fact.

27 It appears that this is the reason why the ***General Publishers*** court and this Court has difficulty in analyzing its own decisions. It is awkward, if not difficult, for a court to consider whether it has made a palpable and overriding error in its exercise of discretion or in findings of fact. These are the foundations on which it built its original decision and it undermines this Court's original decision if it were to second guess itself.

28 Nonetheless, Parliament has given this task to the "judge appealed from" so this Court will undertake that task.

29 ***Fairmont Resort*** provides us with the "test for leave." The test is but one test, in which "there

must be serious and arguable grounds that are of real and significant interest to the parties." To determine whether DLL has met its onus, we must consider the four factors that ***Fairmont Resort*** outlines. The question then becomes whether DLL must satisfy all the factors. In other words, if it fails on one (or more), does fail to meet the test? The answer to this question lies in the decision of O'Brien J.A. in ***Ketch Resources Ltd. v. Gauntlet Energy Corp. (Monitor of)***, 2005 CarswellAlta 1527, 15 C.B.R. (5th) 235 (C.A.). In that case, Justice O'Brien went through and applied the four factors to the facts with which he was dealing. The applicant in that case had met some of the factors, but not others. Justice O'Brien at para. 15, made his decision not to grant leave after "weighing all the factors." In other words, success or failure to prove one or more of the factors does not guarantee that the applicant has met the "test for leave." The court must weigh all the factors.

Whether the point on appeal is of significance to the practice

30 DLL argues that the distinction between true leases and financing leases is one of significance to the practice. RBC argues, on the other hand, that the issue is of no significance to the practice. The finding that DLL's Equipment was the subject of a financing lease rather than a true lease is a factual finding that is specific only to that particular lease and does not have any impact on the practice in general.

31 DLL argues that this Court erred in holding that an agreement without a purchase option or any other contractual mechanism of transferring ownership from the purported lessor to the purported lessee, can be characterized as a financing lease. RBC argues that there is no single overriding factor in determining whether a particular lease is a true lease or a financing lease.

32 When characterizing leases pursuant to *CCAA* s.11.01, the court must have regard to the substance, rather than simply the form of the arrangement, ***Smith Brothers Contracting Ltd. (Re)***, 1998 CarswellBC 678, 53 B.C.L.R. (3d) 264 (S.C.). In fact, when making its decision, this Court considered the non-exhaustive list of criteria that the ***Smith Brothers*** court suggested that courts look to when determining whether a document is a true lease or a financing lease. This Court outlined those criteria in its oral reasons, Transcript of Proceedings, August 25, 2010, pp. 57-59, and concluded that:

> [T]here is not one factor that is the *sine qua non* for determining whether a document is a true lease or a financing lease. One must look at the whole document to get a flavour of the [parties'] intentions, Transcript of Proceedings, August 25, 2010, p. 59, ll. 11-13.

33 This Court concluded that "When one examines the De Lage Landen Financial Services Canada document as a whole, it is clear that it is a security lease and not a true lease," Transcript of Proceedings, August 25, 2010, p. 59, ll. 23-24.

34 DLL argues that the characterization of a lease without a purchase option or any other

mechanism of transferring ownership from the purported lessor to the purported lessee is a novel proposition in law and is an unresolved issue that is of significance to the practice, ***Kenroc Building Materials Co. Ltd. v. Kerr Interior Systems Ltd.***, 2008 ABCA 291 at para. 9 . If that were the sole basis on which this Court rendered its decision, it might indeed be novel. However, this Court was guided by the broader principle of examining the whole document, which is an approach that is already well-established in the case law. Thus, there is nothing novel about this approach and this Court's finding that the Agreement was a financing lease, rather than a true lease, has no broad significance to the practice.

35 Furthermore, in ***Philip Services Corp. (Re)***, 1999 CarswellOnt 4495, 15 C.B.R. (4th) 107 at para. 4 (Sup. Ct. Jus.), Justice Farley determined that a lease which "does not specifically indicate that there is an option to buy the (hardware) assets at the end of the lease" could indeed be characterized as a capital or financing lease, having regard to the criteria set out in ***Smith Brothers***. Notwithstanding the absence of an option to purchase in the agreement, Justice Farley undertook the same analysis set out in ***Smith Brothers*** to determine the nature of the lease. He said, at para. 3:

> That involves a functional analysis of the relationship based on substance as opposed to form. Unfortunately there are no tags or labels which may be read with ease and "certainty" ("certainty" in the same way that a laboratory is able to conduct a DNA test and give probabilities or odds). Rather the task involves the weighing of the various materials involved. It is not a simple analysis of determining between black and white but rather the shade of grey where all factors are weighed and the balance as to whether the scales would tip towards a true lease relationship or alternatively against being a true lease relationship.

36 DLL pointed out that the parties in ***Philip Services*** had a course of conduct that resulted in the lessee purchasing leased assets from the lessor, although Justice Farley, at para. 1, described the course of conduct between the parties as "rather informal, flexible and sloppy." The fact that Justice Farley took care to point out that the leases themselves did not contain an option to buy assets at the end of the lease term indicates that this factor was in his mind when he balanced the various ***Smith Brothers*** factors. Depending on the circumstances of each case, the presence or absence of an option to purchase may or may not loom large in the court's analysis. In the case with which this Court was dealing, this "tag" or "label" was but one factor it considered.

37 Thus, this Court finds that the issue is of no importance to the practise.

Whether the point on appeal is of significance to the action itself

38 This Court acknowledges that the point on any potential appeal has significance to DLL. Otherwise why would this matter have come before this Court? That, however, is not the nature of this factor. This factor requires this Court to look at the action as a whole.

39 RBC argues that the appeal is of no significance to the action because the appeal is moot and,

as such, it would be impossible to "unscramble the egg" even if DLL were successful, ***Minister of National Revenue v. Temple City Housing Inc.***, 2008 ABCA 1 at para. 14. Indeed, DLL acknowledges this fact. However, DLL goes on to argue that while the CCAA Action has been concluded, there still remains the issue of the Disputed Lease Funds. DLL claims entitlement to approximately $900,000, representing the monthly lease payments to which it would be entitled if classified as a true lessor under *CCAA* s.11.01. DLL's claim to these funds rests on it being categorized as a true lessor. Additionally, the allocation of restructuring costs against DLL in these proceedings is dependent on whether DLL is classified as a true lessor.

40 It is important, at this stage, to explain the process that resulted in the Vesting Order. This Court appointed PWC to facilitate negotiations with the various parties and finalization of the transaction. From August 5, 2010, when this Court endorsed PWC's acceptance of the LOI, to August 25, 2010, when this Court approved the Agreement of Purchase and Sale and granted the Vesting Order, Aecon and PWC negotiated the allocation of the purchase price among the various creditors. At the beginning of the process, there was not overwhelming support from the general body of creditors for the Aecon transaction. However, through persistent and effective negotiations, PWC secured the support of holders of 92.8 percent of the debt that Cow Harbour owed to its creditors, representing a majority in number of 90.625 percent. As well, Aecon committed to running Cow Harbour's business and employing almost all of Cow Harbour's employees, except for certain management personnel.

41 Because of the circumstances involving certain of Cow Harbour's management, Cow Harbour would not put Aecon's transaction before the creditors as a plan of arrangement. Besides, it would have been impossible to meet the time requirements set forth in the *CCAA* to allow a plan of arrangement to be considered and approved. Cow Harbour's financial situation was deteriorating with each day. It had to meet payroll and other expenses and it did not have the financial wherewithal to meet those expenses. Aecon advised this Court that for it to facilitate the survival of Cow Harbour's business, this Court had to approve the transaction and allow a closing before the end of August, 2010. Like the parties in ***General Publishing***, the parties in this case had a sword of Damocles hanging over their heads, as the failure of this Court to approve this transaction would surely have resulted in Aecon withdrawing its offer or, if it did not, Cow Harbour's continued financial difficulties would have resulted in its demise, whether or not it was in the Aecon's hands.

42 Given the support that the creditors showed, and the fact that Cow Harbour's business would continue to operate, this Court felt it was in the best interests of the stakeholders to approve the sale and grant the Vesting Order. To do otherwise might have resulted in a piecemeal liquidation of Cow Harbour's assets and a closing-down of its business. In other words, although this transaction was consummated under the Receivership Action, this Court considered the public policy reasons underlying *CCAA* proceedings, when it approved the Aecon transaction and granted the Vesting Order.

43 The Aecon transaction was carefully negotiated and each of the creditors sacrificed part of

their respective claims. No creditor obtained everything it was seeking. Aecon advised this Court on August 25, 2010, that it would not consummate the transaction if it did not receive an order vesting all of the assets it was purchasing into its name, free and clear of all charges, liens and encumbrances. If this Court were to give one creditor, even a creditor that was owed a trifling amount, preferential treatment, the other creditors would not have supported the Aecon transaction.

44 An appeal of this matter might be of significance to DLL specifically. However, this Court's characterization of the Agreement is of no significance to this action generally.

Whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous

45 RBC argues that DLL has not demonstrated that it has a *prima facie* meritorious case. On September 3, 2010, DLL sought a stay of the various orders this Court granted on August 25, 2010. This Court held that because there was no appeal pending and that DLL did not seek a stay of the effect of the various orders this Court granted on that date after they were granted or at least before the Aecon transaction closed, this Court denied DLL's application on the ground of mootness. In other words, even if the Court of Appeal were to overturn this Court's August 25, 2010 decisions, DLL could not succeed in its claim to have the Equipment returned to it. The Equipment was part of a larger transaction.

46 Does this, of itself, mean that the proposed appeal lacks merit or is otherwise frivolous? The simple answer is no. Allowing the appeal may not provide DLL with a remedy, but that does not make the proposed appeal frivolous or one that lacks merit. Rather, we must analyze the strength of the appeal on the basis of the standard of review that would govern the appeal, ***Liberty Oil & Gas Ltd. (Companies' Creditors Arrangement Act)***, 2003 ABCA 158 at para. 20; ***Resurgence Asset Management LLC v. Canadian Airlines Corporation***, 2000 ABCA149 at paras. 28-29 .

47 As stated earlier in these reasons, it is difficult for this Court to find that it made an overriding and palpable error in its consideration of the issues the parties placed before it. Surely, this is the same awkwardness that Justice Ground faced in ***General Publishing***. This Court gave its oral reasons for why it held the Agreement to be a financing lease rather than a true lease. Even taking an objective view of this with the benefit of hindsight, this Court would come to the same conclusion today.

48 This Court acknowledges that it is not necessary for DLL to show that it is guaranteed to win an appeal. It only needs to show that it has an arguable case, ***Kenroc Building Materials Co. Ltd. v. Kerr Interior Systems Ltd.***, 2008 ABCA 291 at para. 11. Given this Court's various findings, it is difficult to see that DLL has an arguable case, in these circumstances. On these bases, this Court finds that any proposed appeal is not on its face meritorious.

Whether the appeal will unduly hinder the progress of the action

49 RBC and PWC argue that an appeal would unduly hinder the CCAA Action and the Receivership Action and create tremendous uncertainty concerning the various transition orders this Court granted in the CCAA Action. It should be noted at this stage that as part of the transition, this Court ordered that Disputed Lease Funds would be transferred from the monitor's counsel to the receiver's counsel, under the same terms as the May 21, 2010 order.

50 DLL, on the other hand argues that an appeal would not unduly hinder the progress of this action. The CCAA Action has been completed. The assets have been sold to Aecon. The hearing at which the other parties with disputed leases will have their agreements categorized has not yet been scheduled. DLL's application for a stay against Aecon has been denied, so there is no issue as to uncertainty surrounding Aecon's use of the Equipment. Accordingly, DLL argues that the progress of neither action would be unduly hindered by an appeal.

51 This Court finds that any appeal would unduly hinder the progress of the actions. Pursuant to the transition orders this Court granted on August 25, 2010, this Court must deal with many issues, including those concerning the remuneration of the chief restructuring advisor, the distribution of the Disputed Lease Funds, and who will be paying the administrative expenses. DLL is correct that Aecon's use of the Equipment is not an issue. However, the creditors seek a distribution of their respective share of the $180 million purchase price. This cannot happen if there is a pending appeal that could have an effect on the allocation. Thus, the progress of this action would be unduly hindered by the appeal to the prejudice of the creditors who supported the Aecon transaction.

52 More importantly, the transaction that PWC and Aecon negotiated with all the creditors rests on a fine balance. The uncertainty surrounding the finality of these issues unduly hinders the progress of these actions. A more thorough discussion of this fine balance will be undertaken when this Court discusses the Stay Application.

53 As a result of the foregoing, this Court dismisses DLL's application for leave to appeal. This result deals sufficiently with the Stay Application. However, as a courtesy to DLL, this Court will comment briefly on it.

IV. Stay Application

54 Earlier, this Court referred to DLL's application for a stay of this Court's orders approving the Aecon Asset Purchase Agreement and the Vesting Order. On September 3, 2010, the parties argued the stay application. This Court denied the application on the basis that the issue was moot and further, that DLL had not met the test for a stay. DLL argues that the application now before this Court differs from the one it argued on September 3, 2010, as it is not challenging the sale and Vesting Order. Rather, it is seeking to have this Court hold back monies representing DLL's alleged share of the Disputed Lease Funds and the net book value of the Equipment.

55 For DLL to obtain a stay of a stay of proceedings it must satisfy a tripartite test set out in ***RJR McDonald Inc. v. Canada (A.G.)***, [1994] 1 S.C.R. 311, being:

(a) Is there a serious question to be argued on appeal?
(b) Will DLL suffer irreparable harm if this Court does not grant a stay?
(c) Does the balance of convenience weigh in favour of a stay?

56 Unlike the factors that make up the "test for leave," the tripartite test does not require or permit courts to weigh these factors. The applicant must satisfy all three elements before a court will grant the stay. In other words, if the applicant does not establish one of the elements, its application will fail. Because of this, this Court will focus on the third element of the tripartite test; the balance of convenience.

57 On August 25, 2010, the Court heard Aecon's submissions that the Equipment is critical to the work that Aecon will be undertaking under contracts with Syncrude. For its negotiations to be successful, Aecon would have to satisfy Syncrude that it could fulfil the requirements under the Syncrude contracts. For this to occur, Aecon required the Equipment. Without the Equipment, Aecon would not have proceeded with the transaction.

58 As well, this Court heard submissions that outlined many details regarding the negotiations and work of Aecon, PWC and numerous creditors which led to the Asset Purchase Agreement. The negotiations were undertaken by these parties in good faith, which required significant compromise by the creditors, including RBC, Cow Harbour's largest creditor. PWC struck a balance among numerous interests.

59 Creditors representing 90.625 percent of all creditors negotiated in good faith and compromised their claims. Granting a stay in these circumstances would undermine the processes that Aecon, PWC, and the other creditors undertook in good faith. Holding back the net book value of the Equipment seriously upsets the fine balance that resulted from these negotiations. The creditors did not agree to compromise their claims so they could recover "something." They compromised their claims so they could receive a definite amount, as negotiated. Their receiving something less than that negotiated amount will result in this Court sanctioning an "unscrambling of the egg" and undermines the process that this Court approved and monitored. It should be noted also that DLL will be receiving an allocation of the purchase price representing a substantial portion of its claim.

60 DLL argues that this Court's finding that it holds a financing lease prejudices its right to argue that it should obtain a portion of the Disputed Lease Funds. That may be so, but it chose to have this Court deal with the nature of the Agreement in a summary fashion. Given this Court's finding that the Agreement is a financing lease, in the end, this argument carries little weight. However, this Court has dealt with that issue and it is not now open to DLL to attempt to re-argue it.

61 As a result, the balance of convenience favours this Court dening the stay.

V. Conclusion

62 For the foregoing reasons this Court dismisses DLL's application pursuant to *CCAA* s. 13, for leave to appeal this Court's August 25, 2010 order, which declared that the Agreement was a financing lease and not a true lease. As well, it dismisses DLL's application seeking an order in the nature of a stay pending appeal, holding back the Disputed Lease Funds insofar as they relate to funds payable under the Agreement and an order holding back from distribution a portion of the sale proceeds resulting from the Asset Purchase Agreement, equivalent to the net book value of the Equipment.

K.D. YAMAUCHI J.

cp/e/qlcct/qlpwb/qlcas/qljyw/qlcas

TAB 10

Indexed as:

Housen v. Nikolaisen

Paul Housen, appellant;
v.
Rural Municipality of Shellbrook No. 493, respondent.

[2002] 2 S.C.R. 235

[2002] S.C.J. No. 31

2002 SCC 33

File No.: 27826.

Supreme Court of Canada

2001: October 2 / 2002: March 28.

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 SASKATCHEWAN (176 paras.)

Torts -- Motor vehicles -- Highways -- Negligence -- Liability of rural municipality for failing to post warning signs on local access road -- Passenger sustaining injuries in motor vehicle accident on rural road -- Trial judge apportioning part of liability to rural municipality -- Whether Court of Appeal properly overturning trial judge's finding of negligence -- The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Municipal law -- Negligence -- Liability of rural municipality for failing to post warning signs on local access road -- Passenger sustaining injuries in motor vehicle accident on rural road -- Trial judge apportioning part of liability to rural municipality -- Whether Court of Appeal properly overturning trial judge's finding of negligence -- The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Appeals -- Courts -- Standard of appellate review -- Whether Court of Appeal properly overturning trial judge's finding of negligence -- Standard of review for questions of mixed fact and law.

The appellant was a passenger in a vehicle operated by N on a rural road in the respondent municipality. N [page236] failed to negotiate a sharp curve on the road and lost control of his vehicle. The appellant was rendered a quadriplegic as a result of the injuries he sustained in the accident. Damages were agreed upon prior to trial in the amount of $2.5 million, but at issue were the respective liabilities, if any, of the municipality, N and the appellant. On the day before the accident, N had attended a party at the T residence not far from the scene of the accident. He continued drinking through the night at another party where he met up with the appellant. The two men drove back to the T residence in the morning where N continued drinking until a couple of hours before he and the appellant drove off in N's truck. N was unfamiliar with the road, but had travelled on it three times in the 24 hours preceding the accident, on his way to and from the T residence. Visibility approaching the area of the accident was limited due to the radius of the curve and the uncleared brush growing up to the edge of the road. A light rain was falling as N turned onto the road from the T property. The truck fishtailed a few times before approaching the sharp curve where the accident occurred. Expert testimony revealed that N was travelling at a speed of between 53 and 65 km/hr when the vehicle entered the curved portion of the road, slightly above the speed at which the curve could be safely negotiated under the conditions prevalent at the time of the accident.

The road was maintained by the municipality and was categorized as a non-designated local access road. On such non-designated roads, the municipality makes the decision to post signs if it becomes aware of a hazard, or if there are several accidents at one spot. The municipality had not posted signs on any portion of the road. Between 1978 and 1987, three other accidents were reported in the area to the east of the site of the appellant's accident. The trial judge held that the appellant was 15 percent contributorily negligent in failing to take reasonable precautions for his own safety in accepting a ride from N, and apportioned the remaining joint and several liability 50 percent to N and 35 percent to the municipality. The Court of Appeal overturned the trial judge's finding that the municipality was negligent.

Held (Gonthier, Bastarache, Binnie and LeBel JJ. dissenting): The appeal should be allowed and the judgment of the trial judge restored.

[page237]

Per McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ.: Since an appeal is not a re-trial of a case, consideration must be given to the standard of review applicable to questions that arise on appeal. The standard of review on pure questions of law is one of correctness, and an appellate court is thus free to replace the opinion of the trial judge with its own. Appellate courts require a broad scope of review with respect to matters of law because their primary role is to delineate and refine legal rules and ensure their universal application.

The standard of review for findings of fact is such that they cannot be reversed unless the trial judge has made a "palpable and overriding error". A palpable error is one that is plainly seen. The reasons for deferring to a trial judge's findings of fact can be grouped into three basic principles. First, given the scarcity of judicial resources, setting limits on the scope of judicial review in turn limits the number, length and cost of appeals. Secondly, the principle of deference promotes the autonomy and integrity of the trial proceedings. Finally, this principle recognizes the expertise of trial judges and their advantageous position to make factual findings, owing to their extensive exposure to the evidence and the benefit of hearing the testimony viva voce. The same degree of deference must be

paid to inferences of fact, since many of the reasons for showing deference to the factual findings of the trial judge apply equally to all factual conclusions. The standard of review for inferences of fact is not to verify that the inference can reasonably be supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, a stricter standard. Making a factual conclusion of any kind is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion.

[page238]

Questions of mixed fact and law involve the application of a legal standard to a set of facts. Where the question of mixed fact and law at issue is a finding of negligence, it should be deferred to by appellate courts, in the absence of a legal or palpable and overriding error. Requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury. Where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. A determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law, and is thus subject to a standard of palpable and overriding error, unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law, subject to a standard of correctness.

Here, the municipality's standard of care was to maintain the road in such a reasonable state of repair that those requiring to use it could, exercising ordinary care, travel upon it with safety. The trial judge applied the correct test in determining that the municipality did not meet this standard of care, and her decision should not be overturned absent palpable and overriding error. The trial judge kept the conduct of the ordinary motorist in mind because she stated the correct test at the outset, and discussed implicitly and explicitly the conduct of a reasonable motorist approaching the curve. Further, her apportionment of negligence indicates that she assessed N's conduct against the standard of the ordinary driver as does her use of the term "hidden hazard" and her consideration of the speed at which motorists should have approached the curve.

The Court of Appeal's finding of a palpable and overriding error by the trial judge was based on the erroneous presumption that she accepted 80km/h as the speed at which an ordinary motorist would approach the curve, when in fact she found that a motorist exercising [page239] ordinary care could approach the curve at greater than the speed at which it would be safe to negotiate it. This finding was based on the trial judge's reasonable and practical assessment of the evidence as a whole, and is far from reaching the level of palpable and overriding error.

The trial judge did not err in finding that the municipality knew or ought to have known of the disrepair of the road. Because the hazard in this case was a permanent feature of the road, it was open to the trial judge to draw the inference that a prudent municipal councillor ought to be aware of it. Once this inference has been drawn, then unless the municipality can rebut the inference by show-

ing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. Prior accidents on the road do not provide a direct basis for finding that the municipality had knowledge of the particular hazard, but this factor, together with knowledge of the type of drivers using this road, should have caused the municipality to investigate the road which would have resulted in actual knowledge. To require the plaintiff to provide concrete proof of the municipality's knowledge of the state of disrepair of its roads is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

The trial judge's conclusion on the cause of the accident was a finding of fact subject to the palpable and overriding error standard of review. The abstract nature of the inquiry as to whether N would have seen a sign had one been posted before the curve supports deference to the factual findings of the trial judge. The trial judge's factual findings on causation were reasonable and thus should not have been interfered with by the Court of Appeal.

Per Gonthier, Bastarache, Binnie and LeBel JJ. (dissenting): A trial judge's findings of fact will not be overturned absent palpable and overriding error principally in recognition that only the trial judge observes witnesses and hears testimony first hand and is therefore better able to choose between competing versions of events. The process of fact-finding involves [page240] not only the determination of the factual nexus of the case but also requires the judge to draw inferences from facts. Although the standard of review is identical for both findings of fact and inferences of fact, an analytical distinction must be drawn between the two. Inferences can be rejected for reasons other than that the inference-drawing process is deficient. An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. The question of whether the conduct of the defendant has met the appropriate standard of care in the law of negligence is a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care, a question of law within the purview of both the trial and appellate courts.

A question of mixed fact and law in this case was whether the municipality knew or should have known of the alleged danger. The trial judge must approach this question having regard to the duties of the ordinary, reasonable and prudent municipal councillor. Even if the trial judge correctly identifies this as the applicable legal standard, he or she may still err in assessing the facts through the lens of that legal standard, a process which invokes a policy-making component. For example, the trial judge must consider whether the fact that accidents had previously occurred on different portions of the road would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the councillor would have been alerted to the previous accident by an accident-reporting system, a normative issue reviewable on a standard of correctness. Not all matters of mixed fact and law are reviewable according to the standard of correctness, but neither should they be accorded deference in every case.

Section 192 of the Rural Municipality Act, 1989, requires the trial judge to examine whether the portion of the road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Here, the trial judge failed to ask whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident [page241]

occurred. This amounted to an error of law. The duty of the municipality is to keep the road in such a reasonable state of repair that those required to use it may, exercising ordinary care, travel upon it with safety. The duty is a limited one as the municipality is not an insurer of travellers using its streets. Although the trial judge found that the portion of the road where the accident occurred presented drivers with a hidden hazard, there is nothing to indicate that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. Where an error of law has been found, the appellate court has jurisdiction to take the factual findings of the trial judge as they are and to reassess these findings in the context of the appropriate legal test. Here, the portion of the road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the condition of the road in general signalled to the reasonable driver that caution was needed.

The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair. She made no finding that the municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to it on the basis that it should have known of the danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor. The question is then answered through the trial judge's assessment of the facts of the case. The trial judge erred in law by approaching the question of knowledge from the perspective of an expert rather than from that of a prudent municipal councillor and by failing to appreciate that the onus of proving that the municipality knew or should have known of the disrepair remained on the plaintiff throughout. She made palpable and overriding errors in fact by drawing the unreasonable inference that the municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of the road. As the municipality had not received any complaints from motorists respecting the absence of signs on the road, the lack of super-elevation on the curves, or the presence of vegetation along the sides of the road, it had no particular reason to inspect that segment of the road for the presence of hazards. The question of the municipality's knowledge is inextricably linked to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is [page242] a duty to repair. Here, the municipality cannot have been expected to have knowledge of the hazard that existed at the site of the accident, since the hazard did not pose a risk to the reasonable driver. Implicit in the trial judge's reasons was the expectation that the municipality should have known about the accidents through an accident reporting system, a palpable error, absent any evidence of what might have been a reasonable system.

With respect to her conclusions on causation, which are conclusions on matters of fact, the trial judge ignored evidence that N had swerved on the first curve he negotiated prior to the accident, and that he had driven on the road three times in the 18 to 20 hours preceding the accident. She further ignored the significance of the testimony of the forensic alcohol specialist which pointed overwhelmingly to alcohol as the causal factor which led to the accident, and erroneously relied on one statement by him to support her conclusion that a driver at N's level of impairment would have reacted to a warning sign. The finding that the outcome would have been different had N been forewarned of the curve ignores the fact that he already knew the curve was there. The fact that the trial judge referred to some evidence to support her findings on causation does not insulate them from review by this Court. An appellate court is entitled to assess whether or not it was clearly wrong for

the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion.

Whatever the approach to the issue of the duty of care, it is only reasonable to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver. To expand the repair obligation of municipalities to require them to take into account the actions of unreasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard.

[page243]

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By Bastarache J. (dissenting)

Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802; Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114; Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487; Partridge v. Rural Municipality of Langenburg, [1929] 3 W.W.R. 555; Fafard v. City of Quebec (1917), 39 D.L.R. 717; Van de Perre v. Edwards, [2001] 2 S.C.R. 1014, 2001 SCC 60; Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2; Swinamer v. Nova Scotia (Attorney General), [1994] 1 S.C.R. 445; Jaegli Enterprises Ltd. v. Taylor, [1981] 2 S.C.R. 2, rev'g (1980), 112 D.L.R. (3d) 297 (sub nom. Taylor v. The Queen in Right of British Columbia), rev'g (1978), 95 D.L.R. (3d) 82; Brown v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420; Ryan v. Victoria (City), [1999] 1 S.C.R. 201; Schwartz v. Canada, [1996] 1 S.C.R. 254; Joseph Brant Memorial Hospital v. Koziol, [1978] 1 S.C.R. 491; Williams v. Town of North Battleford (1911), 4 Sask. L.R. 75; [page244] Shupe v. Rural Municipality of Pleasantdale, [1932] 1 W.W.R. 627; Galbiati v. City of Regina, [1972] 2 W.W.R. 40; Just v. British Columbia, [1989] 2 S.C.R. 1228; Geffen v. Goodman Estate, [1991] 2 S.C.R. 353; Moge v. Moge, [1992] 3 S.C.R. 813; R. v.

Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984); St-Jean v. Mercier, [2002] 1 S.C.R. 491, 2002 SCC 15; Schreiber Products Ltd. v. Currie Brothers Ltd., [1980] 2 S.C.R. 78; Levey v. Rural Municipality of Rodgers, No. 133, [1921] 3 W.W.R. 764; Diebel Estate v. Pinto Creek No. 75 (Rural Municipality) (1996), 149 Sask. R. 68; R. v. Jennings, [1966] S.C.R. 532; County of Parkland No. 31 v. Stetar, [1975] 2 S.C.R. 884; Nelson v. Waverley (Rural Municipality) (1988), 65 Sask. R. 260.

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[page245]

Gary D. Young, Q.C., Denis I. Quon and M. Kim Anderson, for the appellant.
Michael Morris and G. L. Gerrand, Q.C., for the respondent.

Solicitors for the appellant: Robertson Stromberg, Saskatoon; Quon Ferguson MacKinnon, Saskatoon.
Solicitors for the respondent: Gerrand Rath Johnson, Regina.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Iacobucci, Major and Arbour JJ. was delivered by

IACOBUCCI and MAJOR JJ.:--

I. Introduction

1 A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

2 Authority for this abounds particularly in appellate courts in Canada and abroad (see Gottardo Properties (Dome) Inc. v. Toronto (City) (1998), 162 D.L.R. (4th) 574 (Ont. C.A.); Schwartz v. Canada, [1996] 1 S.C.R. 254; Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114; Van de Perre v. Edwards, [2001] 2 S.C.R. 1014, 2001 SCC 60). In addition scholars, national and international, endorse it (see C. A. Wright in "The Doubtful Omniscience of Appellate Courts" (1957), 41 Minn. L. Rev. 751, at p. 780; and the Honourable R. P. Kerans in Standards of Review Employed by Appellate Courts (1994); and American Bar Association, Judicial Administration Division, Standards Relating to Appellate Courts (1995), at pp. 24-25).

3 The role of the appellate court was aptly defined in Underwood v. Ocean City Realty Ltd. (1987), 12 B.C.L.R. (2d) 199 (C.A.), at p. 204, where it was stated:

> The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

[page246]

4 While the theory has acceptance, consistency in its application is missing. The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.

5 What is palpable error? The New Oxford Dictionary of English (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The Cambridge International Dictionary of English (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). The Random House Dictionary of the English Language (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the

"palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

II. The Role of the Appellate Court in the Case at Bar

7 Given that an appeal is not a retrial of a case, consideration must be given to the applicable standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant [page247] to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. Standard of Review for Questions of Law

8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, supra, at p. 90.

9 There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in Woods Manufacturing Co. v. The King, [1951] S.C.R. 504, at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ... should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by Kerans, supra, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

[page248]

Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

B. Standard of Review for Findings of Fact

10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": Stein v. The Ship "Kathy K", [1976] 2 S.C.R. 802, at p. 808; Ingles v. Tutkaluk Construction Ltd., [2000] 1 S.C.R. 298, 2000 SCC 12, at para. 42; Ryan v. Victoria (City), [1999] 1 S.C.R. 201, at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

11 A fundamental reason for general deference to the trial judge is the presumption of fitness -- a presumption that trial judges are just as competent as appellate judges to ensure that disputes are resolved justly. Kerans, supra, at pp. 10-11, states that:

> If we have confidence in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.

[para12 With respect to findings of fact in particular, in Gottardo Properties, supra, Laskin J.A. summarized the purposes underlying a deferential stance as follows (at para. 48):

[page249]

> Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice.

Similar concerns were expressed by La Forest J. in Schwartz, supra, at para. 32:

> It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial... . Others have also pointed out additional judicial policy concerns to justify the rule. Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact; see R. D. Gibbens, "Appellate

> Review of Findings of Fact" (1992), 13 Adv. Q. 445, at pp. 445-48; Fletcher v. Manitoba Public Insurance Co., [1990] 3 S.C.R. 191, at p. 204.

See also in the context of patent litigation, Consolboard Inc. v. MacMillan Bloedel (Saskatchewan) Ltd., [1981] 1 S.C.R. 504, at p. 537.

13 In Anderson v. Bessemer City, 470 U.S. 564 (1985), at pp. 574-75, the United States Supreme Court also listed numerous reasons for deferring to the factual findings of the trial judge:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate [page250] their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'" ... For these reasons, review of factual findings under the clearly-erroneous standard -- with its deference to the trier of fact -- is the rule, not the exception.

14 Further comments regarding the advantages possessed by the trial judge have been made by R. D. Gibbens in "Appellate Review of Findings of Fact" (1991-92), 13 Advocates' Q. 445, at p. 446:

> The trial judge is said to have an expertise in assessing and weighing the facts developed at trial. Similarly, the trial judge has also been exposed to the entire case. The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.

The corollary to this recognized advantage of trial courts and judges is that appellate courts are not in a favourable position to assess and determine factual matters. Appellate court judges are restricted to reviewing written transcripts of testimony. As well, appeals are unsuited to reviewing voluminous amounts of evidence. Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

15 In our view, the numerous bases for deferring to the findings of fact of the trial judge which are discussed in the above authorities can be grouped into the following three basic principles.

(1) Limiting the Number, Length and Cost of Appeals

16 Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be [page251] encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

(2) Promoting the Autonomy and Integrity of Trial Proceedings

17 The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.

(3) Recognizing the Expertise of the Trial Judge and His or Her Advantageous Position

18 The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony viva voce, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

C. Standard of Review for Inferences of Fact

19 We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our [page252] view, that to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.

20 Our colleague acknowledges that, in Geffen v. Goodman Estate, [1991] 2 S.C.R. 353, this Court determined that a trial judge's inferences of fact and findings of fact should be accorded a similar degree of deference. The relevant passage from Geffen is the following (per Wilson J., at pp. 388-89):

> It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts ... . Even where a finding of fact is not contingent upon credibility, this Court has maintained a non-interventionist approach to the review of trial court findings... .
>
> And even in those cases where a finding of fact is neither inextricably linked to the credibility of the testifying witness nor based on a misapprehension of the evidence, the rule remains that appellate review should be limited to those

> instances where a manifest error has been made. Hence, in Schreiber Brothers Ltd. v. Currie Products Ltd., [1980] 2 S.C.R. 78, this Court refused to overturn a trial judge's finding that certain goods were defective, stating at pp. 84-85 that it is wrong for an appellate court to set aside a trial judgment where the only point at issue is the interpretation of the evidence as a whole (citing Métivier v. Cadorette, [1977] 1 S.C.R. 371).

This view has been reiterated by this Court on numerous occasions: see Palsky v. Humphrey, [1964] S.C.R. 580, at p. 583; Schwartz, supra, at para. 32; Hodgkinson v. Simms, [1994] 3 S.C.R. 377, at p. 426, per La Forest J.; Toneguzzo-Norvell, supra. The United States Supreme Court has taken a similar position: see Anderson, supra, at p. 577.

21 In discussing the standard of review of the trial judge's inferences of fact, our colleague states, at para. 103, that:

[page253]

> In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles... . While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact. [Emphasis added.]

With respect, we find two problems with this passage. First, in our view, the standard of review is not to verify that the inference can be reasonably supported by the findings of fact of the trial judge, but whether the trial judge made a palpable and overriding error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.

22 Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

[page254]

23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.

24 In addition, in distinguishing inferences of fact from findings of fact, our colleague states, at para. 102, that deference to findings of fact is "principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand", a rationale which does not bear on factual inferences. With respect, we disagree with this view. As we state above, there are numerous reasons for showing deference to the factual findings of a trial judge, many of which are equally applicable to all factual conclusions of the trial judge. This was pointed out in Schwartz, supra. After listing numerous policy concerns justifying a deferential approach to findings of fact, at para. 32 La Forest J. goes on to state:

> This explains why the rule [that appellate courts must treat a trial judge's findings of fact with great deference] applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge. [Emphasis added.]

[page255]

Recent support for deferring to all factual conclusions of the trial judge is found in Toneguzzo-Norvell, supra. McLachlin J. (as she then was) for a unanimous Court stated, at pp. 121-22:

> A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.
>
> ...
>
> I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge. [Emphasis added.]

We take the above comments of McLachlin J. to mean that, although the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged. This does not, however, imply that there is a lower standard of review where witness credibility is not in issue, or that there are not numerous policy reasons supporting deference to all factual conclusions of the trial judge. In our view, this is made clear by the underlined portion of the above passage. The essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review.

25 Although the trial judge will always be in a distinctly privileged position when it comes to [page256] assessing the credibility of witnesses, this is not the only area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the principal rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on all conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge -- that of palpable and overriding error.

D. Standard of Review for Questions of Mixed Fact and Law

26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal [page257] or factual. Because of this similarity, the two types of questions are sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 L.Q.R. 402, at p. 405:

> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."

In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal

standard, which in this case is provided by s. 192(3) of the Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, to these factual findings. Similarly, the finding of negligence involves weighing the underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.

27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southam, supra, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the [page258] decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: Southam, supra, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in Southam, at para. 37:

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

29 When the question of mixed fact and law at issue is a finding of negligence, this Court has held that [page259] a finding of negligence by the trial judge should be deferred to by appellate courts. In Jaegli Enterprises Ltd. v. Taylor, [1981] 2 S.C.R. 2, at p. 4, Dickson J. (as he then was) set aside the holding of the British Columbia Court of Appeal that the trial judge had erred in his

finding of negligence on the basis that "it is wrong for an appellate court to set aside a trial judgment where there is not palpable and overriding error, and the only point at issue is the interpretation of the evidence as a whole" (see also Schreiber Brothers Ltd. v. Currie Products Ltd., [1980] 2 S.C.R. 78, at p. 84).

30 This more stringent standard of review for findings of negligence is appropriate, given that findings of negligence at the trial level can also be made by juries. If the standard were instead correctness, this would result in the appellate court assessing even jury findings of negligence on a correctness standard. At present, absent misdirection on law by the trial judge, such review is not available. The general rule is that courts accord great deference to a jury's findings in civil negligence proceedings:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it.

(McCannell v. McLean, [1937] S.C.R. 341, at p. 343)

See also Dube v. Labar, [1986] 1 S.C.R. 649, at p. 662, and C.N.R. v. Muller, [1934] 1 D.L.R. 768 (S.C.C.). To adopt a correctness standard would change the law and undermine the traditional function of the jury. Therefore, requiring a standard of "palpable and overriding error" for findings of negligence made by either a trial judge or a jury reinforces [page260] the proper relationship between the appellate and trial court levels and accords with the established standard of review applicable to a finding of negligence by a jury.

31 Where, however, the erroneous finding of negligence of the trial judge rests on an incorrect statement of the legal standard, this can amount to an error of law. This distinction was pointed out by Cory J. in Galaske v. O'Donnell, [1994] 1 S.C.R 670, at pp. 690-91:

> The definition of the standard of care is a mixed question of law and fact. It will usually be for the trial judge to determine, in light of the circumstances of the case, what would constitute reasonable conduct on the part of the legendary reasonable man placed in the same circumstances. In some situations a simple reminder may suffice while in others, for example when a very young child is the passenger, the driver may have to put the seat belt on the child himself. In this case, however, the driver took no steps whatsoever to ensure that the child passenger wore a seat belt. It follows that the trial judge's decision on the issue amounted to a finding that there was no duty at all resting upon the driver. This was an error of law.

Galaske, supra, is an illustration of the point made in Southam, supra, of the potential to extricate a purely legal question from what appears to be a question of mixed fact and law. However, in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with.

32 We are supported in our conclusion by the analogy which can be drawn between inferences of fact and questions of mixed fact and law. As stated above, both involve drawing inferences from underlying facts. The difference lies in whether the inference drawn relates to a legal standard or not. Because both processes are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing [page261] deference to the trial judge's inferences of mixed fact and law.

33 Where, however, an erroneous finding of the trial judge can be traced to an error in his or her characterization of the legal standard, then this encroaches on the law-making role of an appellate court, and less deference is required, consistent with a "correctness" standard of review. This nuance was recognized by this Court in St-Jean v. Mercier, [2002] 1 S.C.R. 491, 2002 SCC 15, at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (Southam, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. [Emphasis added.]

34 A good example of this subtle principle can be found in Rhône (The) v. Peter A.B. Widener (The), [1993] 1 S.C.R. 497, at pp. 515-16. In that case the issue was the identification of certain individuals within a corporate structure as directing minds. This is a mixed question of law and fact. However, the erroneous finding of the courts below was easily traceable to an error of law which could be extricated from the mixed question of law and fact. The extricable question of law was the issue of the functions which are required in order to be properly identified as a "directing mind" within a corporate structure (pp. 515-16). In the opinion of Iacobucci J. for the majority of the Court (at p. 526):

> With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an [page262] operational basis, whether at head office or across the sea.

35 Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the "directing mind" of a company, when the correct legal factor characterizing a "directing mind" is in fact "the capacity to exercise decision-making authority on matters of corporate policy". This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

36 To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in Jaegli Enterprises, supra, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[page263]

37 In this regard, we respectfully disagree with our colleague when he states at para. 106 that "[o]nce the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts". In our view, it is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

III. Application of the Foregoing Principles to this Case: Standard of Care of the Municipality

A. The Appropriate Standard of Review

38 We agree with our colleague that the correct statement of the municipality's standard of care is that found in Partridge v. Rural Municipality of Langenburg, [1929] 3 W.W.R. 555 (Sask. C.A.), per Martin J.A., at pp. 558-59:

> The extent of the statutory obligation placed upon municipal corporations to keep in repair the highways under their jurisdiction, has been variously stated in numerous reported cases. There is, however, a general rule which may be gathered from the decisions, and that is, that the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety. What is a reasonable state of repair is a question of fact, depending upon all the surrounding circumstances; "repair" is a relative term, and hence the facts in one case afford no fixed rule [page264] by which to determine another case where the facts are different ... .

However, we differ from the views of our colleague in that we find that the trial judge applied the correct test in determining that the municipality did not meet its standard of care, and thus did not commit an error of law of the type mentioned in Southam, supra. The trial judge applied all the elements of the Partridge standard to the facts, and her conclusion that the respondent municipality failed to meet this standard should not be overturned absent palpable and overriding error.

B. The Trial Judge Did Not Commit an Error of Law

39 We note that our colleague bases his conclusion that the municipality met its standard of care on his finding that the trial judge neglected to consider the conduct of the ordinary motorist, and thus failed to apply the correct standard of care, an error of law, which justifies his reconsideration of the evidence (para. 114). As a starting point to the discussion of the ordinary or reasonable motorist, we emphasize that the failure to discuss a relevant factor in depth, or even at all, is not itself a sufficient basis for an appellate court to reconsider the evidence. This was made clear by the recent decision of Van de Perre, supra, where Bastarache J. says, at para. 15:

> ... omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in Van Mol (Guardian ad Litem of) v. Ashmore (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [2000] 1 S.C.R. vi, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence.

[page265]

In our view, as we will now discuss, there can be no reasoned belief in this case that the trial judge forgot, ignored, or misconceived the question of the ordinary driver. It would thus be an error to engage in a re-assessment of the evidence on this issue.

40 The fact that the conduct of the ordinary motorist was in the mind of the trial judge from the outset is clear from the fact that she began her standard of care discussion by stating the correct test, quoting the above passage from Partridge, supra. Absent some clear sign that she subsequently varied her approach, this initial acknowledgment of the correct legal standard is a strong indication that this was the standard she applied. Not only is there no indication that she departed from the stated test, but there are further signs which support the conclusion that the trial judge applied the Partridge standard. The first such indication is that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. The second indication is that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Finally, the fact that the trial judge apportioned negligence to Mr. Nikolaisen indicates that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter.

41 The discussion of the ordinary motorist is found in the passage from the trial judgment immediately following the statement of the requisite standard of care:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

[page266]

> There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the maximum speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be safely negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet.
>
> ... where the existence of that bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Underlining added; italics in original.]
>
> ([1998] 5 W.W.R. 523, at paras. 84-86)

42 In our view, this passage indicates that the trial judge did consider how a motorist exercising ordinary care would approach the curve in question. The implication of labelling the curve a "hidden hazard" which is "not readily apparent to users of the road", is that the danger is of the type that cannot be anticipated. This in turn implies that, even if the motorist exercises ordinary care, he or she will not be able to react to the curve. As well, the trial judge referred explicitly to the conduct of a motorist exercising ordinary care: "it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86 (emphasis added)).

[page267]

43 With respect to the speed of a motorist approaching the curve, there is also an indication that the trial judge considered the conduct of an ordinary motorist. First, she stated that she accepted the evidence of Mr. Anderson and Mr. Werner with respect to the finding that the curve constituted a hazard to the public. The evidence given by these experts suggests that between 60 and 80 km/h is a reasonable speed to drive parts of this road, and at that speed, the curve presents a hazard. Their evidence also indicates their general opinion that the curve was a hazardous one. Mr. Anderson refers to the curve being difficult to negotiate at "normal speeds". Also, Mr. Anderson states that "if you're not aware that this curve is there, the sharp course of the curve, and you enter too far into it before you realize that the curve is there, then you have to do a tighter radius than 118 metres in order to get back on track to be able to negotiate the second curve". He also states that "you could be lulled into thinking you've got an 80 kilometres an hour road until you are too far into the tight curve to be able to respond".

44 The Court of Appeal found that, given the nature and condition of Snake Hill Road, the contention that this rural road would be taken at 80 km/h by the ordinary motorist was untenable. However, it is clear from the trial judge's reasons that she did not take 80 km/h as the speed at which the ordinary motorist would approach the curve. Instead she found, based on expert evidence, that "this curve cannot be safely negotiated at speeds greater than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet" (para. 85 (emphasis in original)). From this finding, coupled with the finding that the curve was hidden and unexpected, the logical conclusion is that the trial judge found that a motorist exercising ordinary care could easily be deceived into approaching the curve at speeds in excess of the safe speed for the curve, and subsequently be taken by surprise. Therefore, the trial judge found that the curve was hazardous to the ordinary [page268] motorist and it follows that she applied the correct standard of care.

45 In our respectful view, our colleague errs in agreeing with the Court of Appeal's finding that the trial judge should have addressed the conduct of the ordinary motorist more fully (para. 124). At para. 119, he writes:

> A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question.

And later, he states, "In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road" (para. 125). With respect, requiring the trial judge to have made this specific inquiry in her reasons is inconsistent with Van de Perre, supra, which makes it clear that an omission or a failure to discuss a factor in depth is not, in and of itself, a basis for interfering with the findings of the trial judge and reweighing the evidence. As we note above, it is clear that although the trial judge may not have conducted an extensive review of this element of the Partridge test, she did indeed consider this factor by stating the correct test, then applying this test to the facts.

46 We note that in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses. However, her reliance on the evidence of Mr. Anderson and Mr. Werner is insufficient proof that she "forgot, ignored, or misconceived" the evidence. The full record was before the trial judge and we can presume that she reviewed all of it, absent further proof that the trial judge forgot, ignored or misapprehended the

evidence, leading to an error in law. It is open to a trial judge to prefer the evidence of some witnesses over others: [page269] Toneguzzo-Norvell, supra, at p. 123. Mere reliance by the trial judge on the evidence of some witnesses over others cannot on its own form the basis of a "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (Van de Perre, supra, at para. 15). This is in keeping with the narrow scope of review by an appellate court applicable in this case.

47 A further indication that the trial judge considered the conduct of an ordinary motorist on Snake Hill Road is her finding that both Mr. Nikolaisen and the municipality breached their duty of care to Mr. Housen, and that the defendant Nikolaisen was 50 percent contributorily negligent. Since a finding of negligence implies a failure to meet the ordinary standard of care, and since Mr. Nikolaisen's negligence related to his driving on the curve, to find that Mr. Nikolaisen's conduct on the curve failed to meet the standard of the ordinary driver implies a consideration of that ordinary driver on the curve. The fact that the trial judge distinguished the conduct of Mr. Nikolaisen in driving negligently on the road from the conduct of the municipality in negligently failing to erect a warning sign is evidence that the trial judge kept the municipality's legal standard clearly in mind in its application to the facts, and that she applied this standard to the ordinary driver, not the negligent driver.

48 To summarize, in the course of her reasons, the trial judge first stated the requisite standard of care from Partridge, supra, relating to the conduct of the ordinary driver. She then applied that standard to the facts referring again to the conduct of the ordinary driver. Finally, in light of her finding that the municipality breached this standard, she apportioned negligence between the driver and the municipality in a way which again entailed a consideration of the [page270] ordinary driver. As such, we are overwhelmingly drawn to the conclusion that the conduct of the ordinary driver was both considered and applied by the trial judge.

49 Thus, we conclude that the trial judge did not commit an error of law with respect to the municipality's standard of care. On this matter, we disagree with the basis for the re-assessment of the evidence undertaken by our colleague (paras. 122-42) and regard this re-assessment to be an unjustified intrusion into the finding of the trial judge that the municipality breached its standard of care. This finding is a question of mixed law and fact which should not be overturned absent a palpable and overriding error. As discussed below, it is our view that no such error exists, as the trial judge conducted a reasonable assessment based on her view of the evidence.

C. The Trial Judge Did Not Commit A Palpable or Overriding Error

50 Despite this high standard of review, the Court of Appeal found that a palpable and overriding error was made by the trial judge ([2000] 4 W.W.R. 173, 2000 SKCA 12, at para. 84). With respect, this finding was based on the erroneous presumption that the trial judge accepted 80 km/h as the speed at which an ordinary motorist would approach the curve, a presumption which our colleague also adopts in his reasons (para. 133).

51 As discussed above, the trial judge's finding was that an ordinary motorist could approach the curve in excess of 60 km/h in dry conditions, and 50 km/h in wet conditions, and that at such speeds the curve was hazardous. The trial judge's finding was not based on a particular speed at which the curve would be approached by the ordinary motorist. Instead, she found that, because the curve was hidden and sharper than would be anticipated, a motorist exercising ordinary care could approach it at greater than [page271] the speed at which it would be safe to negotiate the curve.

52 As we explain in greater detail below, in our opinion, not only is this assessment far from reaching the level of a palpable and overriding error, in our view, it is a sensible and logical way to deal with large quantities of conflicting evidence. It would be unrealistic to focus on some exact speed at which the curve would likely be approached by the ordinary motorist. The findings of the trial judge in this regard were the result of a reasonable and practical assessment of the evidence as a whole.

53 In finding a palpable and overriding error, Cameron J.A. relied on the fact that the trial judge adopted the expert evidence of Mr. Anderson and Mr. Werner which was premised on a de facto speed limit of 80 km/h taken from The Highway Traffic Act, S.S. 1986, c. H-3.1. However, whether or not the experts based their testimony on this limit, the trial judge did not adopt that limit as the speed of the ordinary motorist approaching the curve. Again, the trial judge found that the curve could not be taken safely at greater than 60 km/h dry and 50 km/h wet, and there is evidence in the record to support this finding. For example, Mr. Anderson states:

> If you don't anticipate the curve and you get too far into it before you start to do your correction then you can get into trouble even at, probably at 60. Fifty you'd have to be a long ways into it, but certainly at 60 you could.

It is notable too that both Mr. Anderson and Mr. Werner would have recommended installing a sign, warning motorists of the curve, with a posted limit of 50 km/h.

54 Although clearly the curve could not be negotiated safely at 80 km/h, it could also not be [page272] negotiated safely at much slower speeds. It should also be noted that the trial judge did not adopt the expert testimony of Mr. Anderson and Mr. Werner in its entirety. She stated: "There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner" (para. 85 (emphasis added)). It cannot be assumed from this that she accepted a de facto speed limit of 80 km/h especially when one bears in mind (1) the trial judge's statement of the safe speeds of 50 and 60 km/h, and (2) the fact that both these experts found the road to be unsafe at much lower speeds than 80 km/h.

55 Given that the trial judge did not base her standard of care analysis on a de facto speed limit of 80 km/h, it then follows that the Court of Appeal's finding of a palpable and overriding error cannot stand.

56 Furthermore, the narrowly defined scope of appellate review dictates that a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others. As we are of the view that the trial judge committed no error of law in finding that the municipality breached its standard of care, we are also respectfully of the view that our colleague's re-assessment of the evidence on this issue (paras. 129-42) is an unjustified interference with the findings of the trial judge, based on a difference of opinion concerning the inferences to be drawn from the evidence and the proper weight to be placed on different portions of the evidence. For instance, in the opinion of our colleague, based on some portions of the expert evidence, a reasonable driver exercising ordinary care would approach a rural road at 50 km/h or less, because a reasonable driver would have difficulty seeing the sharp radius of the curve and oncoming traffic (para. 129). However, the trial judge, basing her assessment on other portions of the expert evidence, found that the nature of the road was such that a motorist could be

[page273] deceived into believing that the road did not contain a sharp curve and thus would approach the road normally, unaware of the hidden danger.

57 We are faced in this case with conflicting expert evidence on the issue of the correct speed at which an ordinary motorist would approach the curve on Snake Hill Road. The differing inferences from the evidence drawn by the trial judge and the Court of Appeal amount to a divergence on what weight should be placed on various pieces of conflicting evidence. As noted by our colleague, Mr. Sparks was of the opinion that "[if] you can't see around the corner, then, you know, drivers would have a fairly strong signal ... that due care and caution would be required". Similar evidence of this nature was given by Mr. Nikolaisen, and indeed even by Mr. Anderson and Mr. Werner. This is contrasted with evidence such as that given by Mr. Anderson and Mr. Werner that a reasonable driver would be "lulled" into thinking that there is an 80 km/h road ahead of him or her.

58 As noted by McLachlin J. in Toneguzzo-Norvell, supra, at p. 122 and mentioned above, "the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact". In that case, a unanimous Court found that the Court of Appeal erred in interfering with the trial judge's factual findings, on the basis that it was open to the trial judge to place less weight on certain evidence and accept other, conflicting evidence which the trial judge found to be more convincing (Toneguzzo-Norvell, at pp. 122-23). Similarly, in this case, the trial judge's factual findings concerning the proper speed to be used on approaching the curve should not be interfered with. It was open to her to choose to place more weight on certain portions of the evidence of Mr. Anderson and Mr. Werner, where the evidence was conflicting. Her assessment of the proper speed was a reasonable inference based on the evidence and does not reach [page274] the level of a palpable and overriding error. As such, the trial judge's findings with respect to the standard of care should not be overturned.

IV. Knowledge of the Municipality

59 We agree with our colleague that s. 192(3) of The Rural Municipality Act, 1989, requires the plaintiff to show that the municipality knew or should have known of the disrepair of Snake Hill Road before the municipality can be found to have breached its duty of care under s. 192. We also agree that the evidence of the prior accidents, in and of itself, is insufficient to impute such knowledge to the municipality. However, we find that the trial judge did not err in her finding that the municipality knew or ought to have known of the disrepair.

60 As discussed, the question of whether the municipality knew or should have known of the disrepair of Snake Hill Road is a question of mixed fact and law. The issue is legal in the sense that the municipality is held to a legal standard of knowledge of the nature of the road, and factual in the sense of whether it had the requisite knowledge on the facts of this case. As we state above, absent an isolated error in law or principle, such a finding is subject to the "palpable and overriding" standard of review. In this case, our colleague concludes that the trial judge erred in law by failing to approach the question of knowledge from the perspective of a prudent municipal councillor, and holds that a prudent municipal councillor could not be expected to become aware of the risk posed to the ordinary driver by the hazard in question. He also finds that the trial judge erred in law by failing to recognize that the burden of proving knowledge rested with the plaintiff. With respect, we disagree with these conclusions.

[page275]

61 The hazard in question is an unsigned and unexpected sharp curve. In our view, when a hazard is, like this one, a permanent feature of the road which has been found to present a risk to the ordinary driver, it is open to the trial judge to draw an inference, on this basis alone, that a prudent municipal councillor ought to be aware of the hazard. In support of his conclusion on the issue of knowledge, our colleague states that the municipality's knowledge is inextricably linked to the standard of care, and ties his finding on the question of knowledge to his finding that the curve did not present a hazard to the ordinary motorist (para. 149). We agree that the question of knowledge is closely linked to the standard of care, and since we find that the trial judge was correct in holding that the curve presented a hazard to the ordinary motorist, from there it was open to the trial judge to find that the municipality ought to have been aware of this hazard. We further note that as a question of mixed fact and law this finding is subject to the "palpable and overriding" standard of review. On this point, however, we restrict ourselves to situations such as the one at bar where the hazard in question is a permanent feature of the road, as opposed to a temporary hazard which reasonably may not come to the attention of the municipality in time to prevent an accident from occurring.

62 In addition, our colleague relies on the evidence of the lay witnesses, Craig and Toby Thiel, who lived on Snake Hill Road, and who testified that they had not experienced any difficulties with it (para. 149). With respect, we find three problems with this reliance. First, since the curve was found to be a hazard based on its hidden and unexpected nature, relying on the evidence of those who drive the road on a daily basis does not, in our view, assist in determining whether the curve presented a hazard to the ordinary motorist, or whether the municipality ought to have been aware of the hazard. In addition, in finding that the municipality ought to have known of the disrepair, the trial judge clearly chose not to rely on the above evidence. As we state above, [page276] it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court.

63 As well, since the question of knowledge is to be approached from the perspective of a prudent municipal councillor, we find the evidence of lay witnesses to be of little assistance. In Ryan, supra, at para. 28, Major J. stated that the applicable standard of care is that which "would be expected of an ordinary, reasonable and prudent person in the same circumstances" (emphasis added). Municipal councillors are elected for the purpose of managing the affairs of the municipality. This requires some degree of study and of information gathering, above that of the average citizen of the municipality. Indeed, it may in fact require consultation with experts to properly meet the obligation to be informed. Although municipal councillors are not experts, to equate the "prudent municipal councillor" with the opinion of lay witnesses who live on the road is incorrect in our opinion.

64 It is in this context that we view the following comments of the trial judge, at para. 90:

> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied

> that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

[page277]

From this statement, we take the trial judge to have meant that, given the occurrence of prior accidents on this low-traffic road, the existence of permanent residents, and the type of drivers on the road, the municipality did not take the reasonable steps it should have taken in order to ensure that Snake Hill Road did not contain a hazard such as the one in question. Based on these factors, the trial judge drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question. This factual inference, grounded as it was on the trial judge's assessment of the evidence, was in our view, far from reaching the requisite standard of palpable and overriding error, proper.

65 Although we agree with our colleague that the circumstances of the prior accidents in this case do not provide a direct basis for the municipality to have had knowledge of the particular hazard in question, in the view of the trial judge, they should have caused the municipality to investigate Snake Hill Road, which in turn would have resulted in actual knowledge. In this case, far from causing the municipality to investigate, the evidence of Mr. Danger, who had been the municipal administrator for 20 years, was that, until the time of the trial, he was not even aware of the three accidents which had occurred between 1978 and 1987 on Snake Hill Road. As such, we do not find that the trial judge based her conclusion on any perspective other than that of a prudent municipal councillor, and therefore that she did not commit an error of law in this respect. Moreover, we do not find that she imputed knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road. The existence of the prior accidents was simply a factor which caused the trial judge to find that the municipality should have been put on notice with respect to the condition of Snake Hill Road (para. 90).

66 We emphasize that, in our view, the trial judge did not shift the burden of proof to the municipality [page278] on this issue. Once the trial judge found that there was a permanent feature of Snake Hill Road which presented a hazard to the ordinary motorist, it was open to her to draw an inference that the municipality ought to have been aware of the danger. Once such an inference is drawn, then, unless the municipality can rebut the inference by showing that it took reasonable steps to prevent such a hazard from continuing, the inference will be left undisturbed. In our view, this is what the trial judge did in the above passage when she states: "I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing" (para. 90 (emphasis added)). The fact that she drew such an inference is clear from the fact that this statement appears directly after her finding that the municipality ought to have known of the hazard based on the listed factors. Thus, it is our view that the trial judge did not improperly shift the burden of proof onto the municipality in this case.

67 As well, although the circumstances of the prior accidents in this case do not provide strong evidence that the municipality ought to have known of the hazard, proof of prior accidents is not a necessary condition to a finding of breach of the duty of care under s. 192 of The Rural Municipality Act, 1989. If this were so, the first victim of an accident on a negligently maintained road would not be able to recover, whereas subsequent victims in identical circumstances would. Although un-

der s. 192(3) the municipality cannot be held responsible for disrepair of which it could not have known, it is not sufficient for the municipality to wait for an accident to occur before remedying the disrepair, and, in the absence of proof by the plaintiff of prior accidents, claim that it could not have known of the hazard. If this were the case, not only would the first victim of an accident suffer a disproportionate evidentiary burden, but municipalities would also be encouraged not to collect information pertaining to accidents on its roads, as this would make it more difficult for the plaintiff in a motor vehicle accident to prove that the [page279] municipality knew or ought to have known of the disrepair.

68 Although in this case the trial judge emphasized the prior accidents that the plaintiff did manage to prove, in our view, it is not necessary to rely on these accidents in order to satisfy s. 192(3). For the plaintiff to provide substantial and concrete proof of the municipality's knowledge of the state of disrepair of its roads, is to set an impossibly high burden on the plaintiff. Such information was within the particular sphere of knowledge of the municipality, and in our view, it was reasonable for the trial judge to draw an inference of knowledge from her finding that there was an ongoing state of disrepair.

69 To summarize our position on this issue, we do not find that the trial judge erred in law either by failing to approach the question from the perspective of a prudent municipal councillor, or by improperly shifting the burden of proof onto the defendant. As such, it would require a palpable and overriding error in order to overturn her finding that the municipality knew or ought to have known of the hazard, and, in our view, no such error was made.

V. Causation

70 We agree with our colleague's statement at para. 159 that the trial judge's conclusions on the cause of the accident was a finding of fact: Cork v. Kirby MacLean, Ltd., [1952] 2 All E.R. 402 (C.A.), at p. 407, quoted with approval in Matthews v. MacLaren (1969), 4 D.L.R. (3d) 557 (Ont. H.C.), at p. 566. Thus, this finding should not be interfered with absent palpable and overriding error.

[page280]

71 The trial judge based her findings on causation on three points (at para. 101):

(1) the accident occurred at a dangerous part of the road where a sign warning motorists of the hidden hazard should have been erected;
(2) even if there had been a sign, Mr. Nikolaisen's degree of impairment did increase his risk of not reacting, or reacting inappropriately, to a sign;
(3) even so, Mr. Nikolaisen was not driving recklessly such that one would have expected him to have missed or ignored a warning sign. Moments before, on departing the Thiel residence, he had successfully negotiated a sharp curve which he could see and which was apparent to him.

The trial judge concluded that, on a balance of probabilities, Mr. Nikolaisen would have reacted and possibly avoided an accident, if he had been given advance warning of the curve. However she also

found that the accident was partially caused by the conduct of Mr. Nikolaisen, and apportioned fault accordingly, with 50 percent to Mr. Nikolaisen and 35 percent to the Rural Municipality (para. 102).

72 As noted above, this Court has previously held that "an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (Van de Perre, supra, at para.15). In the present case, it is not clear from the trial judge's reasons which portions of the evidence of Mr. Laughlin, Craig and Toby Thiel and Paul Housen she relied upon, or to what extent. However, as we have already stated, the full evidentiary record was before the trial judge and, absent further proof that the omission in her reasons was due to her misapprehension or neglect, of the evidence, we can presume that she reviewed the evidence in its entirety and based her factual findings [page281] on this review. This presumption, absent sufficient evidence of misapprehension or neglect, is consistent with the high level of error required by the test of "palpable and overriding" error. We reiterate that it is open to the trial judge to prefer the testimony of certain witnesses over others and to place more weight on some parts of the evidence than others, particularly where there is conflicting evidence: Toneguzzo-Norvell, supra, at pp. 122-23. The mere fact that the trial judge did not discuss a certain point or certain evidence in depth is not sufficient grounds for appellate interference: Van de Perre, supra, at para. 15.

73 For these reasons, we do not feel it appropriate to review the evidence of Mr. Laughlin and the lay witnesses de novo. As we concluded earlier, the trial judge's finding of fact that a hidden hazard existed at the curve should not be interfered with. The finding of a hidden hazard that requires a sign formed part of the basis of her findings concerning causation. As her conclusions on the existence of a hidden hazard had a basis in the evidence, her conclusions on causation grounded in part on the hidden hazard finding also had a basis in the evidence.

74 As for the silence of the trial judge on the evidence of Mr. Laughlin, we observe only that the evidence of Mr. Laughlin appears to be general in nature and thus of limited utility. Mr. Laughlin admitted that he could only provide general comments on the effects of alcohol on motorists, but could not provide specific expertise on the actual effect of alcohol on an individual driver. This is significant, as the level of tolerance of an individual driver plays a key role in determining the actual effect of alcohol on the [page282] motorist; an experienced drinker, although dangerous, will probably perform better on the road than an inexperienced drinker. It is noteworthy that the trial judge believed the evidence of Mr. Anderson that Mr. Nikolaisen's vehicle was travelling at the relatively slow speed of between 53 to 65 km/h at the time of impact with the embankment. It was also permissible for the trial judge to rely on the evidence of lay witnesses that Mr. Nikolaisen had successfully negotiated an apparently sharp curve moments before the accident, rather than relying on the evidence of Mr. Laughlin, which was of a hypothetical and unspecific nature. Indeed, the hypothetical nature of Mr. Laughlin's evidence reflects the entire inquiry into whether Mr. Nikolaisen would have seen a sign and reacted, or the precise speed that would be taken by a reasonable driver upon approaching the curve. The abstract nature of such inquiries supports deference to the factual findings of the trial judge, and is consistent with the stringent standard imposed by the phrase "palpable and overriding error".

75 Therefore we conclude that the trial judge's factual findings on causation were reasonable and thus do not reach the level of a palpable and overriding error, and therefore should not have been interfered with by the Court of Appeal.

VI. Common Law Duty of Care

76 As we conclude that the municipality is liable under The Rural Municipality Act, 1989, we find it unnecessary to consider the existence of a common law duty in this case.

VII. Disposition

77 As we stated at the outset, there are important reasons and principles for appellate courts not to interfere improperly with trial decisions. Applying [page283] these reasons and principles to this case, we would allow the appeal, set aside the judgment of the Saskatchewan Court of Appeal, and restore the judgment of the trial judge, with costs throughout.

The reasons of Gonthier, Bastarache, Binnie and LeBel JJ. were delivered by

BASTARACHE J. (dissenting):--

I. Introduction

78 This appeal arises out of a single-vehicle accident which occurred on July 18, 1992, on Snake Hill Road, a rural road located in the Municipality of Shellbrook, Saskatchewan. The appellant, Paul Housen, a passenger in the vehicle, was rendered a quadriplegic by the accident. At trial, the judge found that the driver of the vehicle, Douglas Nikolaisen, was negligent in travelling Snake Hill Road at an excessive rate of speed and in operating his vehicle while impaired. The trial judge also found the respondent, the Municipality of Shellbrook, to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1. The Court of Appeal overturned the trial judge's finding that the respondent municipality was negligent. At issue in this appeal is whether the Court of Appeal had sufficient grounds to intervene in the decision of the lower court. The respondent has also asked this Court to overturn the trial judge's finding that the respondent knew or ought to have known of the alleged disrepair of Snake Hill Road and that the accident was caused in part by the negligence of the respondent. An incidental question is whether a common law duty of care exists alongside the statutory duty imposed on the respondent by s. 192.

[page284]

79 I conclude that the Court of Appeal was correct to overturn the trial judge's finding that the respondent was negligent. Though I would not interfere with the trial judge's factual findings on this issue, I find that she erred in law by failing to apply the correct standard of care. I would also overturn the trial judge's conclusions with regard to knowledge and causation. In coming to the conclusion that the respondent knew or should have known of the alleged disrepair of Snake Hill Road, the trial judge erred in law by failing to consider the knowledge requirement from the perspective of a prudent municipal councillor and by failing to be attentive to the fact that the onus of proof was on the appellant. In addition, the trial judge drew an unreasonable inference by imputing knowledge to the respondent on the basis of accidents that occurred on other segments of the road while motorists were travelling in the opposite direction. The trial judge also erred with respect to causation. She misapprehended the evidence before her, drew erroneous conclusions from that evidence and ignored relevant evidence. Finally, I would not interfere with the decision of the courts below to reject

the appellant's argument that a common law duty existed. It is unnecessary to impose a common law duty of care where a statutory duty exists. Moreover, the application of common law negligence principles would not affect the outcome in these proceedings.

II. Factual Background

80 The sequence of events which culminated in this tragic accident began to unfold some 19 hours before its occurrence on the afternoon of July 18, 1992. On July 17, Mr. Nikolaisen attended a barbeque at the residence of Craig and Toby Thiel, located on Snake Hill Road. He arrived in the late afternoon and had his first drink of the day at approximately 6:00 p.m. He consumed four or five drinks before leaving the Thiel residence at approximately [page285] 10:00 or 10:30 p.m. After returning home for a few hours, Mr. Nikolaisen proceeded to the Sturgeon Lake Jamboree, where he met up with the appellant. At the jamboree, Mr. Nikolaisen consumed eight or nine double rye drinks and several beers. The appellant was also drinking during this event. The appellant and Mr. Nikolaisen partied on the grounds of the jamboree for several hours. At approximately 4:30 a.m., the appellant left the jamboree with Mr. Nikolaisen. After travelling around the back roads for a period of time, they returned to the Thiel residence. It was approximately 8:00 a.m. The appellant and Mr. Nikolaisen had several more drinks over the course of the morning. Mr. Nikolaisen stopped drinking two or three hours before leaving the Thiel residence with the appellant at approximately 2:00 p.m.

81 A light rain was falling when the appellant and Mr. Nikolaisen left the Thiel residence, travelling eastbound with Mr. Nikolaisen behind the wheel of a Ford pickup truck. The truck swerved or "fish-tailed" as it turned the corner from the Thiel driveway onto Snake Hill Road. As Mr. Nikolaisen continued on his way over the course of a gentle bend some 300 metres in length, gaining speed to an estimated 65 km/h, the truck again fish-tailed several times. The truck went into a skid as Mr. Nikolaisen approached and entered a sharper right turn. Mr. Nikolaisen steered into the skid but was unable to negotiate the curve. The left rear wheel of the truck contacted an embankment on the left side of the road. The vehicle travelled on the road for approximately 30 metres when the left front wheel contacted and climbed an 18-inch embankment on the left side of the road. This second contact with the embankment caused the truck to enter a 360-degree roll with the passenger side of the roof contacting the ground first.

82 When the vehicle came to rest, the appellant was unable to feel any sensation. Mr. Nikolaisen climbed out the back window of the vehicle and ran to the Thiel residence for assistance. Police later accompanied Mr. Nikolaisen to the Shellbrook Hospital where a blood sample was taken. Expert testimony estimated Mr. Nikolaisen's blood alcohol level to be [page286] between 180 and 210 milligrams in 100 millilitres of blood at the time of the accident, well over the legal limits prescribed in The Highway Traffic Act, S.S. 1986, c. H-3.1, and the Criminal Code, R.S.C. 1985, c. C-46.

83 Mr. Nikolaisen had travelled on Snake Hill Road three times in the 24 hours preceding the accident, but had not driven it on any earlier occasions. The road was about a mile and three quarters in length and was flanked by highways to the north and to the east. Starting at the north end, it ran south for a short distance, dipped between open fields, then curved to the southeast and descended in a southerly loop down and around Snake Hill, past trees, bush and pasture, to the bottom of the valley. There it curved sharply to the southeast as it passed the Thiels' driveway. Once it passed the driveway, it curved gently to the south east for about 300 metres, then curved more dis-

tinctly to the south. It was on this stretch that the accident occurred. From that point on, the road crossed a creek, took another curve, then ascended a steep hill to the east, straightened out, and continued east for just over half a mile, past tree-lined fields and another farm site, to an approach to the highway.

84 Snake Hill Road was established in 1923 and was maintained by the respondent municipality for the primary purpose of providing local farmers access to their fields and pastures. It also served as an access road for the two permanent residences and one veterinary clinic located on it. The road at its northernmost end, coming off the highway, is characterized as a "Type C" local access road under the provincial government's scheme of road classification. This means that it is graded, gravelled and elevated above the surrounding land. The portion of the road east of the Thiel residence, on which the accident occurred, is characterized as "Type B" bladed trail, essentially a prairie trail that has been bladed to remove the ruts and to allow it to be driven on. Bladed trails follow the path of least resistance through the surrounding land and are not elevated or gravelled. The [page287] province of Saskatchewan has some 45,000 kilometres of bladed trails.

85 According to the provincial scheme of road classification, both bladed trails and local access roads are "non-designated", meaning that they are not subject to the Saskatchewan Rural Development Sign Policy and Standards. On such roads, the council of the rural municipality makes a decision to post signs if it becomes aware of a hazard or if there are several accidents at one specific spot. Three accidents had occurred on Snake Hill Road between 1978 and 1987. All three accidents occurred to the east of the site of the Nikolaisen rollover, with drivers travelling westbound. A fourth accident occurred on Snake Hill Road in 1990 but there was no evidence as to where it occurred. There was no evidence that topography was a factor in any of these accidents. The respondent municipality had not posted signs on any portion of Snake Hill Road.

III. Relevant Statutory Provisions

86 The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1

> 192(1) Every Council shall keep in a reasonable state of repair all municipal roads, dams and reservoirs and the approaches to them that have been constructed or provided by the municipality or by any person with the permission of the council or that have been constructed or provided by the province, having regard to the character of the municipal road, dam or reservoir and the locality in which it is situated or through which it passes.
>
> ...
>
> (2) Where the council fails to carry out its duty imposed by subsections (1) and (1.1), the municipality is, subject to The Contributory Negligence Act, civilly liable for all damages sustained by any person by reason of the failure.

[page288]

(3) Default under subsections (1) and (1.1) shall not be imputed to a municipality in any action without proof by the plaintiff that the municipality knew or should have known of the disrepair of the municipal road or other thing mentioned in subsections (1) and (1.1).

The Highway Traffic Act, S.S. 1986, c. H-3.1

33(1) Subject to the other provisions of this Act, no person shall drive a vehicle on a highway:

(a) at a speed greater than 80 kilometres per hour; or
(b) at a speed greater than the maximum speed indicated by any signs that are erected on the highway ... .

(2) No person shall drive a vehicle on a highway at a speed greater than is reasonable and safe in the circumstances.

44(1) No person shall drive a vehicle on a highway without due care and attention.

IV. Judicial History

A. Saskatchewan Court of Queen's Bench, [1998] 5 W.W.R. 523

87 Wright J. found the respondent negligent in failing to erect a sign to warn motorists of the sharp right curve on Snake Hill Road, which she characterized as a "hidden hazard". She also found Mr. Nikolaisen negligent in travelling Snake Hill Road at an excessive speed and in operating his vehicle while impaired. The appellant was held to be contributorily negligent in accepting a ride with Mr. Nikolaisen. Fifteen percent of the fault was apportioned to the appellant, and the remainder was apportioned jointly and severally 50 percent to Mr. Nikolaisen and 35 percent to the respondent.

88 Wright J. found that s. 192 of The Rural Municipality Act, 1989 imposed a statutory duty of care on the respondent toward persons travelling on Snake Hill Road. She then considered whether the respondent met the standard of care as delineated in [page289] s. 192 and the jurisprudence interpreting that section. She referred specifically to Partridge v. Rural Municipality of Langenberg, [1929] 3 W.W.R. 555 (Sask. C.A.), in which it was stated at p. 558 that "the road must be kept in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety". She also cited Shupe v. Rural Municipality of Pleasantdale, [1932] 1 W.W.R. 627 (Sask. C.A.), at p. 630: "[R]egard must be had to the locality ... the situation of the road therein, whether required to be used by many or by few; ... to the number of roads to be kept in repair; to the means at the disposal of the council for that purpose, and the requirements of the public who use the road." Relying on Galbiati v. City of Regina, [1972] 2 W.W.R. 40 (Sask. Q.B.), Wright J. observed that although the Act does not mention an obligation to erect warning signs, the general duty of repair nevertheless includes the duty to warn motorists of a hidden hazard.

89 Having laid out the relevant case law, Wright J. went on to discuss the character of the road. Relying primarily on the evidence of two experts at trial, Mr. Anderson and Mr. Werner, she found

that the sharp right turning curve was a hazard that was not readily apparent to the users of the road. From their testimony she concluded (at para. 85):

> It is a hidden hazard. The location of the Nikolaisen rollover is the most dangerous segment of Snake Hill Road. Approaching the location of the Nikolaisen rollover, limited sight distance, created by uncleared bush, precludes a motorist from being forewarned of an impending sharp right turn immediately followed by a left turn. While there were differing opinions on the maximum speed at which this curve can be negotiated, I am satisfied that when limited sight distance is combined with the tight radius of the curve and lack of superelevation, this curve cannot be safely negotiated at speeds greater [page290] than 60 kilometres per hour when conditions are favourable, or 50 kilometres per hour when wet. [Emphasis in original.]

Wright J. then noted that, while it would not be reasonable to expect the respondent to construct the road to a higher standard or to clear all of the bush away, it was reasonable to expect the respondent to erect and maintain a warning or regulatory sign "so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation" (para. 86).

90 Wright J. then considered s. 192(3) of the Act, which provides that there is no breach of the statutory standard of care unless the municipality knew or should have known of the danger. Wright J. observed that between 1978 and 1990, there were four accidents on Snake Hill Road, three of which occurred "in the same vicinity" as the Nikolaisen rollover, and two of which were reported to the authorities. On the basis of this information, she held that "[i]f the R.M. [Rural Municipality] did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known" (para. 90). Wright J. also found significant the relatively low volume of traffic on the road, the fact that there were permanent residences on the road, and the fact that the road was frequented by young and perhaps less experienced drivers.

91 In respect to causation, Wright J. found that it was probable that a warning sign would have enabled Mr. Nikolaisen to take corrective action to maintain control of his vehicle despite the fact of his impairment. She concluded (at para. 101):

> Mr. Nikolaisen's degree of impairment only served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded [page291] a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him.

92 Wright J. also addressed the appellant's argument that the municipality was in breach of a common law duty of care which was not qualified or limited by any of the restrictions set out under s. 192. She held that Just v. British Columbia, [1989] 2 S.C.R. 1228, and the line of authority both preceding and following that decision did not apply to the case before her given the existence of the statutory duty of care. She also found that any qualifying words in s. 192 of the Act pertained to the standard of care and did not impose limitations on the statutory duty of care.

B. Saskatchewan Court of Appeal, [2000] 4 W.W.R. 173, 2000 SKCA 12

93 On appeal, Cameron J.A., writing for a unanimous court, dealt primarily with the trial judge's finding that the respondent's failure to place a warning sign or regulatory sign at the site of the accident constituted a breach of its statutory duty of road repair. He did not find it necessary to rule on the issue of causation given his conclusion that the trial judge erred in finding the respondent negligent.

94 Cameron J.A. characterized the trial judge's conclusion that the respondent had breached the statutory duty of care as a matter of mixed fact and law. He noted that an appellate court is not to interfere with a trial judge's findings of fact unless the judge made a "palpable and overriding error" which affected his or her assessment of the facts. With respect to errors of law, however, Cameron J.A. remarked that the ability of an appellate court to overturn the finding of the trial judge is "largely unbounded". Regarding errors of mixed fact and law, Cameron J.A. noted that these are typically subject to the same standard of review as findings [page292] of fact. One exception to this, according to Cameron J.A., occurs where the trial judge identifies the correct legal test, yet fails to apply one branch of that test to the facts at hand. As support for this proposition, Cameron J.A. cited (at para. 41) Iacobucci J. in Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, at para. 39:

> [I]f a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

95 Turning to the applicable law in this case, Cameron J.A. acknowledged that the standard of care set out in the Act and the jurisprudence interpreting it requires municipalities to post warning signs to warn of hazards that prudent drivers, using ordinary care, would be unlikely to appreciate. Based on the jurisprudence, Cameron J.A. set out (at para. 50) an analytical framework to be used in order to assess if a municipality has breached its duty in this regard. This framework requires the judge:

1. To determine the character and state of the road at the time of the accident. This, of course, is a matter of fact that entails an assessment of the material features of the road where the accident occurred, as well as those factors going to the maintenance standard, namely the location, class of road, patterns of use, and so on.
2. To assess the issue of whether persons requiring to use the road, exercising ordinary car[e], could ordinarily travel upon it safely. This is essentially a reasonable person test, one concerned with how a [page293] reasonable driver on that particular road would have conducted himself or herself. It is necessary in taking this step to take account of the various elements noted in the authorities referred to earlier, namely the locality of the road, the character and class of the road, the standard to which the municipality could reasonably have been expected to maintain the road, and so forth. These criteria fall to be balanced in the context of the question: how would

> a reasonable driver have driven upon this particular road? Since this entails the application of a legal standard to a given set of facts, it constitutes a question of mixed fact and law.
>
> 3. To determine either tha[t] the road was in a reasonable state of repair or that it was not, depending upon the assessment made while using the second step. If it is determined that the road was not in a reasonable state of repair, then it becomes necessary to go on to determine whether the municipality knew or should have known of the state of disrepair before imputing liability.

96 According to Cameron J.A., the trial judge did not err in law by failing to set out the proper legal test. She did, however, make an error in law of the type identified by Iacobucci J. in Southam, supra. In his view, when applying the law to the facts of the case, the trial judge failed to assess the manner in which a reasonable driver, exercising ordinary care, would ordinarily have driven on the road, and the risk, if any, that the unmarked curve might have posed for the ordinary driver. As noted by Cameron J.A., the trial judge "twice alluded to the matter, but failed to come to grips with it" (para. 57).

97 Cameron J.A. also found that the trial judge had made a "palpable and overriding" error of fact in determining that the respondent had breached the standard of care. According to Cameron J.A., the trial judge's factual error stemmed from her reliance on the expert testimony of Mr. Werner and Mr. Anderson. Cameron J.A. found that the evidence of both experts was based on the fundamental premise [page294] that the ordinary driver could be expected to travel the road at a speed of 80 km/h. In his view, this premise was misconceived and unsupported by the evidence.

98 Cameron J.A. concluded that although the trial judge was free to accept the evidence of some witnesses over others, she was not free to accept expert testimony that was based on an erroneous factual premise. According to Cameron J.A., had the trial judge found that a prudent driver, exercising ordinary care for his or her safety, would not ordinarily have driven this section of Snake Hill Road at a speed greater than 60 km/h, then she would have had to conclude that no hidden hazard existed since the curve could be negotiated safely at this speed.

99 Cameron J.A. agreed with the trial judge that a common law duty of care was not applicable in this case. His remarks in this respect are found at para. 44 of his reasons:

> Concerning the duty of care, it might be noted that unlike statutory provisions empowering municipalities to maintain roads, but imposing no duty upon them to do so, the duty in this instance owes its existence to a statute, rather than the neighbourhood principle of the common law: Just v. British Columbia, [1989] 2 S.C.R. 1228 (S.C.C.). The duty is readily seen to extend to all who travel upon the roads.

V. Issues

100 A. Did the Court of Appeal properly interfere with the trial judge's finding that the respondent was in breach of its statutory duty of care?

B. Did the trial judge err in finding the respondent knew or should have known of the alleged danger?
C. Did the trial judge err in finding that the accident was caused in part by the respondent's negligence?

[page295]

D. Does a common law duty of care coexist alongside the statutory duty of care?

VI. Analysis
A. Did the Court of Appeal Properly Interfere with the Decision at Trial?

(1) The Standard of Review

101 Although the distinctions are not always clear, the issues that confront a trial court fall generally into three categories: questions of law, questions of fact, and questions of mixed law and fact. Put briefly, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests (Southam, supra, at para. 35).

102 Of the three categories above, the highest degree of deference is accorded to the trial judge's findings of fact. The Court will not overturn a factual finding unless it is palpably and overridingly, or clearly wrong (Southam, supra, at para. 60; Stein v. The Ship"Kathy K", [1976] 2 S.C.R. 802, at p. 808; Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 1 S.C.R. 114, at p. 121). This deference is principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand, and is therefore better able to choose between competing versions of events (Schwartz v. Canada, [1996] 1 S.C.R. 254, at para. 32). It is however important to recognize that the making of a factual finding often involves more than merely determining the who, what, where and when of the case. The trial judge is very often called upon to draw inferences from the facts that are put before the court. For example, in this case, the trial judge inferred from the fact of accidents having occurred on Snake Hill Road [page296] that the respondent knew or should have known of the hidden danger.

103 This Court has determined that a trial judge's inferences of fact should be accorded a similar degree of deference as findings of fact (Geffen v. Goodman Estate, [1991] 2 S.C.R. 353). In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. I respectfully disagree with the majority's view that inferences can be rejected only where the inference-drawing process itself is deficient: see Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487, at para. 45:

> When a court is reviewing a tribunal's findings of fact or the inferences made on the basis of the evidence, it can only intervene "where the evidence, viewed reasonably, is incapable of supporting a tribunal's findings of fact":

> Lester (W. W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644, at p. 669 per McLachlin J.

An inference can be clearly wrong where the factual basis upon which it relies is deficient or where the legal standard to which the facts are applied is misconstrued. My colleagues recognize themselves that a judge is often called upon to make inferences of mixed law and fact (para. 26). While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact.

[page297]

104 My colleagues take issue with the above statement that an appellate court will verify whether the making of an inference can reasonably be supported by the trial judge's findings of fact, a standard which they believe to be less strict than the "palpable and overriding" standard. I do not agree that a less strict standard is implied. In my view there is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by him or her and concluding that the inference was not reasonably supported by those facts. The distinction is merely semantic.

105 By contrast, an appellate court reviews a trial judge's findings on questions of law not merely to determine if they are reasonable, but rather to determine if they are correct; Moge v. Moge, [1992] 3 S.C.R. 813, at p. 833; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, at p. 647; R. P. Kerans, Standards of Review Employed by Appellate Courts (1994), at p. 90. The role of correcting errors of law is a primary function of the appellate court; therefore, that court can and should review the legal determinations of the lower courts for correctness.

106 In the law of negligence, the question of whether the conduct of the defendant has met the appropriate standard of care is necessarily a question of mixed fact and law. Once the facts have been established, the determination of whether or not the standard of care was met by the defendant will in most cases be reviewable on a standard of correctness since the trial judge must appreciate the facts within the context of the appropriate standard of care. In many cases, viewing the facts through the legal lens of the standard of care gives rise to a policy-making or law-setting function that is the purview of both the trial and appellate courts. As stated by Kerans, supra, at p. 103, "[t]he evaluation of facts as meeting or not meeting a legal test is a process that involves law-making. Moreover, it is probably correct to say that every new attempt to apply a legal rule to a set of [page298] facts involves some measure of interpretation of that rule, and thus more law-making" (emphasis in original).

107 In a negligence case, the trial judge is called on to decide whether the conduct of the defendant was reasonable under all the circumstances. While this determination involves questions of fact, it also requires the trial judge to assess what is reasonable. As stated above, in many cases, this

will involve a policy-making or "law-setting" role which an appellate court is better situated to undertake (Kerans, supra, at pp. 5-10). For example, in this case, the degree of knowledge that the trial judge should have imputed to the reasonably prudent municipal councillor raised the policy consideration of the type of accident-reporting system that a small rural municipality with limited resources should be expected to maintain. This law-setting role was recognized by the United States Supreme Court in Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984), at note 17, within the context of an action for defamation:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes -- in terms of impact on future cases and future conduct -- are too great to entrust them finally to the judgment of the trier of fact.

[page299]

108 My colleagues assert that the question of whether or not the standard of care was met by the defendant in a negligence case is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law (para. 36). I disagree. In many cases, it will not be possible to "extricate" a purely legal question from the standard of care analysis applicable to negligence, which is a question of mixed fact and law. In addition, while some questions of mixed fact and law may not have "any great precedential value" (Southam, supra, at para. 37), such questions often necessitate a normative analysis that should be reviewable by an appellate court.

109 Consider again the issue of whether the municipality knew or should have known of the alleged danger. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality having regard to the duties of the ordinary, reasonable and prudent municipal councillor. If the trial judge applies a different legal standard, such as the reasonable person standard, it is an error of law. Yet even if the trial judge correctly identifies the applicable legal standard, he or she may still err in the process of assessing the facts through the lens of that legal standard. For example, there may exist evidence that an accident had previously occurred on the portion of the road on which the relevant accident occurred. In the course of considering whether or not that fact satisfies the legal test for knowledge the trial judge must make a number of normative assumptions. The trial judge must consider whether the fact that one accident had previously occurred in the same location would alert the ordinary, reasonable and prudent municipal councillor to the existence of a hazard. The trial judge must also consider whether the ordinary, reasonable and prudent councillor would have been alerted to the previous accident by an accident-reporting system. In my view, the question of whether the fact of a previous accident having

occurred fulfills the applicable knowledge [page300] requirement is a question of mixed fact and law and it is artificial to characterize it as anything else. As is apparent from the example given, the question may also raise normative issues which should be reviewable by an appellate court on the correctness standard.

110 I agree with my colleagues that it is not possible to state as a general proposition that all matters of mixed fact and law are reviewable according to the standard of correctness: citing Southam, supra, at para. 37 (para. 28). I disagree, however, that the dicta in Southam establishes that a trial judge's conclusions on questions of mixed fact and law in a negligence action should be accorded deference in every case. This Court in St-Jean v. Mercier, [2002] 1 S.C.R. 491, 2002 SCC 15, a medical negligence case, distinguished Southam on the issue of the standard applicable to questions of mixed fact and law where the tribunal has no particular expertise. Gonthier J., writing for a unanimous Court, stated at paras. 48-49:

> A question "about whether the facts satisfy the legal tests" is one of mixed law and fact. Stated differently, "whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact" (Southam, at para. 35).
>
> Generally, such a question, once the facts have been established without overriding and palpable error, is to be reviewed on a standard of correctness since the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts. Such is the standard for medical negligence. There is no issue of expertise of a specialized tribunal in a particular field which may go to the determination of facts and be pertinent to defining an appropriate standard and thereby call for some measure of deference by a court of general appeal (Southam, supra, at para. 45; and Nova Scotia Pharmaceutical Society, supra, at p. 647).

111 I also disagree with my colleagues that Jaegli Enterprises Ltd. v. Taylor, [1981] 2 S.C.R. 2, is authority for the proposition that when the question [page301] of mixed fact and law at issue is a finding of negligence, that finding should be deferred to by appellate courts. In that case the trial judge found that the conduct of the defendant ski instructor met the standard of care expected of him. Moreover, the trial judge found that the accident would have occurred regardless of what the ski instructor had done (Taylor v. The Queen in Right of British Columbia (1978), 95 D.L.R. (3d) 82). Seaton J.A. of the British Columbia Court of Appeal disagreed with the trial judge that the ski instructor had met the applicable standard of care (Taylor (Guardian ad litem of) v. British Columbia (1980), 112 D.L.R. (3d) 297). Seaton J.A. recognized nevertheless that the "final question" was whether "the instructor's failure to remain was a cause of the accident" (p. 307). On the issue of causation, a question of fact, Seaton J.A. clearly substituted his opinion for that of the trial judge's without regard to the appropriate standard of review. His concluding remarks on the issue of causation at p. 308 highlight his lack of deference to the trial judge's conclusion on causation:

> On balance, I think that the evidence supports the plaintiffs' claim against the instructor, that his conduct in leaving the plaintiff below the crest was one of the causes of the accident.

112 This Court, which restored the finding of the trial judge, did not clearly state whether it did so on the basis that the appellate court was wrong to interfere with the trial judge's finding of negligence or whether it did so because the appellate court wrongly interfered with the trial judge's conclusions on causation. The reasons suggest the latter. The only portion of the trial judgment that this Court referred to was the finding on causation. Dickson J. (as he then was) remarks in Jaegli Enterprises, supra, at p. 4:

> At the end of a nine-day trial Mr. Justice Meredith, the presiding judge, delivered a judgment in which he [page302] very carefully considered all of the evidence and concluded that the accident had been caused solely by Larry LaCasse and that the plaintiffs should recover damages, in an amount to be assessed, against LaCasse. The claims against Paul Ankenman, Jaegli Enterprises Limited and the other defendants were dismissed with costs.

113 The Court went on to cite a number of cases, some of which did not involve negligence (see Schreiber Brothers Ltd. v. Currie Products Ltd., [1980] 2 S.C.R. 78), for the general proposition that "it [is] wrong for an appellate court to set aside a trial judgment where [there is not palpable and overriding error, and] the only point at issue [was] the interpretation of the evidence as a whole" (p. 84). Given that the Court focussed on the issue of causation, a question of fact alone, I do not think that Jaegli Enterprises establishes that a finding of negligence by the trial judge should be deferred to by appellate courts. In my view, the Court in Jaegli Enterprises merely affirmed the longstanding principle that an appellate court should not interfere with a trial judge's finding of fact absent a palpable and overriding error.

(2) Error of Law in the Reasons of the Court of Queen's Bench

114 The standard of care set out in s. 192 of The Rural Municipality Act, 1989, as interpreted within the jurisprudence, required the trial judge to examine whether the portion of Snake Hill Road on which the accident occurred posed a hazard to the reasonable driver exercising ordinary care. Having identified the correct legal test, the trial judge nonetheless failed to ask herself whether a reasonable driver exercising ordinary care would have been able to safely drive the portion of the road on which the accident occurred. To neglect entirely one branch of a legal test when applying the facts to the test is to misconstrue the law (Southam, supra, at para. 39). The Saskatchewan Court of Appeal was therefore right to characterize this failure as an error of law and to consider the factual findings made by the trial judge in light of the appropriate legal test.

[page303]

115 The long line of jurisprudence interpreting s. 192 of The Rural Municipality Act, 1989 and its predecessor provisions clearly establishes that the duty of the municipality is to keep the road "in such a reasonable state of repair that those requiring to use it may, exercising ordinary care, travel upon it with safety" (Partridge, supra, at p. 558; Levey v. Rural Municipality of Rodgers, No. 133, [1921] 3 W.W.R. 764 (Sask. C.A.), at p. 766; Diebel Estate v. Pinto Creek No. 75 (Rural Municipality) (1996), 149 Sask. R. 68 (Q.B.), at pp. 71-72). Legislation in several other provinces establishes a similar duty of care and courts in these provinces have interpreted it in a similar fashion (R.

v. Jennings, [1966] S.C.R. 532, at p. 537; County of Parkland No. 31 v. Stetar, [1975] 2 S.C.R. 884, at p. 892; Fafard v. City of Quebec (1917), 39 D.L.R. 717 (S.C.C.), at p. 718). This Court, in Jennings, supra, interpreting a similar provision under the Ontario Highway Improvement Act, R.S.O. 1960, c. 171, remarked at p. 537 that: "[i]t has been repeatedly held in Ontario that where a duty to keep a highway in repair is imposed by statute the body upon which it is imposed must keep the highway in such a condition that travellers using it with ordinary care may do so with safety".

116 There is good reason for limiting the municipality's duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. As stated by this Court in Fafard, supra, at p. 718: "[a] municipal corporation is not an insurer of travellers using its streets; its duty is to use reasonable care to keep its streets in a reasonably safe condition for ordinary travel by persons exercising ordinary care for their own safety". Correspondingly, appellate courts have long held that it is an error for the trial judge to find a municipality in breach of its duty merely because a danger exists, regardless of whether or not that danger poses a risk to the ordinary user of the road. The type of error to be guarded against was described by Wetmore C.J. in Williams v. [page304] Town of North Battleford (1911), 4 Sask. L.R. 75 (en banc), at p. 81:

> The question in an action of this sort, whether or not the road is kept in such repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, is, it seems to me, largely one of fact ... I would hesitate about setting aside a finding of fact of the trial Judge if he had found the facts necessary for the determination of the case, but he did not so find. He found that the crossing was a "dangerous spot without a light, and that if the utmost care were used no accident might occur, but it was not in such proper or safe state as to render such accident unlikely to occur." He did not consider the question from the standpoint of whether or not those requiring to use the road might, using ordinary care, pass to and fro upon it in safety. The mere fact of the crossing being dangerous is not sufficient ... . [Emphasis added.]

117 From the jurisprudence cited above, it is clear that the mere existence of a hazard or danger does not in and of itself give rise to a duty on the part of the municipality to erect a sign. Even if a trial judge concludes on the facts that the conditions of the road do, in fact, present a hazard, he or she must still go on to assess whether that hazard would present a risk to the reasonable driver exercising ordinary care. The ordinary driver is often faced with inherently dangerous driving conditions. Motorists drive in icy or wet conditions. They drive at night on country roads that are not well lit. They are faced with obstacles such as snow ridges and potholes. These obstacles are often not in plain view, but are obscured or "hidden". Common sense dictates that motorists will, however, exercise a degree of caution when faced with dangerous driving conditions. A municipality is expected to provide extra cautionary measures only where the conditions of the road and the surrounding circumstances do not signal to the driver the possibility that a hazard is present. For example, the ordinary driver expects a dirt road to become slippery when wet. By contrast, paved [page305] bridge decks on highways are often slick, though they appear completely dry. Consequently, signs will be posted to alert drivers to this unapparent possibility.

118 The appellant in this case argued, at para. 27 of his factum, that the trial judge did, in fact, assess whether a reasonable driver using ordinary care would find the portion of Snake Hill Road on which the accident occurred to pose a risk. He points in particular to the trial judge's comments at paras. 85-86 that:

> There is a portion of Snake Hill Road that is a hazard to the public. In this regard I accept the evidence of Mr. Anderson and Mr. Werner. Further, it is a hazard that is not readily apparent to users of the road. It is a hidden hazard... .
>
> ... where the existence of ... bush obstructs the ability of a motorist to be forewarned of a hazard such as that on Snake Hill Road, it is reasonable to expect the R.M. to erect and maintain a warning or regulatory sign so that a motorist, using ordinary care, may be forewarned, adjust speed and take corrective action in advance of entering a dangerous situation. [Emphasis added.]

119 The appellant's argument suggests that the trial judge discharged her duty to apply the facts to the law merely by restating the facts of the case in the language of the legal test. This was not, however, sufficient. Although it is clear from the citation above that the trial judge made a factual finding that the portion of Snake Hill Road on which the accident occurred presented drivers with a hidden hazard, there is nothing in this portion of her reasons to suggest that she considered whether or not that portion of the road would pose a risk to the reasonable driver exercising ordinary care. The finding that a hazard, or even that a hidden hazard, exists does not automatically give rise to the conclusion that the reasonable driver exercising ordinary care could not [page306] travel through it safely. A proper application of the test demands that the trial judge ask the question: "How would a reasonable driver have driven on this road?" Whether or not a hazard is "hidden" or a curve is "inherently" dangerous does not dispose of the question. My colleagues state that it was open to the trial judge to draw an inference of knowledge of the hazard simply because the sharp curve was a permanent feature of the road (para. 61). Here again, there is nothing in the reasons of the trial judge to suggest that she drew such an inference or to explain how such an inference accorded with the legal requirements concerning the duty of care.

120 Nor did the trial judge consider the question in any other part of her reasons. Her failure to do so becomes all the more apparent when her analysis (or lack thereof) is compared to that in cases in which the courts applied the appropriate method. The Court of Appeal referred to two such cases by way of example. In Nelson v. Waverley (Rural Municipality) (1988), 65 Sask. R. 260 (Q.B.), the plaintiff argued that the defendant municipality should have posted signs warning of a ridge in the middle of the road that resulted from the grading of the road by the municipality. The trial judge concluded that if the driver had exercised ordinary care, he could have travelled along the roadway with safety. Instead, he drove too fast and failed to keep an adequate look-out considering the maintenance that was being performed on the road. In Diebel Estate, supra, the issue was whether the municipality had a duty under s. 192 to post a sign warning motorists that a rural road ended abruptly in a T-intersection. The question of how a reasonable driver exercising ordinary care would have driven on that road was asked and answered by the trial judge in the following passage at p. 74:

> His [the expert's] conclusions as to stopping are, however, mathematically arrived at and never having been on [page307] the road, from what was described in the course of the trial, I would think the intersection could be a danger at night to a complete stranger to the area, depending on one's reaction time and the possibility of being confused by what one saw rather than recognizing the T intersection to be just that. On the other hand I would think a complete stranger in the

> area would be absolutely reckless to drive down a dirt road of the nature of this particular road at night at 80 kilometres per hour. [Emphasis added; emphasis in original deleted.]

121 The conclusion that Wright J. erred in failing to apply a required aspect of the legal test does not automatically lead to a rejection of her factual findings. This Court's jurisdiction to review questions of law entitles it, where an error of law has been found, to take the factual findings of the trial judge as they are, and to assess these findings anew in the context of the appropriate legal test.

122 In my view, neither Wright J.'s factual findings nor any other evidence in the record that she might have considered had she asked the appropriate question, support the conclusion that the respondent was in breach of its duty. The portion of Snake Hill Road on which the accident occurred did not pose a risk to a reasonable driver exercising ordinary care because the conditions of Snake Hill Road in general and the conditions with which motorists were confronted at the exact location of the accident signalled to the reasonable motorist that caution was needed. Motorists who appropriately acknowledged the presence of the several factors which called for caution would have been able to navigate safely the so-called "hidden hazard" without the benefit of a road sign.

123 The question of how a reasonable driver exercising ordinary care would have driven on Snake Hill Road necessitates a consideration of the nature and locality of the road. A reasonable motorist will not approach a narrow gravel road in the country in the same way that he or she will approach a paved highway. It is reasonable to expect a motorist to drive more slowly and to pay greater attention to the potential presence of hazards when driving on a [page308] road that is of a lower standard, particularly when he or she is unfamiliar with it.

124 While the trial judge in this case made some comments regarding the nature of the road, I agree with the Court of Appeal's findings that "[s]he might have addressed the matter more fully, taking into account more broadly the terrain through which the road passed, the class and designation of the road in the scheme of classification, and so on ... " (para. 55). Instead, the extent of her analysis of the road was limited to the following comments, found at para. 84 of her reasons:

> Snake Hill Road is a low traffic road. It is however maintained by the R.M. so that it is passable year round. There are permanent residences on the road. It is used by farmers for access to their fields and cattle. Young people frequent Snake Hill Road for parties and as such the road is used by those who may not have the same degree of familiarity with it as do residents.

125 In my view, the question of how the reasonable driver would have negotiated Snake Hill Road necessitated a somewhat more in-depth analysis of the character of the road. The trial judge's analysis focussed almost entirely on the use of the road, without considering the sort of conditions it presented to drivers. It is perhaps not surprising that the trial judge did not engage in this fuller analysis, given that she did not turn her mind to the question of how a reasonable driver would have approached the road. Had she considered this question, she likely would have engaged in the type of assessment that was made by the Court of Appeal at para. 13 of its judgment:

> The road, about 20 feet in width, was classed as "a bladed trail," sometimes referred to as "a land access road," a classification just above that of "prairie trail". As such, it was not built up, nor gravelled, except lightly at one end of it, but

> simply bladed across the terrain following the path of least resistance. Nor was it in any way signed.

[page309]

Given the fact that Snake Hill Road is a low standard road, in a category only one or two levels above a prairie trail, one can assume that a reasonable driver exercising ordinary care would approach the road with a certain degree of caution.

126 Having considered the character of the road in general, and having concluded that by its very nature it warranted a certain degree of caution, it is nonetheless necessary to consider the material features of the road at the point at which the accident occurred. Even on roads which are of a lower standard, a reasonable driver exercising due caution may be caught unaware by a particularly dangerous segment of the road. That was, in fact, the central argument that the appellant put forward in this case. According to the appellant's "dual nature" theory, at para. 8 of his factum, the fact that the curvy portion of Snake Hill Road where the accident occurred was flanked by straight segments of road created a risk that a motorist would be lulled into thinking that the curves could be taken at speeds greater than that at which they could actually be taken.

127 While it is not clear from her reasons that the trial judge accepted the appellant's "dual nature" theory, it appears that her conclusion that the municipality did not meet the standard of care required by it was based largely on her observation of the material features of the road at the location of the Nikolaisen rollover. Relying on the evidence of two experts, Mr. Anderson and Mr. Werner, she found the portion of the road on which the accident occurred to be a "hazard to the public". In her view, the limited sight distance created by the presence of uncleared bush precluded a motorist from being forewarned of the impending sharp right turn immediately followed by a left turn. Based on expert testimony, she concluded that the curve could not be negotiated at speeds greater than 60 km/h under favourable conditions, or 50 km/h under wet conditions.

128 Again, I would not reject the trial judge's factual finding that the curve presented motorists with an [page310] inherent hazard. The evidence does not, however, support a finding that a reasonable driver exercising ordinary care would have been unable to negotiate the curve with safety. As I explained earlier, the municipality's duty to repair is implicated only when an objectively hazardous condition exists, and where it is determined that a reasonable driver arriving at the hazard would be unable to provide for his or her own security due to the features of the hazard.

129 I agree with the trial judge that part of the danger posed by the presence of bushes on the side of the road was that a driver would not be able to predict the radius of the sharp right-turning curve obscured by them. In my view, however, the actual danger inherent in this portion of the road was that the bushes, together with the sharp radius of the curve, prevented an eastbound motorist from being able to see if a vehicle was approaching from the opposite direction. Given this latter situation, it is highly unlikely that any reasonable driver exercising ordinary care would approach the curve at speeds in excess of 50 km/h, a speed which was found by the trial judge to be a safe speed at which to negotiate the curve. Since a reasonable driver would not approach this curve at speeds in excess of which it could safely be taken, I conclude that the curve did not pose a risk to the reasonable driver.

130 One need only refer to the series of photographs of the portion of Snake Hill Road on which the accident occurred to appreciate the extent to which visual clues existed which would alert a driver to approach the curve with caution (Respondent's Record, vol. II, at pp. 373-76). The photographs, which indicate what the driver would have seen on entering the curve, show the presence of bush extending well into the road. From the photographs, it is clear that a motorist approaching the curve would not fail to appreciate the risk presented by the curve, which is simply that it is impossible to see around it and to gauge what may be coming in the opposite direction. In addition, the danger posed [page311] by the inability to see what is approaching in the opposite direction is somewhat heightened by the fact that this road is used by farm operators. At trial, the risk was described in the following terms by Mr. Sparks, an engineer giving expert testimony:

> ... if you can't, if you can't see far enough down the road to, you know, if there's somebody that's coming around the corner with a tractor and a cultivator and you can't see around the corner, then, you know, drivers would have a fairly strong signal, in my view, that due care and caution would be required.

131 The expert testimony relied on by the trial judge does not support a finding that the portion of Snake Hill Road on which the accident occurred would pose a risk to a reasonable driver exercising ordinary care. When asked at trial whether motorists, exercising reasonable care, would enter the curve at a slow speed because they could not see what was coming around the corner, Mr. Werner agreed that he, himself, drove the corner "at a slower speed" and that it would be prudent for a driver to slow down given the limited sight distance. Similarly, Mr. Anderson admitted to having taken the curve at 40-45 km/h the first time he drove it because he "didn't want to get into trouble with it". When asked if the reason he approached the curve at that speed was because he could not see around it, he replied in the affirmative: "[t]hat's why I approached it the way I did."

132 Perhaps most tellingly, Mr. Nikolaisen himself testified that he could not see if a vehicle was coming in the opposite direction as he approached the curve. The following exchange which occurred during counsel's cross-examination of Mr. Nikolaisen at trial is instructive:

> Q. ... You told my learned friend, Mr. Logue, that your view of the road was quite limited, that is correct? The view ahead on the road is quite limited, is that right?

[page312]

> A. As in regards to travelling through the curves, yes, that's right, yeah.
> Q. Yes. And you did not know what was coming as you approached the curve, that is correct?
> A. That's correct, yes.
> Q. There might be a vehicle around that curve coming towards you or someone riding a horse on the road, that is correct?
> A. Or a tractor or a cultivator or something, that's right.
> Q. Or a tractor or a cultivator. You know as a person raised in rural Saskatchewan that all of those things are possibilities, that is right?
> A. That's right, yeah, that is correct.

133 Nor do I accept the appellant's submission that the "dual nature" of the road had the effect of lulling drivers into taking the curve at an inappropriate speed. This theory rests on the assumption that the motorists would drive the straight portions of the road at speeds of up to 80 km/h, leaving them unprepared to negotiate suddenly appearing curves. Yet, while the default speed limit on the road was 80 km/h, there was no evidence to suggest that a reasonable driver would have driven any portion of the road at that speed. While Mr. Werner testified that a driver "would be permitted" to drive at a maximum of 80 km/h, since this was the default (not the posted) speed limit, he later acknowledged that bladed trails in the province are not designed to meet 80 km/h design criteria. I agree with the Court of Appeal that the evidence is that "Snake Hill Road was self-evidently a dirt road or bladed trail" and that it "was obviously not designed to accommodate travel at a general speed of 80 kilometres per hour". As I earlier remarked, the locality of the road and its character and class must be considered when determining whether the reasonable driver would be able to navigate it safely.

[page313]

134 Furthermore, the evidence at trial did not suggest that drivers were somehow fooled by the so-called "dual nature" of the road. The following exchange between counsel for the respondent and Mr. Werner at trial is illustrative of how motorists would view the road:

Q. Now, Mr. Werner, would you not agree that the change in the character of this road as you proceeded from east to west was quite obvious?
A. It was straight, and then you came to a hill, and you really didn't know what might lie beyond the hill.
Q. That's right. But I mean, the fact that the road went from being straight and level to suddenly there was a hill and you couldn't see -- you could see from the point of the top of the hill that the road didn't continue in a straight line, couldn't you?
A. Yes, you could, from the top of the hill, it's a very abrupt hill, yes.
Q. And as you proceeded down though the hill it became quite obvious, did it not, that the character of the road changed?
A. Yes, it changed, yes.
Q. Now you were faced with something other than a straight road?
A. M'hm. Yes.
Q. Now you were on -- and at some point along there the surface of the road changed, did it not?
A. Yes.
Q. And, of course, the road was no longer, I use the term built-up to refer to a road that has grade and it has some drainage. As you proceeded from west to east, you realized, you could see, it was obvious that this was not longer a built-up road?
A. It was a road essentially that was cut out of the topography and had no ditches, and there was an abutment or shoulder right to the driving surface. It was different than the first part.
Q. Yes. And all those differences were obvious, were they not?

[page314]

A. Well, I -- they were clear, satisfactorily clear to me, yes. [Emphasis added.]

135 Although they may be compelling factors in other cases, in this case the "dual nature" of the road, the radius of the curve, the surface of the road, and the lack of superelevation do not support the conclusion of the trial judge. The question of how a reasonable driver exercising ordinary care would approach this road demands common sense. There was no necessity to post a sign in this case for the simple reason that any reasonable driver would have reacted to the presence of natural cues to slow down. The law does not require a municipality to post signs warning motorists of hazards that pose no real risk to a prudent driver. To impose a duty on the municipality to erect a sign in a case such as this is to alter the character of the duty owed by a municipality to drivers. Municipalities are not required to post warnings directed at drunk drivers and thereby deal with their inability to react to the cues that alert the ordinary driver to the presence of a hazard.

136 My colleagues assert that the trial judge properly considered all aspects of the applicable legal test, including whether the curve would pose a risk to the reasonable driver exercising ordinary care. They say that the trial judge did discuss, both explicitly and implicitly, the conduct of an ordinary or reasonable motorist approaching the curve. Secondly, they note that she referred to the evidence of the experts, Mr. Anderson and Mr. Werner, both of whom discussed the conduct of an ordinary motorist in this situation. Thirdly, the fact that the trial judge apportioned negligence to Nikolaisen indicates, in their view, that she assessed his conduct against the standard of the ordinary driver, and thus considered the conduct of the latter (para. 40).

[page315]

137 I respectfully disagree that it is explicit in the trial judge's reasons that she considered whether the portion of the road on which the accident occurred posed a risk to the ordinary driver exercising reasonable care. As I explained above, the fact that the trial judge restated the legal test in the form of a conclusion in no way suggests that she turned her mind to the issue of whether the ordinary driver would have found the curve to be hazardous.

138 Nor do I agree that a discussion of the conduct of an ordinary motorist in the situation was somehow "implicit" in the trial judge's reasons. In my view, it is highly problematic to presume that a trial judge made factual findings on a particular issue in the absence of any indication in the reasons as to what those findings were. While a trial judge is presumed to know the law, he or she cannot be presumed to have reached a factual conclusion without some indication in the reasons that he or she did in fact come to that conclusion. If the reviewing court is willing to presume that a trial judge made certain findings based on evidence in the record absent any indication in the reasons that the trial judge actually made those findings, then the reviewing court is precluded from finding that the trial judge misapprehended or neglected evidence.

139 In my view, my colleagues have throughout their reasons improperly presumed that the trial judge reached certain factual findings based on the evidence despite the fact that those findings

were not expressed in her reasons. On the issue of whether the curve presented a risk to the ordinary driver, my colleagues note that "in relying on the evidence of Mr. Anderson and Mr. Werner, the trial judge chose not to base her decision on the conflicting evidence of other witnesses" (para. 46). The problem with this statement is that although the trial judge relied on the evidence of Mr. Anderson and Mr. Werner to conclude that the portion of Snake Hill Road on which the accident occurred was a hazard, it is impossible from her reasons to discern what, if [page316] any, evidence she relied on to reach the conclusion that the curve presented a risk to the ordinary driver exercising reasonable care. In the absence of any indication that she considered this issue, I am not willing to presume that she did.

140 My colleagues similarly presume findings of fact when discussing the knowledge of the municipality. On this issue, they reiterate that "it is open for a trial judge to prefer some parts of the evidence over others, and to re-assess the trial judge's weighing of the evidence, is, with respect, not within the province of an appellate court" (para. 62). At para. 64 of their reasons, my colleagues review the findings of the trial judge on the issue of knowledge and conclude that the trial judge "drew the inference that the municipality should have been put on notice and investigated Snake Hill Road, in which case it would have become aware of the hazard in question". I think that it is improper to conclude that the trial judge made a finding that the municipality's system of road inspection was inadequate in the absence of any indication in her reasons that she reached this conclusion. My colleagues further suggest that the trial judge did not impute knowledge to the municipality on the basis of the occurrence of prior accidents on Snake Hill Road (para. 65). They even state that it was not necessary for the trial judge to rely on the accidents in order to satisfy s. 192(3) (para. 67). This, in my view, is a reinterpretation of the trial judge's findings that stands in direct contradiction to the reasons that were provided by her. The trial judge discusses other factors pertaining to knowledge only to heighten the significance that she attributes to the fact that accidents had previously occurred on other portions of the road (at para. 90):

[page317]

> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. [Emphasis added.]

141 My colleagues refer to the decision of Van de Perre v. Edwards, [2001] 2 S.C.R. 1014, 2001 SCC 60, in which I stated that "an omission [in the trial judge's reasons] is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (para. 15). This case is however distinguishable from Van de Perre. In Van de Perre, the appellate court improperly substituted its own findings of fact for the trial judge's clear factual conclusions on the basis that the trial judge had not considered all of the evidence. By contrast, in this case my colleagues assert that this Court should not interfere with the "findings of the trial judge" even where no findings were made and where

such findings must be presumed from the evidence. The trial judge's failure in this case to reach any conclusion on whether the ordinary driver would have found the portion of the road on which the accident occurred hazardous, in my view, gives rise to the reasoned belief that she ignored the evidence on the issue in a way that affected her conclusion.

142 Finally, I do not agree that the trial judge's conclusion that Mr. Nikolaisen was negligent equates to an assessment of whether a motorist exercising ordinary care would have found the curve on which the accident occurred to be hazardous. It is clear from the trial judge's reasons that she made a factual finding that the curve could be driven safely at 60 km/h in dry conditions and 50 km/h in wet conditions and that Mr. Nikolaisen approached the curve at an [page318] excessive speed. As earlier stated, what she failed to consider was whether the ordinary driver exercising reasonable care would have approached the curve at a speed at which it could be safely negotiated, or, stated differently, whether the curve posed a real danger to the ordinary driver.

B. Did the Trial Judge Err in Finding that the Respondent Municipality Knew or Should Have Known of the Danger Posed by the Municipal Road?

143 Pursuant to s. 192(3) of The Rural Municipality Act, 1989, fault is not to be imputed to the municipality in the absence of proof by the plaintiff that the municipality "knew or should have known of the disrepair".

144 The trial judge made no finding that the respondent municipality had actual knowledge of the alleged state of disrepair, but rather imputed knowledge to the respondent on the basis that it should have known of the danger. This is apparent in her findings on knowledge at paras. 89-91 of her reasons:

> Breach of the statutory duty of care imposed by section 192 of the Rural Municipality Act, supra, cannot be imputed to the R.M. unless it knew of or ought to have known of the state of disrepair on Snake Hill Road. Between 1978 and 1990 there were four accidents on Snake Hill Road. Three of these accidents occurred in the same vicinity as the Nikolaisen rollover. The precise location of the fourth accident is unknown. While at least three of these accidents occurred when motorists where travelling in the opposite direction of the Nikolaisen vehicle, they occurred on that portion of Snake Hill Road which is the most dangerous -- where the road begins to curve, rather than where it is generally straight and flat. At least two of these accidents were reported to authorities.
>
> If the R.M. did not have actual knowledge of the danger inherent in this portion of Snake Hill Road, it should have known. While four accidents in 12 years may not in itself be significant, it takes on more significance [page319] given the close proximity of three of these accidents, the relatively low volume of traffic, the fact that there are permanent residences on the road and the fact that the road is frequented by young and perhaps less experienced drivers. I am not satisfied that the R.M. has established that in these circumstances it took reasonable steps to prevent this state of disrepair on Snake Hill Road from continuing.

> I find that by failing to erect and maintain a warning and regulatory sign on this portion of Snake Hill Road the R.M. has not met the standard of care which is reasonable in the circumstances. Accordingly, it is in breach of its duty of care to motorists generally, and to Mr. Housen in particular. [Emphasis added.]

145 Whether the municipality should have known of the disrepair (here, the risk posed in the absence of a sign) involves both questions of law and questions of fact. As a matter of law, the trial judge must approach the question of whether knowledge should be imputed to the municipality with regard to the duties of the ordinary, reasonable and prudent municipal councillor (Ryan v. Victoria (City), [1999] 1 S.C.R. 201, at para. 28). The question is then answered through the trial judge's assessment of the facts of the case.

146 I find that the trial judge made both errors of law and palpable and overriding errors of fact in determining that the respondent municipality should have known of the alleged state of disrepair. She erred in law by approaching the question of knowledge from the perspective of an expert rather than from the perspective of a prudent municipal councillor. She also erred in law by failing to appreciate that the onus of proving that the municipality knew or should have known of the alleged disrepair remained on the plaintiff throughout. The trial judge clearly erred in fact by drawing the unreasonable inference that the respondent municipality should have known that the portion of the road on which the accident occurred was dangerous from evidence that accidents had occurred on other parts of Snake Hill Road.

[page320]

147 The trial judge's failure to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known is implicit in her reasons. The respondent could not be held, for the purposes of establishing knowledge under the statutory test, to the standard of an expert analysing the curve after the accident. Yet this is precisely what the trial judge did. She relied on the expert evidence of Mr. Anderson and Mr. Werner to reach the conclusion that the curve presented a hidden hazard. She also implicitly accepted that the risk posed by the curve was not one that would be readily apparent to a lay person. This is evident in the portion of her judgment where she accepts as a valid excuse for not filing a timely claim against the respondent the appellant counsel's explanation that he did not believe the respondent to be at fault until expert opinions were obtained. The trial judge stated in this regard: "[i]t was only later when expert opinions were obtained that serious consideration was given to the prospect that the nature of Snake Hill Road might be a factor contributing to the accident" (para. 64). Her failure to consider the risk to the prudent driver is also apparent when one considers that she ignored the evidence concerning the way in which the two experts themselves had approached the dangerous curve (see para. 54 above).

148 Had the trial judge considered the question of whether the municipality should have known of the alleged disrepair from the perspective of the prudent municipal councillor, she would necessarily have reached a different conclusion. There was no evidence that the road conditions which existed posed a risk that the respondent should have been aware of. The respondent had no particular reason to inspect that segment of the road for the presence of hazards. It had not received any complaints from motorists respecting the absence of signs on the road, the lack of superelevation on

the curves, or the presence of [page321] trees and vegetation which grew up along the sides of the road.

149 In addition, the question of the respondent's knowledge is linked inextricably to the standard of care. A municipality can only be expected to have knowledge of those hazards which pose a risk to the reasonable driver exercising ordinary care, since these are the only hazards for which there is a duty to repair. The trial judge should not have expected the respondent in this case to have knowledge of the road conditions that existed at the site of the Nikolaisen rollover since that road condition simply did not pose a risk to the reasonable driver. In addition to the evidence that was discussed above in the context of the standard of care, this conclusion is supported by the testimony of the several lay witnesses that testified at trial. Craig Thiel, a resident on the road, testified that he was not aware that Snake Hill Road had a reputation of being a dangerous road, and that he himself had never experienced difficulty with the portion of the road on which the accident occurred. His wife, Toby, also testified that she had experienced no problems with the road.

150 The trial judge also clearly erred in fact by imputing knowledge to the municipality on the basis of the four accidents that had previously occurred on Snake Hill Road. While her factual findings regarding the accidents themselves have a sound basis in the evidence, these findings simply do not support her conclusion that a prudent municipal councillor ought to have known that a risk existed for the normal prudent driver. As such, the trial judge erred in drawing an unreasonable inference from the evidence that was before her. As stated above, the standard of review for inferences of fact is, above all, one of reasonableness. This is reflected in the following passage from Joseph Brant Memorial Hospital v. Koziol, [1978] 1 S.C.R. 491, at pp. 503-4:

> ... "it is a well-known principle that appellate tribunals should not disturb findings of fact made by a trial judge [page322] if there were credible evidence before him upon which he could reasonably base his conclusion". [Emphasis added.]

151 As I stated above, there was no evidence to suggest that the respondent had actual knowledge that accidents had previously occurred on Snake Hill Road. To the contrary, Mr. Danger, the administrator of the municipality, testified that the first he heard of the accidents was at the trial.

152 Implicit in the trial judge's reasons, then, was the expectation that the municipality should have known about the accidents through an accident-reporting system. The appellant put forward that argument explicitly before this Court, placing significant emphasis on the fact that respondent "has no regularized approach to gathering this information, whether from councillors or otherwise". The argument suggests that, had the municipality established a formal system to find out whether accidents had occurred on a given road, it would have known that accidents had occurred on Snake Hill Road and would have taken the appropriate corrective action to ensure that the road was safe for travellers.

153 I find the above argument to be flawed in two important respects. First, the argument that the other accidents on Snake Hill Road were relevant in this case is based on the assumption that there was an obligation on the respondent municipality to have a "regularized" accident-reporting system, and that the informal system that was in place was somehow deficient. In my view, the appellant did not meet its onus to show that the system relied on by the municipality to discharge its obligations under s. 192 of the The Rural Municipality Act, 1989 was deficient. The evidence

shows that, prior to 1988, there was no formal system of accident reporting in place. There was, nonetheless, an informal system whereby the municipal councillors were responsible for finding out if there were road hazards. Information that hazards existed came to the attention of the councillors via complaints, and from their own familiarity [page323] with the roads within the township under their jurisdiction. The trial judge made a palpable error in finding that this informal system was deficient in the absence of any evidence of the practice of other municipalities at the time that the accidents occurred and what might have been a reasonable system, particularly given the fact that the rural municipality in question had only six councillors. There is no evidence that a rural municipality of this type requires the sort of sophisticated information-gathering process that may be required in a city, where accidents occur with greater frequency and where it is less likely that word of mouth will suffice to bring hazards to the attention of the councillors.

154 The respondent municipality now has a more formalized system of accident reporting. Since 1988, Saskatchewan Highways and Transportation annually provides the municipalities with a listing of all motor vehicle accidents which occur within the municipality and which are reported to the police. While I agree that this system may provide the municipality with a better chance of locating hazards in some circumstances, I do not accept that the adoption of this system is relevant on the facts of this case. Only one accident, which occurred in 1990, was reported to the respondent under this system. The appellant adduced no evidence to suggest that this accident occurred at the same location as the Nikolaisen rollover, or that this accident occurred as a result of the conditions of the road rather than the negligence of the driver.

155 Secondly, and perhaps more importantly, it was simply illogical for the trial judge to infer from the fact of the earlier accidents that the respondent should have known that the site of the Nikolaisen rollover posed a risk to prudent drivers. The three accidents, which took place in 1978, 1985, and 1987, occurred on different curves, while the vehicles involved were proceeding in the opposite [page324] direction. The accidents of 1978 and 1987 occurred on the first right-turning curve in the road with the drivers travelling westbound, at the bottom of the hill. The accident in 1985 took place on the next curve in the road with the driver also travelling westbound, again on a different curve from the one where the Nikolaisen rollover took place. If anything, these accidents signal that the municipality should have been concerned with the curves that were, when travelling westbound, to the east of the site of the Nikolaisen rollover. The evidence disclosed no accidents that had occurred at the precise location of the accident that is the subject of this case.

156 Furthermore, the mere occurrence of an accident does not in and of itself indicate a duty to post a sign. In many cases, accidents happen not because of the conditions of the road, but rather because of the negligence of the driver. Illustrative in this regard is Mr. Agrey's accident on Snake Hill Road in 1978. Mr. Agrey testified that, just prior to the accident, he had turned his attention away from the road to talk to one of the passengers in the vehicle. Another passenger shouted to him to "look out", but by the time he was alerted it was too late to properly navigate the turn. Mr. Agrey was charged and fined for his carelessness. As was discussed in the context of the standard of care, a municipality is not obligated to make safe the roads for all drivers, regardless of the care and attention that they are exercising when driving. It need only keep roads in such a state of repair as will allow a reasonable driver exercising ordinary care to drive with safety.

157 In addition to the substantial errors discussed above, I would also note that, in my view, the trial judge was inattentive to the onus of proof on this issue. When reviewing the evidence pertaining to other accidents on Snake Hill Road, the trial judge remarked, at para. 31: "Cst. Forbes does

not recall [page325] any other accident on Snake Hill Road during her time at the Shellbrook RCMP Detachment, from 1987 until 1996. Cpl. Healey had heard of one other accident. Forbes and Healey are only two of nine members of the RCMP Detachment at Shellbrook" (emphasis added). By this comment, the trial judge seems to imply that there may have been more accidents on Snake Hill Road that had been reported and that the respondent should have known about this. With all due respect to the trial judge, if there had been accidents other than the ones that were raised at trial, it was up to the appellant to bring evidence of these accidents forward, either by calling the RCMP members to whom they had been reported, or by calling those who were involved in the accidents, or by any other available means. Furthermore, the significance that the trial judge attributed to the other accidents that occurred on Snake Hill Road was dependent on her assumption that the respondent should have had a formal accident-reporting system in place. The respondent did not bear the onus of demonstrating that it was not obliged to have such a system; there was, rather, a positive onus on the appellant to demonstrate that such a system was required and that the informal reporting system was inadequate.

C. Did the Trial Judge Err in Finding that the Accident was Caused in Part by the Failure of the Respondent Municipality to Erect a Sign Near the Curve?

158 The trial judge's findings on causation are found at para. 101 of her judgment, where she states:

> I find that this accident occurred as a result of Mr. Nikolaisen entering the curve on Snake Hill Road at a speed slightly in excess of that which would allow successful negotiation. The accident occurred at the most dangerous segment of Snake Hill Road where a warning or regulatory sign should have been erected and maintained to warn motorists of an impending and hidden hazard. Mr. Nikolaisen's degree of impairment only [page326] served to increase the risk of him not reacting, or reacting inappropriately to a sign. Mr. Nikolaisen was not driving recklessly such that he would have intentionally disregarded a warning or regulatory sign. He had moments earlier, when departing the Thiel residence, successfully negotiated a sharp curve which he could see and which was apparent to him. I am satisfied on a balance of probabilities that had Mr. Nikolaisen been forewarned of the curve, he would have reacted and taken appropriate corrective action such that he would not have lost control of his vehicle when entering the curve.

159 The trial judge's above findings in respect to causation represent conclusions on matters of fact. Consequently, this Court will only interfere if it finds that in coming to these conclusions she made a manifest error, ignored conclusive or relevant evidence, misunderstood the evidence, or drew erroneous conclusions from it (Toneguzzo-Norvell, supra, at p. 121).

160 In coming to her conclusion on causation, the trial judge made several of the types of errors that this Court referred to in Toneguzzo-Norvell. To the extent that the trial judge relied on the evidence of Mr. Laughlin, the only expert to have testified on the issue of causation, I find that she either misunderstood his evidence or drew erroneous conclusions from it. The only other testimony in respect to causation was anecdotal evidence pertaining to Mr. Nikolaisen's level of impairment provided by Craig Thiel, Toby Thiel and Paul Housen. Although their testimonies provided some evi-

dence in respect to causation, for reasons I will discuss, it was not evidence on which the trial judge could reasonably rely. Nor do I find that the trial judge was entitled to rely on evidence that Mr. Nikolaisen successfully negotiated the curve from the Thiel driveway onto Snake Hill Road. The inference that the trial judge drew from this fact was unreasonable and ignored evidence that Mr. Nikolaisen swerved even on this curve. In addition, the trial judge clearly erred by ignoring other relevant evidence in respect to causation, in particular the fact that Mr. Nikolaisen had driven on the [page327] road three times in the 18 to 20 hours preceding the accident.

161 I cannot agree with the trial judge that the testimony of Mr. Laughlin, a forensic alcohol specialist employed by the RCMP supports the finding that Mr. Nikolaisen would have reacted to a sign forewarning of the impending right-turning curve on which the accident occurred. The preponderance of Mr. Laughlin's testimony establishes that persons at the level of impairment which Mr. Nikolaisen was found to be at when the accident occurred would be unlikely to react to a warning sign. In addition, Mr. Laughlin's testimony points overwhelmingly to the conclusion that alcohol was the causal factor which led to this accident. The trial judge erred by misapprehending one comment in Mr. Laughlin's testimony and ignoring the significance of his testimony when taken as a whole.

162 Based on blood samples obtained by Constable Forbes approximately three hours after the accident occurred, Mr. Laughlin predicted that Mr. Nikolaisen's blood alcohol level at the time of the accident ranged from 180 to 210 milligrams percent. Mr. Laughlin commented at length on the effect that this level of blood alcohol could be expected to have on a person's ability to drive, testifying:

> Well, My Lady, this alcohol level that I've calculated here is a very high alcohol level. The critical mental faculties [that] are important in operating a motor vehicle will be impaired by the alcohol. And any skill that depends on these mental faculties will be affected. These include anticipation, judgment, attention, concentration, the ability to divide attention among two or more areas of interest. Because these are affected to such a degree, it would be unsafe for anybody to operate a motor vehicle with this level of alcohol in their body.

[page328]

When asked about his knowledge of research pertaining to the effects of alcohol on the risk of being involved in an automobile accident, Mr. Laughlin had this to say:

> At this level the moderate user of alcohol risk of causing crash is tremendously high, probably 100 times that of a sober driver, or even higher. And in some cases at this level, I've seen scientific literature indicating that the risk of causing a fatal crash is 2 to 300 times that of a sober driver... . if an impaired person is an experienced drinker there -- it won't be that high. However, there will be an increased risk compared to a sober state... . But above 100 milligrams percent, regardless of tolerance, a person will be impaired with respect to driving ability.

Following these comments, Mr. Laughlin discussed the ability of a severely impaired person to react to the presence of a hazard when driving:

> My Lady, I would like to add that the driving task is a demanding one and involves many multi-various tasks occurring at the same time. The hazard for a person under the influence of alcohol is it takes longer to notice a hazard or danger if one should occur; it takes longer to decide what corrective action is appropriate, and it takes longer to execute that decision and the person may tend to make incorrect decisions. So there is increased risk in that process. As well, if the impairment has progressed to the point where the motor skills are affected, the execution of that decision is impaired. So it's not a very graceful attempt at a corrective action. As well, some people tend to make more risks under the influence of alcohol. They do not apply sound reasoning and judgment. They are not able to properly assess the impairment of their driving skills, they are not able to properly assess the risk, not able to properly assess the changing road and weather conditions and adjust for that. But even if they do recognize those as hazards, they may tend to take more risks than a sober driver would.

163 The above comments support the conclusion that the accident occurred as a result of Mr. Nikolaisen's impairment and not as a result of any failure on the part of the respondent. Indeed, when the portions of Mr. Laughlin's testimony that the trial judge relied [page329] on are considered in their context, they do not support her conclusion that Mr. Nikolaisen would have been able to react to a sign had one been posted. When asked by counsel whether it was possible for an individual with Mr. Nikolaisen's blood alcohol level to perceive and react to a road sign, Mr. Laughlin responded:

> Yes, it's possible that a person will see and react to it and maybe react properly. It's possible that they will react improperly or may miss it altogether. I think what's key here is that at this level of alcohol, it's more likely that the person under this level of alcohol will either miss the sign or not react properly compared to the sober driver. That the driver with this level of alcohol will make more mistakes than will the sober driver. [Emphasis added.]

In the passage above, it is clear that Mr. Laughlin is merely admitting that anything is possible, while solidly expressing the view that drivers at this level of intoxication are more likely to not react to a sign or other warning. This view is also apparent in the following passage, in which Mr. Laughlin expands on the ability of an intoxicated driver to react to signs and other road conditions:

> What happens with respect to perception under the influence of alcohol is a driver tends to concentrate on the central field of vision, and miss certain indicators on the periphery, that's called tunnel vision. As well, drivers tend to concentrate on the lower part of that central field of view and therefore they don't have a very long preview distance in the course of operating a motor vehicle and looking down the road. And so studies indicate that under the influence of alcohol drivers tend to miss more signs, warnings, indicators, especially those in the peripheral field of view or farther down the road. [Emphasis added.]

164 In argument before this Court, the appellant emphasized that although Mr. Laughlin was the only expert to testify with respect to causation, lay witnesses testified that Mr. Nikolaisen was not visibly impaired prior to leaving the Thiel residence. [page330] It is not clear from the trial judge's reasons that she relied on testimony to this effect given by Craig Thiel, Toby Thiel and Paul Housen. To the extent that she did rely on such evidence to establish that the accident was caused in part by the respondent's negligence, I find this reliance to be unreasonable. Whereas the lay witnesses in this case were qualified to give their opinion on whether they, as ordinary drivers, could safely negotiate the segment of Snake Hill Road on which the accident occurred, they were not qualified to assess the degree of Mr. Nikolaisen's impairment. The reason for their lack of qualification in this regard was explained by Mr. Laughlin in the following response to counsel's question on whether it is possible to draw a conclusion from the fact that an individual does not exhibit any impairment of their motor skills and speech:

> No, Your Honour, because, My Lady, when you're looking at motor skill impairment or for signs of motor skill impairment, you're looking for signs of intoxication, not impairment. Remember I mentioned that the first components affected by alcohol are cognitive and mental faculties. These are all important in driving. However, it is very difficult when you look at an individual who has been consuming alcohol to tell that they have impaired in attention or divided attention, or concentration, or judgment. So as an indicator of impairment, motor skills are not reliable. And if you think about the Criminal Code process, they've been abandoned 30 years ago as a useful indicator of impairment. No longer do we rely on police officers subjective assessment of person's motor skills to determine impairment. [Emphasis added.]

165 It is also clear from the trial judge's reasons that she relied to some extent on evidence that Mr. Nikolaisen successfully negotiated the curve at the point where the driveway to the Thiel residence intersected the road. I agree with the respondent that this fact is simply not relevant. The ability of Mr. Nikolaisen to negotiate this curve does not establish that his driving ability was not impaired. As noted by the respondent, at para. 101 of its factum, he may [page331] have been driving more slowly at this point, or he may simply have been lucky. More importantly, this evidence contributes nothing to the issue of whether or not Mr. Nikolaisen would have reacted to a sign on the curve where the accident occurred, had one been present. There was no sign on the curve one faces upon leaving the driveway, just as there was no sign on the curve where the accident took place.

166 At any rate, the trial judge's reliance on Mr. Nikolaisen's successful negotiation of the curve at the location of the Thiel driveway ignores relevant evidence that he had swerved or "fish-tailed" when leaving the Thiel residence. A reasonable inference to be drawn from this evidence is that while Mr. Nikolaisen was able to negotiate this curve, he did not do so free from difficulty. While this evidence may not be significant in and of itself, it should have been enough to alert the trial judge to the problems inherent in the inference she drew from his ability to navigate this earlier curve.

167 In addition to ignoring the relevant evidence of the fish-tail marks, the trial judge failed to consider the relevance of the fact that Mr. Nikolaisen had travelled Snake Hill Road three times in the 18 to 20 hours preceding the accident. In her review of the evidence, she noted at para. 8 of her reasons that: "Mr. Nikolaisen was unfamiliar with Snake Hill Road. While he had in the preceding

24 hours travelled the road three times, only once was in the same direction that he was travelling upon leaving the Thiel residence."

168 I simply cannot see how the trial judge found accidents which occurred when motorists were travelling in the opposite direction relevant to the issue of the respondent's knowledge of a risk to motorists while at the same time suggesting that the fact that Mr. Nikolaisen had driven the road in the opposite direction twice was irrelevant to the issue of whether [page332] or not he would have recognized that the curve posed a risk or that he would have reacted to a warning sign. This discrepancy aside, I find the fact that Mr. Nikolaisen had travelled Snake Hill Road in the same direction when he left the Thiel residence to go to the Jamboree the evening before the accident highly relevant to the causation issue. The finding that the outcome would have been different had Mr. Nikolaisen been forewarned of the curve ignores the fact that he already knew that the curve was there. I agree with the respondent that the obvious reason Mr. Nikolaisen was unable to safely negotiate the curve on the afternoon of the 18th, despite having negotiated this curve and others without difficulty in the preceding 18 to 20 hours was the combined effect of his drinking, lack of sleep and lack of food.

169 In conclusion on the issue of causation, I wish to clarify that the fact that the trial judge referred to some evidence to support her findings on this issue does not insulate those findings from review by this Court. The standard of review for findings of fact is reasonableness, not absolute deference. Such a standard entitles the appellate court to assess whether or not it was clearly wrong for the trial judge to rely on some evidence when other evidence points overwhelmingly to the opposite conclusion. The logic of this approach was aptly explained by Kerans, supra, in the following passage at p. 44:

> The key to the problem is whether the reviewer is to look merely for "evidence to support" the finding. Some evidence might indeed support the finding, but other evidence may point overwhelmingly the other way. A court might be able to say that reliance on the "some" in the face of the "other" was not what the reasonable trier of fact would do; indeed, it might say that, in all the circumstances it was convinced that to rely on the one in the face of the other was quite unreasonable. To say that "some evidence" is enough, then, without regard to that "other [page333] evidence" is to turn one's back on review for reasonableness.

D. Did the Courts Below Err in Finding that no Common Law Duty of Care Exists Alongside the Statutory Duty Imposed Under Section 192 of The Rural Municipality Act, 1989?

170 The appellant urges this Court to find that a common law duty of care exists alongside the statutory duty of care imposed on the respondent by s. 192 of The Rural Municipality Act, 1989. According to the appellant, the application of the common law duty of care would free the Court from the need to focus on how a reasonable driver exercising ordinary care would have navigated the road in question. The appellant submits that the Court would instead apply the "classic reasonableness formulation" which, in its view, would require the Court to take into account the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost of preventing that harm. The appellant argues that the respondent would be held liable under this test.

171 The courts below rejected the above argument when it was put to them by the appellant. I would not interfere with their ruling on this issue for the reason that it is unnecessary for this Court to impose a common law duty of care where a statutory one clearly exists. In any event, the application of the common law test would not affect the outcome in these proceedings.

172 I agree with the respondent's submissions that in this case, where the legislature has clearly imposed a statutory duty of care on the respondents, it would be redundant and unnecessary to find that a common law duty of care exists. The two-part test to establish a common law duty of care set out in Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2, simply has no application where the legislature has defined a statutory duty. As was stated by this Court in Brown [page334] v. British Columbia (Minister of Transportation and Highways), [1994] 1 S.C.R. 420, at p. 424:

> ... if a statutory duty to maintain existed as it does in some provinces, it would be unnecessary to find a private law duty on the basis of the neighbourhood principle in Anns v. Merton London Borough Council, [1978] A.C. 728. Moreover, it is only necessary to consider the policy/operational dichotomy in connection with the search for a private law duty of care.

All of the authorities cited by the appellant as support for the imposition of an independent common law duty of care can be distinguished from the case at hand on the basis that no statutory duty of care existed (Just, supra; Brown, supra; Swinamer v. Nova Scotia (Attorney General), [1994] 1 S.C.R. 445; Ryan, supra).

173 In addition, I find that the outcome in this case would not be different if the case were determined according to ordinary negligence principles. First, were the Court to engage in a common law analysis, it would still look to the statutory standard of care as laid out in The Rural Municipality Act, 1989, as interpreted by the case law in order to assess the scope of liability owed by the respondent to the appellant. As this Court stated in Ryan, supra, at para. 29:

> Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

174 Moreover, even under the common law analysis, this Court would be called upon to question the type of hazards that the respondent, in this case, ought to have foreseen. Whatever the approach, it is only reasonable [page335] to expect a municipality to foresee accidents which occur as a result of the conditions of the road, and not, as in this case, as a result of the condition of the driver.

175 The courts have long restricted the standard of care under the statutory duty to require municipalities to repair only those hazards which would pose a risk to the reasonable driver exercising ordinary care. Compelling reasons exist to maintain this interpretation. The municipalities within the province of Saskatchewan have some 175,000 kilometres of roads under their care and control, 45,000 kilometres of which fall within the "bladed trail" category. These municipalities, for the most part, do not boast large, permanent staffs with extensive time and budgetary resources. To expand the repair obligation of municipalities to require them to take into account the actions of un-

reasonable or careless drivers when discharging this duty would signify a drastic and unworkable change to the current standard. Accordingly, it is a change that I would not be prepared to make.

VII. Disposition

176 In the result, the judgment of the Saskatchewan Court of Appeal is affirmed and the appeal is dismissed with costs.

TAB 11

Case Name:

Canadian Union of Public Employees, Locals 1712, 3009, 2225-05, 2225-06 and 2225-12 v. Royal Crest Lifecare Group Inc. (Trustee of)

IN THE MATTER OF the Bankruptcy of the Royal Crest Lifecare Group Inc.
Between
Canadian Union of Public Employees, Locals 1712, 3009, 2225-05, 2225-06 and 2225-12, and Service Employees International Union, Locals 204 and 532, appellants, and Ernst & Young Inc., in its capacity as Trustee in Bankruptcy for the Royal Crest Lifecare Group Inc., Confederation Life Insurance Company, in liquidation and the National Life Assurance Company of Canada, respondents, and Attorney General of Ontario, intervenor

[2004] O.J. No. 174

98 C.L.R.B.R. (2d) 210

181 O.A.C. 115

46 C.B.R. (4th) 126

[2004] CLLC para. 220-014

128 A.C.W.S. (3d) 212

2004 CarswellOnt 190

Docket No. C39457

Ontario Court of Appeal
Toronto, Ontario

Borins, MacPherson and Cronk JJ.A.

Heard: September 17, 2003.
Judgment: January 21, 2004.

(74 paras.)

Labour law -- Labour relations boards and judicial review -- Boards, jurisdiction -- Successor rights and obligations -- Bankruptcy -- Practice -- Actions, commencement of -- Preliminary matters -- Leave

to commence action.

Appeal by the Canadian Union of Public Employees from the dismissal of its application. The respondent Royal Crest Lifecare Group operated several nursing and retirement homes. It was petitioned into bankruptcy after it defaulted under its loan agreements. The trustee applied for an order that it was not bound by the collective agreements between Royal and the Union. It also sought an order that it not be deemed a successor employer under the Labour Relations Act. The Union applied for leave to pursue an application before the Ontario Labour Relations Board for the trustee to be designated as a successor employer. Both applications were dismissed. The bankruptcy judge considered the applications to be premature. The trustee did not appeal.

HELD: Appeal dismissed. The judge did not apply the wrong test under section 215 of the Bankruptcy and Insolvency Act. He considered that there was no evidentiary basis for the proposed application. There was evidence to support the judge's conclusion that the applications were premature. The judge did not decide the successor employer issue, which was within the exclusive jurisdiction of the Board. He did not decide this issue on its merits as he merely dismissed the applications.

Statutes, Regulations and Rules Cited:

Bankruptcy Act, s. 186.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 46, 72(1), 215.

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

Courts of Justice Act, R.S.O. 1990, c. C-43, ss. 101, 109.

Employment Standards Act, S.O. 2000, c. 41.

Human Rights Code, R.S.O. 1990, c. H-19.

Labour Relations Act, S.O. 1995, c. 1, Sch. A., s. 69, 69(1), 69(2), 69(12), 114(1).

Occupational Health and Safety Act, R.S.O. 1990, c. O-1.

Pay Equity Act, R.S.O. 1990, c. P-7.

Pension Benefits Act, R.S.O. 1990, c. P-8.

Pension Benefits Standards Act, R.S.C. 1985, c. 32.

Workplace Safety and Insurance Act, S.O. 1997, c. 16, Sch. A.

Appeal From:

On appeal from the order of Justice James M. Farley of the Superior Court of Justice dated January 16, 2003, reported at (2003), 40 C.B.R. (4th) 146.

Counsel:

Sean Dewart and Michael Kainer, for the appellants.
John A. MacDonald, for the respondent, Ernst & Young.
Harold P. Rolph, for independent counsel, for the trustee.
L. Joseph Latham and Joseph K. Morrison, for the respondent, Confederation Life.
Kyla E.M. Mahar, for the respondent, National Life.
Robin K. Basu, for the intervenor.

Reasons for judgment were delivered by MacPherson J.A., concurred in by Cronk J.A. Separate reasons were delivered by Borins J.A.

MacPHERSON J.A.:--

A. INTRODUCTION

1 On January 10, 2003, a large group of related companies collectively known as The Royal Crest Lifecare Group Inc. ("Royal Crest"), which operated five nursing homes, six retirement homes and six mixed care (nursing and retirement) homes in southern Ontario, was petitioned into bankruptcy by several banks after it defaulted under its loan agreements with the banks. Ernst & Young Inc. ("Ernst & Young") was appointed as trustee of the estate of the bankrupt.

2 On the same day, and before the same judge, Farley J., who made the bankruptcy order, the trustee and the unions representing many of the employees of the bankrupt company brought duelling motions.

3 The trustee sought an order that it not be bound by the collective agreements between Royal Crest and the unions and that it not be deemed to be a successor employer under the Labour Relations Act, S.O. 1995, c. 1, Sch. A. (the "LRA"), and other labour and employment laws.

4 The unions resisted the trustee's motion. In addition, based on their view that the question of successor employer' came within the exclusive jurisdiction of the Ontario Labour Relations Board (the "OLRB"), the unions made a cross-motion before the bankruptcy judge. In their cross-motion, the unions sought leave, pursuant to s. 215 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA"), to pursue an application before the OLRB seeking the designation of the trustee as a successor employer.

5 The bankruptcy judge dismissed the trustee's motion. The trustee does not appeal.

6 The bankruptcy judge also dismissed the unions' cross-motion, but "without prejudice to such a motion being brought back on again with appropriate factual underpinning". The unions appeal.

B. THE FACTS

(1) The parties and the events

7 Royal Crest operated 17 long-term care facilities in Southern Ontario. These homes provided approximately 2300 beds for patients and residents. Royal Crest employed about 2200 full-time and part-time employees. Canadian Union of Public Employees Locals 1712, 3009, 2225-05, 2225-06 and 2225-12 and Service Employees International Union Locals 204 and 532 (the "unions") represent approximately 1400 of these employees.

8 Unfortunately, by late 2002 Royal Crest was in serious financial difficulty. It owed its creditors, mostly banks, in excess of $128 million and was in default under its loan agreements.

9 On October 21, 2002, Royal Crest was granted protection under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 (the "CCAA") by order of Crane J. On November 13, 2002, the proceedings under the CCAA were terminated and Ernst & Young was appointed as interim receiver pursuant to s. 46 of the BIA. The interim receiver immediately engaged the former employees under terms and conditions of employment similar, but not identical, to those provided in the various collective agreements. One of the terms of employment to which the employees had to agree was that they accepted that Ernst & Young was not a successor employer.

10 On January 10, 2003, Royal Crest was petitioned into bankruptcy. Ernst & Young was appointed as trustee.

(2) The litigation

(a) Before the bankruptcy judge

11 On January 10, 2003, the trustee and the unions brought their duelling or mirror motions on the question of whether the trustee should be deemed to be a successor employer within the meaning of s. 69 of the LRA.

12 The bankruptcy judge dismissed the trustee's motion. He reviewed considerable case law, much of it conflicting. It seems clear from his reasons that he doubted two of the propositions advanced by the trustee: (1) a trustee in bankruptcy cannot be a successor employer; and (2) collective agreements terminate with bankruptcy. All that the bankruptcy judge was prepared to order, consistent with Re Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, was:

> This Court orders that the employment of all employees engaged by the Interim Receiver is terminated by virtue of the bankruptcy. The Trustee is hereby authorized to engage any or all of such former employees of the Bankrupt or any other persons.

The trustee does not appeal this component of the bankruptcy judge's order.

13 The bankruptcy judge also dismissed the unions' cross-motion. Again, the bankruptcy judge conducted a full review of the relevant legislation and case law. He concluded:

> There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E & Y Inc. in its capacity as IR) has been dragging its feet or will do so. The CUPE cross-motion for leave is dismissed without prejudice to such a motion being brought back on again with appropriate factual underpinning which I would be of the view ought to demonstrate that the Trustee has slipped over from functioning qua realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities.

The unions appeal the bankruptcy judge's decision relating to their cross-motion.

(b) The appeal

14 The appeal is unusual in an important respect. Most appeals involve the same parties, issues and arguments that were before the trial, application or motion judge. To some extent, that is true of this

appeal. Some of the matters that were before the bankruptcy judge, and which he resolved, are raised again on appeal.

15 However, significant attention was devoted on the appeal (in facta and in oral argument) to an issue that was invisible, or almost invisible, in the hearing before the bankruptcy judge. The issue is the relationship, in constitutional law terms, between the federal BIA and the Ontario LRA.

16 The appellants raised the purported constitutional issue in their factum by framing the first issue of the appeal as:

> (a) Did the learned bankruptcy judge err in effectively finding a conflict between the provisions of the Bankruptcy and Insolvency Act and the Labour Relations Act, 1995, where none in fact exists?

17 Rather than ignore the fact that the appellants' argument appeared to be put no higher than the assertion that the bankruptcy judge had made an implicit determination of a constitutional issue raised by no one, the respondent trustee decided to mount a full-scale attack on the applicability of the successor employer provisions of the LRA in a bankruptcy context. The trustee served a Notice of Constitutional Question upon the Attorney General of Canada and the Attorney General of Ontario, pursuant to s. 109 of the Courts of Justice Act, R.S.O. 1990, c. C.43.

18 The Attorney General of Ontario intervened in the appeal. He noted that no Notice of Constitutional Question was served in the proceedings before the bankruptcy judge and, consequently, he had no opportunity to participate in those proceedings.

19 During the appeal hearing, the panel permitted the appellants and the trustee to make their constitutional arguments. However, at the conclusion of these submissions, the panel indicated that it did not need to hear further submissions on this issue, including submissions from the Attorney General who had filed an extensive factum on the purported constitutional issue. The panel essentially agreed with the Attorney General's submissions that: (1) the constitutional issue was not raised before, or addressed or determined by, the bankruptcy judge; and (2) the appeal could, and should, be determined without the necessity of dealing with the constitutional issue.

C. ISSUE

20 The sole issue on the appeal is whether the bankruptcy judge erred in the exercise of his discretion by refusing to permit the unions to proceed, on January 10, 2003, to the OLRB to have the question of the status of the trustee as successor employer resolved.

D. ANALYSIS

(1) The standard of review

21 A bankruptcy is a disaster. A company has failed; in many cases it will not survive. Creditors, who provided goods and services in good faith, may lose substantial sums of money. Employees of the bankrupt company instantly lose their jobs.

22 The bankruptcy judge is thrown into the middle of the disaster. The judge will need to make important decisions that will affect the future of the company, creditors and employees. The qualities of a good bankruptcy judge are therefore expertise, sensitivity and speed.

23 Appellate courts have long recognized the unique difficulties faced by judges in bankruptcy and

CCAA proceedings. The result is that appellate courts accord considerable deference to judges' decisions in these contexts: see, for example, Re Algoma Steel Inc., [2001] O.J. No. 1943 (C.A.); Banque National de Paris (Canada) v. Opiola, [2001] 6 W.W.R. 95 (Alta. C.A.); and Ford Credit Canada Ltd. v. Fred Walls & Sons Holdings Ltd., [2003] B.C.J. No. 454 (C.A.).

(2) The test under s. 215 of the BIA

24 The LRA gives the OLRB exclusive jurisdiction to decide successor employer applications: see ss. 69(12), 114 and 116. However, in bankruptcy proceedings, a party seeking to challenge a decision by a trustee must seek leave from a judge. Section 215 of the BIA provides:

> 215. Except by leave of the court, no action lies against ... a trustee with respect to any report made under, or any action taken pursuant to, this Act.

The appellants acknowledge that they require the leave of the court in order to pursue their application to the OLRB.

25 The case law establishes that the threshold for granting leave under s. 215 of the BIA is a low one. In Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 50 O.R. (3d) 688 at 690 (C.A.) ("SOCAN"), Charron J.A. stated:

> [T]he evidence required to support an order under s. 215 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action. However, the evidence does not have to be sufficient to enable the motions judge to make a final assessment of the merits of the proposed claim. The sufficiency of the evidence must be measured in the context of the purpose of s. 215 which is to prevent the trustee from having to respond to actions which are frivolous or vexatious or which do not disclose a cause of action ...

See also: Mancini (Bankrupt) et al. v. Falconi et al. (1993), 61 O.A.C. 332 and Vanderwoude et al. v. Scott and Pichelli Ltd. et al. (2001), 143 O.A.C. 195.

(3) Discussion

26 The appellants contend that the bankruptcy judge made three errors in his reasons relating to their cross-motion: (1) he applied the wrong test for a BIA s. 215 application; (2) he determined a matter - whether the trustee was a successor employer - within the exclusive jurisdiction of the OLRB; and (3) he incorrectly found that the various collective agreements were in "suspended animation".

27 I do not agree that the bankruptcy judge applied the wrong test. The cross-motion was directly related to s. 215 of the BIA and the relevant case law was argued before the bankruptcy judge. It is true that the test under s. 215 of the BIA establishes a low threshold for granting leave. However, SOCAN makes it clear that there must be an evidentiary basis for the proposed cause of action.

28 The bankruptcy judge clearly turned his mind to this component of the test. In dismissing the cross-motion, he invited the unions to bring a further motion "with appropriate factual underpinning".

29 It is important to place the appellants' cross-motion in its proper context. Prior to January 10, 2003, there was no live successor employer issue because Ernst & Young, acting as interim receiver, engaged current employees only if they contractually agreed that Ernst & Young was not a successor employer. On January 10, 2003, this picture changed in a major way. When receiving orders were made and Ernst & Young was appointed as trustee of the estate of Royal Crest, the status of the trustee as a potential

successor employer emerged as a live issue because the existing employment relation was automatically terminated: see Re Rizzo & Rizzo Shoes Ltd., supra. Both the trustee and the unions decided, virtually instantaneously, to resort to their preferred institutions, the court and the OLRB respectively, to resolve the issue.

30 It is clear that the bankruptcy judge regarded both motions as premature. In my view, this conclusion was amply supported by the chronology of events and the record before the bankruptcy judge.

31 The trustee has many responsibilities - to the estate it is managing, to creditors and to the court. Where, as here, a trustee in bankruptcy seeks to hire former employees of the bankrupt company, the trustee also has a responsibility to those employees. The trustee's decision to bring a motion on the first day of its trusteeship seeking a declaration that it not be deemed a successor employer "for any purpose whatsoever" was, in the bankruptcy judge's view, premature. Accordingly, he dismissed the motion. The trustee does not appeal this component of his decision.

32 Equally, the appellants' cross-motion, understandable perhaps because of the trustee's motion, was also, arguably, misconceived. The first day of a bankruptcy is hardly business as usual' for anyone, including the employees. The relationship between the trustee and the employees of the bankrupt company cannot be resolved instantly. Care, sensitivity, negotiation and at least some time will be necessary before an appropriate relationship can be set in place. The bankruptcy judge regarded the union's cross-motion as premature as well. Accordingly, he dismissed it, but without foreclosing the possibility that such a motion could succeed once the parties, at a minimum, had explored the establishment of an appropriate employment relationship. Again, I see no basis for interfering with the bankruptcy judge's exercise of discretion in this regard.

33 I also do not accept the appellants' submission that the bankruptcy judge decided the successor employer issue. He explicitly did not do this. He dismissed the trustee's motion seeking an order that the trustee not be deemed a successor employer and authorized the trustee to engage former employees of the bankrupt company. He also dismissed the unions' cross-motion, but coupled that dismissal with an invitation to bring another motion later with an "appropriate factual underpinning". In my view, these careful combined dispositions establish clearly that the bankruptcy judge did not decide the successor employer issue on its merits. Rather, he regarded resolution of that issue on January 10, 2003 as being premature. Accordingly, in the exercise of his discretion, he left it open.

34 Finally, I do not agree with the appellants' challenge to the bankruptcy judge's description of the various collective agreements as "not terminated but rather ... put into suspended animation".

35 On January 10, 2003, the first day of the bankruptcy, it strikes me that this description was entirely apt. On that date, it was simply too early to attach formal, and final, legal labels to the relationship between the trustee and the employees. Importantly, the bankruptcy judge explicitly recognized the existence and importance of the collective agreements. Immediately after his description of the collective agreements as contracts put into "suspended animation", he effectively gave some advice to the trustee regarding the importance of the employment relationship established by those agreements:

> The trustee will also have to appreciate that if it does not accede to the union demands for union dues, pension contributions and grievance-type procedures, then conceivably after a period of time (which may vary in length) the personnel which it has employed may become disenchanted with continuing at the various locations and value may evaporate or start to do so unless "corrective" or "ameliorating" measures are taken.

36 For these reasons, I conclude that the bankruptcy judge did not err, in the exercise of his discretion, by deciding that the appellants' cross-motion seeking leave to make an application on the successor employer issue to the OLRB was premature and, therefore, should be dismissed.

E. DISPOSITION

37 I would dismiss the appeal with costs fixed at $20,000 inclusive of disbursements and G.S.T.

MacPHERSON J.A.
CRONK J.A. -- I agree.

38 BORINS J.A. (dissenting):-- I have had the advantage of reading the reasons for judgment of my colleague, MacPherson J.A. With respect, I am unable to agree with his conclusion that this appeal should be dismissed.

39 In my view, this appeal is about the exercise of judicial discretion in the context of an application by two trade unions (the "appellants") pursuant to s. 215 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") for leave to bring an application before the Ontario Labour Relations Board (the "OLRB") under s. 69(12) of the Labour Relations Act, S.O. 1995, c. 1, Sch. A (the "LRA") for a declaration that Ernst & Young, Inc. ("EYI"), the trustee in bankruptcy of The Royal Crest Lifecare Group ("Royal Crest"), is a successor employer. Thus, the issue in this appeal is whether there is any basis on which this court can interfere with the discretion exercised by Farley J. in dismissing the appellants' application under s. 215 of the BIA. For the reasons that follow, I have concluded that the bankruptcy judge erred in the exercise of his discretion.

I

40 At the outset, I find it helpful to repeat what I said about the standard of appellate review of the exercise of judicial discretion in Wong v. Lee (2002), 58 O.R. (3d) 398 at 408-409:

> The standard of appellate review of judicial discretion has been considered by the Supreme Court of Canada in a number of cases. In Reza v. Canada, [1994] 2 S.C.R. 394 at pp. 404-05, 116 D.L.R. (4th) 61 at p. 68, the Supreme Court held that:
>
> > ... the test for appellate review of the exercise of judicial discretion is whether the judge at first instance has given sufficient weight to all relevant considerations: Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at pp. 76-77, per LaForest J. See also Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110, at pp. 154-55.
>
> In Friends of Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at pp. 76-77, LaForest J. stated that in Harelkin v. University of Regina, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14, the Supreme Court had essentially adopted the following standard of review articulated by Viscount Simon L.C. in Charles Osenton & Co. v. Johnston, [1942] A.C. 130 at p. 138 (H.L.):
>
> > The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its

> own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

II

41 It is also helpful to reproduce the legislation that is relevant to this appeal.

Bankruptcy and Insolvency Act

s. 72(1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

s. 215 Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

Labour Relations Act, 1995

s. 69(1) In this section,

> "business" includes a part or parts thereof; ("enterprise")
>
> "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

s. 69(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

s. 114(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling

made by it and vary or revoke any such decision, order, direction, declaration or ruling.

III

42 Although MacPherson J.A. has reviewed the facts which formed the basis for both the appellants' s. 215 application and the trustee in bankruptcy's application for declarations that it is not a successor employer under s. 69(12) of the LRA and other labour and employment laws, his review does not make reference to a number of facts that, in my view, are relevant to this appeal. Therefore, I propose to outline these additional facts.

43 When EYI was appointed as interim receiver of the estate of Royal Crest on November 12, 2002, it immediately engaged the former Royal Crest employees on a temporary basis under terms and conditions of employment similar but not identical to those provided by the collective agreements. EYI was authorized to do so by a term of the order that appointed it as interim receiver. Excluded terms were access to a grievance procedure, full recognition of seniority, payment of union dues and contributions to the company pension plan. The former Royal Crest employees are members of the appellant unions which, prior to the bankruptcy, had entered into collective agreements with the Royal Crest companies. At the time of the interim receivership, there were, and remain, several outstanding labour relations issues, such as: outstanding grievances involving employee discipline; outstanding pay equity adjustments; the negotiation of a first time collective agreement; and default in contributions to the pension plan.

44 On November 13, 2002, EYI delivered a letter to each employee containing an offer of employment and discussing, inter alia, the terms of employment. In addition, the letter contained the following information:

> Our appointment as Interim-Receiver is on a temporary basis and for the limited purpose of continuing the operation of the homes and protecting the assets. It is our intent to stabilize the operations of the home by assuming control of the homes and protecting the interests of the stakeholders, including the residents whose health, safety and well being is of central concern. To assist in achieving this objective, we have retained the services of Extendicare (Canada) Inc. to manage and supervise the operations of the homes.
>
> Pursuant to the terms of the Order, your employment by the Companies has been terminated. We would like to engage your services on a temporary basis to assist with the continued operation of the homes, which will assist the Interim-Receiver in fulfilling its mandate to determine the best way to ensure the future of the homes as going concerns. The purpose of this letter is to set out the terms under which we are prepared to do so.
>
> ...
>
> In making this offer, the Interim-Receiver is acting solely in its capacity as Interim-Receiver and without personal or corporate liability. By accepting this offer you acknowledge that the Interim-Receiver is not a successor employer within the meaning or contemplation of the Ontario Employment Standards Act, 2000, the Ontario Labour Relations Act or other similar federal or provincial legislation.

45 On January 10, 2003, EYI was appointed as trustee in bankruptcy of the estate of Royal Crest under the BIA. On January 17, 2003, pursuant to s. 101 of the Courts of Justice Act, R.S.O. 1990, c.

C.43 (the "CJA"), EYI was appointed as receiver over the assets, property and undertaking of Royal Crest for the purpose of realizing thereon. Although clause 11 of this order expressly precluded the engagement of any or all of Royal Crest's former employees, on January 17, 2003, the trustee delivered a letter to the former employees that contained an offer of employment.

46 The relevant portions of this letter read as follows:

> As noted previously, the Interim Receiver was appointed on a temporary basis until the appointment of the Trustee, and therefore the role of the Interim Receiver has come to an end effective January 17, 2003. The Trustee will continue to operate the homes in the same manner as the Interim Receiver, and the Trustee has retained the services of Extendicare (Canada) Inc. to manage and supervise the operations of the homes.
>
> Your employment with the Interim Receiver has ceased effective January 17, 2003 and the Trustee will immediately re-engage your services on a temporary basis to assist with the continued operation of the homes, on the same terms and conditions as outlined in the Offer of Employment. Your services are required to assist the Trustee in fulfilling its mandate to determine the best way to ensure the future of the homes as going concerns. The purpose of this letter is to set out the terms under which we are prepared to do so.
>
> You will be paid the same regular wages or salary that you have been receiving from the Interim Receiver. The Trustee will continue to provide all benefits provided by the Interim Receiver to you. The Trustee, in the same manner as the Interim Receiver, is unable to continue to provide benefits provided by the Companies to you prior to the appointment of the Interim Receiver (including, but not limited to, life insurance, disability or pension benefits or RRSP contributions). The Trustee will be making the usual payroll deductions to the appropriate government authority on your behalf.
>
> In making this offer, the Trustee is acting solely in its capacity as Trustee and without personal or corporate liability. By continuing to work in the homes after January 17, 2003 you will be deemed to have accepted this offer, have read and understand fully the terms of this letter and agreed to be bound by its terms. You have also acknowledged that the Trustee is not a successor employer within the meaning or contemplation of the Ontario ESA, the Ontario Labour Relations Act or similar federal or provincial legislation.

47 From the foregoing, it is clear that from the outset EYI, in its various capacities, recognized that it was prudent to operate the nursing homes as a going concern for two related reasons: (1) to accommodate the 2300 patients and residents of the homes; and (2) to maximize the potential dividend to be paid to Royal Crest's creditors by selling the nursing homes as a going concern. Moreover, it recognized that the most efficient way to continue to operate the homes was to engage the former employees of Royal Crest. Indeed, this appeared to be of such importance to EYI that in its second letter to the employees it wrote: "Your services are required to assist the Trustee in fulfilling its mandate to determine the best way to ensure the future of the homes as going concerns".

48 When the appellants' motion was before the court, it was clear that the operation of the homes was continuing in the same manner as it had before Royal Crest was granted protection under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C.36 (the "CCAA") on October 21, 2002, and throughout the two month period of the interim receivership. It appeared that this operation would continue in the

same manner until the trustee in bankruptcy was able to sell the nursing home business as a going concern. Thus, when the appellants' s. 215 motion was before the court, approximately 2200 employees were continuing the operation of the nursing homes for approximately 2300 patients and residents, and would continue to do so subsequent to EYI's appointment as trustee in bankruptcy and receiver until EYI was able to obtain a purchaser willing to acquire the nursing homes as a going concern.

49 From the letters it wrote to the former employees of Royal Crest, it is clear that EYI did not wish to be declared a successor employer under s. 69(12) pf the LRA. It is evident from EYI's application for an order declaring that the trustee in bankruptcy is not a successor employer under the LRA, the Occupational Health and Safety Act, R.S.O. 1990, c. O.1, the Employment Standards Act, S.O. 2000, c. 41, the Workplace Safety and Insurance Act, S.O. 1997, c. 16, Sch. A, the Pay Equity Act, R.S.O. 1990, c. P.7, the Human Rights Code, R.S.O. 1990, c. H.19, the Pension Benefits Act, R.S.O. 1990, c. P.8 and the Pension Benefits Standards Act, R.S.C. 1985, c. 32 (2nd Supp.) or any other legislation or common law governing labour relations, that EYI recognized that in the administration of an estate under the BIA, a trustee in bankruptcy is required to do so in conformity with provincial legislation governing employees and employee rights.

IV

50 The test that applies in considering an application under s. 215 of the BIA for leave to bring proceedings against a trustee has received considerable judicial attention. As MacPherson J.A. points out, the case law establishes that the threshold for granting leave is a low one. However, in applying the test it is necessary to consider that s. 215 is part of the machinery of the BIA which is designed to ensure that the purposes of the Act can be carried out properly without the undue intervention of other proceedings. As such, the purpose of s. 215 is to protect the trustee against frivolous and vexatious proceedings, or proceedings that have no factual basis.

51 This court considered s. 186 of the former Bankruptcy Act, the predecessor of s. 215, in Mancini (Bankrupt) et al. v. Falconi et al. (1993), 61 O.A.C. 332. After reviewing a number of authorities, in para. 7 Osborne J.A. set out the factors to be considered on a s. 215 application:

> The following principles can be taken from the decided cases:
>
> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted: see Peat Marwick Ltd. v. Thorne Riddell, supra.
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave: see Re Lufro Ltée; Leblond v. Tremblay (1985), 54 C.B.R. (N.S.) 199 (Que. C.A.).

52 In para. 12 Osborne J.A. stated that the court is required to consider the evidence filed in support of the application in the context of the proposed proceeding when adjudicating a s. 215 leave application. He continued: "The issue is not whether the evidence on the [s. 215] motion discloses the existence of a cause of action against the trustee, but rather whether the evidence provides the required support for the cause of action sought to be asserted [against the trustee]" [emphasis in original].

53 Osborne J.A. commented further on what factors the evidence must establish and the sufficiency of

the evidence in paras. 16-17:

> In my opinion, the motions court judge was correct in reaching the conclusion he did on this issue. *On a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under s. 186 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action.*
>
> The sufficiency of the evidence must be measured in the context of the purpose of s. 186 which, as stated earlier, is to prevent the trustee from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action. As I have previously noted, the evidence on a motion under s. 186 does not have to be sufficient to enable the motions court judge to make a final assessment of the merits of the claim sought to be made, but it must be sufficient to address the issues that I have identified, having in mind the objectives of s. 186 [emphasis added].

V

54 The bankruptcy judge's reasons for rejecting the appellants' s. 215 application are reported as Royal Crest Lifecare Group Inc. (Re), [2003] O.J. No. 756. Early in his reasons, in para. 6, the bankruptcy judge identified "the contentious issue or battlefield [to be] whether the trustee in bankruptcy can become a successor employer [pursuant to s. 69 of the LRA] if the trustee hires employees to do the work previously engaged in by employees pre-bankruptcy". After reviewing the positions of the parties, the bankruptcy judge considered the trustee's submission that collective agreements terminate upon an employer's bankruptcy. He appears to have accepted the reasoning of the Nova Scotia Court of Appeal in Saan Stores Ltd. v. Nova Scotia (Labour Relations Board) (1999), 172 D.L.R. (4th) 134 that although bankruptcy terminates the employment relationship between a bankrupt employer and its employees, a collective agreement is "not rendered inoperative" by reason of an employer's bankruptcy.

55 In paras. 24-26 the bankruptcy judge discussed the statutory mandate of a trustee in bankruptcy. In my opinion, as this discussion is relevant to his ultimate decision to dismiss the appellants' application, it is helpful to reproduce it in its entirety:

> It seems to me that when one appreciates that the mandate of a trustee in bankruptcy is to maximize value of the assets vested in the trustee on a bankruptcy for the purpose of providing a dividend to the creditors to partially satisfy their claims, the circumstance of operating the business (if the assets are the business and undertaking) *is merely ancillary and incidental to that function of realizing upon the assets.* Coupled with the rather "new-found" objective and thrust of the BIA since the 1992 amendments with the significant social and economic policy with particular positive impact for employees and the communities in which these employees live to have businesses, if possible and practicable, sold as a going concern (such being the usual way in which to maximize value as well), *it would be undesirable to saddle the Trustee with (heavy) personal liabilities which may arise either from a finding of "successor employer" against the trustee or a conclusion that a trustee who hires personnel "inherits" an operative collective agreement. Simply put, what role is the trustee truly playing - is it acting qua realizor of the assets or is it acting qua employer in essence.* Where the business cannot be conveniently mothballed (e.g. a steel mill where the blast furnaces must be kept active or otherwise the furnaces would "solidify" or, as here, where the residents cannot be easily transferred both

physically and as well with concern for their emotional disruption), it seems that the trustee may be "forced" to operate the business during the period of marketing through sale. The maintenance of going concern goodwill will also be an important factor in determining whether it is reasonable to continue some or all of the operations, even if it were not a physical problem to shut down operations. *If the trustee did not operate the business where that was physically necessary or to maximize value of realization, then the trustee would be acting contrary to the principles of the BIA and in so acting would be derelict in its duties and obligations under that federal insolvency statute.*

It seems to me that where a trustee is operating the business as incidental to the trustee disposing of it and realizing on the assets and there is no question or issue raised that it is pursuing a marketing and ultimately sale/disposition program *in a reasonable and bona fide way with due dispatch, then the question of employment of personnel is only incidental to its function of realizing on the assets (and protecting stakeholder interests in going concern preservation).*

I certainly agree with the observations of Spence J. in 588871 at p. 33:

> PMTI also contended that this motion involves an important policy question. If, in circumstances such as those in the present case, a trustee in bankruptcy who is given authority to carry on the business is to be exposed to the risk of being considered a successor employer and the attendant liabilities of the status, *no trustee would ever undertake to carry on that business and that could thwart the proper operation of the BIA.*. I think this concern may properly be taken into account.

I do not regard this as an "in terrorem" argument as so characterized by CUPE's counsel. Spence J. went on to state at p. 33:

> With respect to the request for leave, I think a delicate balancing of the relevant considerations is required. The [OLRB] clearly has jurisdiction under the OLRA to make a determination that there has been a sale of a business and that PMTI is a successor employer. The considerations which have been raised here concerning the apparent inconsistencies between a positive determination to that effect and bankruptcy principles and the order of December 14, 1994 could presumably be considered in those proceedings to the extent germane and in any other proceedings that may be taken in this matter. *The courts should ordinarily defer to the [OLRB] on a matter clearly within its statutory jurisdiction. On the other hand, if a decision were taken by the [OLRB] against the trustee, it would involve the inconsistencies mentioned above. It would be incompatible with the termination of the collective agreement as a result of the bankruptcy and the limited role of a trustee in bankruptcy in carrying on a business. It seems to me that such matters are properly to be addressed by this court on this application for leave under the BIA and not to be deferred for decision to a tribunal which is not charged with responsibility in respect of the bankruptcy law.* The stay of proceedings imposed by s. 215 of the BIA is one part of the machinery of the Act which functions to ensure that the purposes of the Act can be carried out properly without the undue intervention of other proceedings. The stay imposed under s. 215 has a proper effect in this case, for the reasons mentioned above. Accordingly, the request for leave nunc pro tunc

should not be granted [emphasis added].

56 In paras. 29-30, the bankruptcy judge then gave what I understand to be his reasons for dismissing the appellants' application:

> *There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E&Y Inc. in its capacity as IR) has been dragging its feet or will do so. The CUPE cross-motion for leave is dismissed without prejudice to such a motion being brought back on again with appropriate factual underpinning which I would be of the view ought to demonstrate that the Trustee has slipped over from functioning qua realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities.*

In the meantime it appears to me that the collective agreement is not terminated but rather is put into suspended animation, to be revived if, as, and when a purchaser with a personal economic interest in the operation of the business acquires the business [emphasis added].

57 Read as a whole, as I read his reasons, the bankruptcy judge dismissed the appellants' application for leave to commence proceedings before the OLRB for a declaration that EYI is a successor employer under s. 69(12) of the LRA because he was of the view that if the application before the Board were to succeed, a declaration that the trustee in bankruptcy is a successor employer would interfere with the mandate of a trustee, saddle the trustee "with (heavy) personal liabilities", would discourage trustees from carrying on a business as a going concern and would be incompatible with the termination of a collective agreement consequent to the bankruptcy of an employer. As a result, the bankruptcy judge agreed with the opinion of Spence J. in Re 588871 Ontario Ltd. (1995), 33 C.B.R. (3d) 28 (Ont. Gen. Div.), that although the OLRB has exclusive jurisdiction over the determination of "whether a business has been sold by one employer to another", the court should not defer to the jurisdiction of the Board where a successor employer application is made in the context of a bankruptcy; instead, this determination should be made by a court "charged" with responsibilities in respect to bankruptcy law.

58 As his ultimate reason for dismissing the application for leave, the bankruptcy judge stated that the trustee in bankruptcy had not "been dragging its feet" and there was no suggestion that it would do so. However, the dismissal of the application was without prejudice to it being reinstated "with appropriate factual underpinning ... to demonstrate that the trustee has slipped over from functioning qua realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities".

VI

59 In analyzing the bankruptcy judge's reasons for dismissing the appellants' application under s. 215 of the BIA it is helpful to recall that the authorities are uniform that the test to be applied by the court sets a low threshold.

60 With respect to the first element of the test established in Mancini, in my view, there can be no question that the proposed application to the OLRB is neither frivolous nor vexatious. At the time of the application, EYI was operating the same business that was operated by Royal Crest and had hired the same employees that had been employed by Royal Crest to perform the same function that they had performed previously. EYI had done so as interim receiver for two months prior to its appointment as trustee in bankruptcy and receiver. Moreover, neither EYI nor the bankruptcy judge suggested that the proposed application to the OLRB was frivolous or vexatious.

61 Under the second element of the test, the proposed application to the OLRB must disclose "a cause of action" against the trustee in bankruptcy. This is to be decided on the basis of evidence that is

sufficient to establish a factual basis for the proposed OLRB application. In the context of these proceedings, the "cause of action" against the trustee consists of the assertion that in the operation of the Royal Crest's business as a going concern, the trustee had become a successor employer within the meaning of s. 69(12) of the LRA. It would appear that the trustee's operation of Royal Crest's business as a going concern for the benefit of its creditors and the patients and residents mitigates in favour of a finding by the OLRB that the trustee is a successor employer. There is little doubt that the evidence of the history of EYI's operation of the business since its appointment as interim receiver on November 12, 2002, provided a factual basis for the appellants' application as contemplated by the second element of the Mancini test.

62 In considering whether the proposed application to the OLRB discloses a cause of action against the trustee in bankruptcy it is important to recognize that s. 69(2) of the LRA provides that a union continues to be the bargaining agent for the employees of the person, or entity, to whom a business is sold until the OLRB otherwise declares. As pointed out by George W. Adams in his text, Canadian Labour Law, 2nd ed. looseleaf (Aurora: Canada Law Book Inc., 2003) at 8.10:

> ... collective bargaining rights flow through changes in ownership so long as there is a continuation of the same business. It is the business - and not the employer - to which collective bargaining rights have become attached ... The successor provisions [of the LRA] have a two-fold purpose: to protect the trade union's right to bargain and to protect any subsisting collective agreement from termination upon sale.

63 Moreover, as Mr. Adams points out at 8.190, labour boards have adopted a broad and liberal interpretation of successorship provisions, including what constitutes the sale of a business under s. 69 (1) of the LRA, in accordance with the remedial nature of the legislation. After reviewing the case law, Mr. Adams concludes:

> For the most part, the Ontario and British Columbia courts accept and recognize that the substantial similarity of work performed subsequent to a transaction to that performed prior to a transaction normally creates a strong inference there has been a transfer of a business. The criteria relevant to such an interpretation are: (a) substantially the same jobs being performed at the same time and places; (b) in respect of substantially the same goods and services; and (c) for substantially the same customers or patrons.

64 In determining whether the appellants' proposed application to the OLRB disclosed a "cause of action" against the trustee in bankruptcy, it was necessary that the bankruptcy judge consider not only the purpose of the successorship provision in s. 69 of the LRA, but the criteria relevant to the determination of whether the trustee could be found by the OLRB to be a successor employer. The bankruptcy judge failed to do so. Based on the above criteria, there is an abundance of evidence in the record to establish a factual basis for the proposed successorship application to the OLRB.

65 As for the third element of the Mancini test, the bankruptcy judge must not make a final assessment of the proposed claim or application. Although the bankruptcy judge did not in fact do so in this case, in my view he came perilously close to doing so. He followed the decision of Spence J. in Re 588871 Ontario Ltd. that the question of successorship should be effectively decided on a motion to the bankruptcy court under s. 215 of the BIA, contrary to s. 114(1) of the LRA that provides that the OLRB has exclusive jurisdiction to exercise the powers conferred upon it by the LRA.

66 In addition, I have difficulty in understanding what the bankruptcy judge meant in para. 24 by his characterization of the trustee's role as "acting qua realizor of the assets or qua employer in essence". In

my view, if it is the opinion of the trustee in bankruptcy that the maximum dividend for creditors can be achieved by selling the bankrupt's business as a going concern it stands to reason that the trustee can do so only if it has the necessary employees to operate the business. The bankruptcy judge reasoned that the trustee's employment of personnel was "only incidental" to its function of realizing on the assets and "protecting stakeholder interests in going concern preservation". With respect, I do not agree with this reasoning. The operation of the business as a going concern and the re-hiring of Royal Crest's employees to accomplish this are neither incidental nor ancillary to the trustee's role to maximize and maintain the value of the assets for the benefit of the creditors. In my view, they are central to that role. Without the former Royal Crest employees, the trustee could not operate the nursing home business as a going concern. The employees have statutory rights which an employer must respect. The unions were attempting to protect and enforce their members' rights in seeking leave to apply to the OLRB to obtain a successorship ruling.

67 The bankruptcy judge returned to this theme in para. 29, where he gave his ultimate reason for dismissing the appellants' s. 215 application. He was of the view that the length of time during which the trustee in bankruptcy had operated the business was pertinent to whether or not the trustee might be declared a successor employer under s. 69 of the OLRA. Thus, he permitted the appellants to make a further application should the trustee "[slip] over from functioning qua realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities".

68 Moreover, in my view the bankruptcy judge minimized the fact that this case involves the rights of employees and workers and that under the legislative scheme of the LRA the only recourse available to the unions in protecting the rights of their members was to bring the appropriate proceeding before the OLRB. In addition, the bankruptcy judge appears to have placed the trustee's role under the BIA ahead of the employees' statutory rights conferred by the statutes that I have listed in para. 12. In doing so, it seems that he overlooked the proposition that except in the case of "operational conflict", valid provincial law of general application continues to apply in a bankruptcy context: Husky Oil Operations Ltd. v. M.N.R., [1995] 3 S.C.R. 453. This is also recognized in s. 72(1) of the BIA where Parliament has explicitly called for the application of provincial law in administering a bankrupt estate, except to the extent that it is inconsistent with the terms of the BIA.

69 In making these observations I am mindful that the court did not require submissions from the parties on the constitutional issue raised by the respondent trustee and I do not intend, by my observations, to be taken as determining that issue. The purpose of my observations is to indicate that as the rights of employees and workers are central to the unions' s. 215 application, it is my view that early recourse to the OLRB was an appropriate factor for the bankruptcy judge to take into account in applying the Mancini test.

70 In summary, the bankruptcy judge placed too much emphasis on the bankruptcy environment and gave insufficient weight to the essential character of the issues that the unions sought to advance before the OLRB on behalf of their members. While the important role performed by bankruptcy trustees is deserving of protection, the rights of labour unions to pursue legitimate issues on behalf of their members must also be respected. As, in my view, the bankruptcy judge did not give sufficient weight to these considerations and to the test to be applied on an application under s. 215 of the BIA as explained in Mancini, he erred in the exercise of his discretion.

71 In my opinion, the unions' s. 215 application was timely and prudent. Nothing about the application was premature. The unions should not be faulted for bringing it on the day that the court appointed EYI as trustee in bankruptcy. It was brought in response to EYI's application for a declaration that it be deemed not to be a successor employer. EYI was no stranger to the business operation of Royal Crest. For two months prior to its appointment as trustee, as interim receiver it had operated the nursing

home business with Royal Crest's former employees. As trustee, it was intending to operate the business with the same employees. The employees had statutory rights which the unions believed required recourse to the OLRB for their protection. Had the bankruptcy judge granted the unions' application for leave to apply to the OLRB, or, indeed, should this court do so, the work of the trustee in administering the estate would not have been delayed or frustrated as it would have continued its operation of the nursing homes, thereby benefiting both the creditors and the residents, while it continued its search for a purchaser of the business as a going concern. At the same time, the unions would have been able to prepare their application to the OLRB.

72 Indeed, nothing changed in the operation of the business on January 10, 2003 other than the status of EYI, which continued that operation as trustee in bankruptcy rather than as interim receiver. The trustee was of the opinion that the record supported its application, which acknowledged the existence of the collective agreements, for a declaration that it was not a successor employer. The unions relied on the same record. Moreover, had the bankruptcy judge granted the unions' application for leave to bring a s. 69(12) application before the OLRB, the record could only have improved in the time that it would have taken for the application to be heard by the OLRB.

VII

73 For all of the foregoing reasons, it is my view that there was a wrongful exercise of discretion by the bankruptcy judge as a result of his failure to apply the test in Mancini and to give sufficient weight to the relevant considerations as argued before us by the appellants. Therefore, this is a proper case for this court to interfere with the bankruptcy judge's exercise of discretion.

74 In the result, I would allow the appeal with costs, set aside the order of the bankruptcy judge and substitute an order granting leave to the appellants pursuant to s. 215 of the BIA to bring an application to the OLRB under s. 69(12) of the LRA.

BORINS J.A.

cp/e/nc/qw/qlhcc/qlgxc

TAB 12

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

By

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obligation only to pay out an equivalent sum on demand.[193] The depositor, even if he be an express trustee depositing trust moneys, has only a personal action against the bank; that is the essence of a claim against a debtor. A trustee on the other hand must keep the assets subject to the trust separate, and be ready to hand over those assets when the time comes.[194]

The question which provides the most difficulty is whether the particular holder of title to assets who acknowledges another's interest is trustee or debtor. A trustee must keep the assets of the trust distinct, but in the normal commercial transaction nothing specific is said about this. The duty to keep the assets distinct, if it exists, must be spelled out of the nature of the transaction, the environment in which the parties agree, the type of persons who are the holders of title and the transferor, and whether or not interest payments are to be made by the holder of the assets. If interest is to be paid, the relationship is nearly always that of creditor and debtor.[195]

A good example of the problem is provided by a series of real estate cases concerned with the right of the selling agent to his share of the commission which is held by the listing agent.[196] In *Re Century 21 Brenmore Real Estate Ltd.*, at first instance[197] Anderson J., in a judgment upheld on appeal, readily conceded that trust and contractual debt are not mutually exclusive.

The listing agent contracts with the would-be vendor to find a purchaser of the property, and that contract in its standard form entitles the agent to a commission

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[193] A term deposit is a debt owed by the bank, and is therefore subject to garnishment proceedings: *Bel-Fran Investments Ltd. v. Pantuity Holdings Ltd.*, [1975] 6 W.W.R. 374, 62 D.L.R. (3d) 140 (B.C. S.C.); and *Bank of Montreal v. I.M. Krisp Foods Ltd.* (1996), 1996 CarswellSask 581, [1997] 1 W.W.R. 209, 140 D.L.R. (4th) 33 (Sask. C.A.). Certification of the drawer/debtor's cheque by the bank does not make the bank a trustee of that sum for the payee/creditor. The certification is equivalent to payment by the debtor, but the bank merely becomes the debtor of the creditor. See *Marrs' Marine Ltd. v. Rosetown Chrysler Plymouth Ltd.* (1975), 61 D.L.R. (3d) 497 (Sask. Q.B.).

If by consent the trustee retains the trust fund when the trust is terminated by the settlor, the trustee becomes instead a debtor *vis-à-vis* the settlor. However, if the former (express) trustee agrees to hold the fund in a separate account, does the law of trusts make him a resulting trustee for the former settlor? Obviously it depends upon the terms of the agreement the parties have made as to retention by the former express trustee. See, e.g., *Barclays Bank Ltd. v. Quistclose Investments Ltd.* (1968), [1970] A.C. 567, [1968] 3 All E.R. 651 (U.K. H.L.).

[194] The beneficiary has not only a right of action against the trustee personally, and the right to recover trust assets as against the general creditors of the trustee himself, but he can trace the assets into the hands of innocent third party donees, and recover from them.

[195] See further, *Restatement, Trusts 3d*, para. 5(k) and the commentary thereon. If interest is to be paid it is almost always a relationship of debtor and creditor, but, even if interest is to be paid, a trust relationship may be found to exist. See, e.g., *Bank of Nova Scotia v. Société Générale (Canada)*, *supra*, note 190; and *McEachren v. Royal Bank of Canada*, *supra*, note 191.

[196] *Re Ridout Real Estate Ltd.* (1957), 36 C.B.R. 111 (Ont. S.C.); *Manitoba (Securities Commission) v. Showcase Realty Ltd.* (1978), 28 C.B.R. (N.S.) 24, 84 D.L.R. (3d) 518 (Man. Q.B.), reversed in part (sub nom. *Manitoba (Securities Commission) v. Imperial Bank of Commerce*) [1979] 2 W.W.R. 526, (sub nom. *Re Showcase Realty Ltd.*) 96 D.L.R. (3d) 58 (Man. C.A.), varied on rehearing [1979] 6 W.W.R. 464, (sub nom. *Re Showcase Realty (No. 2)*) 106 D.L.R. (3d) 679 (Man. C.A.); *Re Allan Realty of Guelph Ltd.* (1979), 24 O.R. (2d) 21, 97 D.L.R. (3d) 95 (Ont. Bktcy.); *Re Century 21 Brenmore Real Estate Ltd.* (1979), 100 D.L.R. (3d) 150, 6 E.T.R. 1 (Ont. S.C.), affirmed (1980), 6 E.T.R. 205, 111 D.L.R. (3d) 280 (Ont. C.A.).

[197] *Re Century 21 Brenmore Real Estate Ltd.*, *supra*, note 196 (6 E.T.R. 1 at 8).

TAB 13

OOSTERHOFF ON TRUSTS:
TEXT, COMMENTARY AND MATERIALS

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There are five major distinctions between the role of a debtor and that of a trustee. First, the debtor is not a fiduciary whereas the trustee is a fiduciary in the highest sense.

Second, a creditor has no interest, legal or equitable, in the property of the debtor. There is simply a personal obligation upon the debtor to repay the debt when it is due. The trust beneficiary, on the other hand, has a beneficial proprietary interest in the trust property.

Third, a debt is created by agreement and the parties may compromise, alter, or extinguish the debt by further agreement. In contrast, there need be no agreement to create a trust. Further, there can be no bargaining between the trustee and the beneficiaries as the trustee must act strictly in the interest of the beneficiaries and not permit his or her own interest to conflict.

Fourth, the debtor always remains liable to the creditor until the debt is paid. The trustee, however, is not personally obligated to compensate the beneficiaries if the trust property is lost other than through the trustee's own fault.[137]

Fifth, the debtor has no duty to invest or deal with the subject property in any particular manner, while the trustee must administer the trust property in accordance with his or her trust duties, which ordinarily include a duty to invest.

The consequences that follow a finding of debt or a trust can be critical in cases of lost or stolen property and in cases of insolvency. If the subject property is lost or stolen, a debtor remains liable to the creditor until the debt is paid, even if the property is lost through no fault of the debtor's own. The trustee, however, does not bear the loss of the trust property unless he or she is at fault.

If the debtor is insolvent, the creditor has no special interest in the subject property and will rank as a general creditor. The trust beneficiary, however, has a proprietary right to the trust property which entitles him or her to rank above all creditors *vis-à-vis* the trust property. It is, therefore, an advantage to be a trust beneficiary rather than a creditor in cases of insolvency.

AIR CANADA v. M & L TRAVEL LTD.

[1993] 3 S.C.R. 787, 108 D.L.R. (4th) 592, 50 E.T.R. 225, 159 N.R. 1
Supreme Court of Canada

M & L Travel Ltd. and Air Canada entered into an agreement providing that all moneys, less commissions, collected by the travel agency on the sale of the airline's travel tickets would be held in trust for the airline. The agency set up trust accounts but never used them. It deposited sale proceeds into its general operating account. When the agency failed to repay a demand loan due to its bank, the bank withdrew the amount outstanding from the agency's general operating account. The airline sued the agency and its two directors personally for breach of trust, claiming as damages the amount it was owed for ticket sales.

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137 *Ontario Hydro-Electric Power Commission of Ontario v. Brown* (1959), 21 D.L.R. (2d) 551, [1960] O.R. 91 (C.A.).

TAB 14

Case Name:

Outset Media Corp. v. Stewart House Publishing Inc.

Between
Outset Media Corporation, (plaintiff/respondent), and
Stewart House Publishing Inc. and Ken Thomson,
(defendants/appellants)

[2003] O.J. No. 2558

34 B.L.R. (3d) 241

124 A.C.W.S. (3d) 70

Docket No. C39390

Ontario Court of Appeal
Toronto, Ontario

O'Connor A.C.J.O., Morden and Sharpe JJ.A.

Heard: June 18, 2003.
Oral judgment: June 18, 2003. Released: June 26, 2003.

(7 paras.)

Trusts -- Creation of trust -- Transactions not creating trusts -- Surplus from sale.

Appeal by the defendants Stewart House Publishing and Thomson from a decision by a motion judge that Stewart held certain monies in trust. The parties entered into a contract regarding the sale of games to purchasers. The judge held that upon the sale of the games, Stewart acquired a contractual right to appropriate 25 per cent of the sale price as a selling agent's commission. The judge further held that the remaining funds, or the net proceeds of the sale, remained Thomson's property.

HELD: Appeal allowed. The arrangement between the parties was inconsistent with the notion that the proceeds received from the sales were impressed with a trust in favour of Outset. Further, there was no provision in the agreement for the segregation of funds received from the sale of the games.

On appeal from the judgment of Justice Angus D.K. MacKenzie of the Superior Court of Justice dated December 16, 2002.

Counsel:

R. Andrew Biggart and John R. Hart, for the appellants.
Robert C. Taylor, for the respondent.

[Quicklaw note: Supplementary reasons for judgment, which included a correction to the text below, were released July 18, 2003. See [2003] O.J. No. 2934.]

The following judgment was delivered by

1 THE COURT (oral endorsement):-- In our view, the appellant, Ken Thomson, is entitled to raise the argument that the motion judge erred in concluding that Stewart House held the monies in trust even though Stewart House itself has not continued its appeal after its bankruptcy. The conclusion of the motion judge that there was a trust affected the appellant's interest and is a conclusion that is as much against the appellant as it is against Stewart House. The appellant is therefore entitled to appeal that conclusion.

2 In our view, on the record before him, the motion judge erred holding that the amounts owing to the respondent were impressed with a trust. In his reasons, the motion judge misconstrued the legal effect of the provision in the agreement relating to the payments by Stewart House to the respondent.

3 The motion judge said the following:

> Upon sale of the product, Stewart House acquired a contractual right to appropriate to itself 25% of the sale price as a selling agent's commission for the product. Upon appropriating that 25% of the sale price to itself, the remaining funds or net proceeds of sale which represented the product remained the property of the plaintiff.

4 We do not think that the agreement, properly interpreted, means that the net proceeds of sale "remained the property of the respondent". Rather, the agreement provided that Stewart House was contractually obligated to pay to the respondent 75% of the amount invoiced to purchasers. Payments to the respondent did not depend on receipt of payment by Stewart House. The risk of non-payment was assumed by Stewart House not by the respondent. Indeed, there was a specific provision in the agreement to this effect.

5 This arrangement for payment to the respondent is inconsistent with the notion that the proceeds received from sales of the games were impressed with a trust in favour of the respondent.

6 Another factor which points away from the existence of a trust is that the agreement made no provision for the segregation of the funds received by Stewart House from the sale of the games.

7 Accordingly, the appeal is allowed with costs to the appellant, Thomson, the judgment as against the appellant, Thomson, is set aside and the motion for summary judgment is dismissed. The costs of the appeal are fixed on a partial indemnity basis in the amount of $12,000, inclusive of disbursements and G.S.T.

O'CONNOR A.C.J.O.
MORDEN J.A.
SHARPE J.A.

cp/e/nc/qw/qlhcc/qlmjb

TAB 15

Indexed as:

Salo v. Royal Bank of Canada (B.C.C.A.)

Between
John Salo, Peter Swanell, David Weymer and Henry Syrjala,
Plaintiffs, (Appellants), and
Royal Bank of Canada and Patrick & Miles Logs Ltd., Defendants,
(Respondents)

Vancouver Registry No. CA005921

[1988] B.C.J. No. 999

British Columbia Court of Appeal

Craig, Macfarlane and Wallace JJ.A.

May 5, 1988

G.L. Bisaro, appearing for the Appellants.
D.G. Morrison, appearing for the Respondent Royal Bank of Canada.
L. Kancs, appearing for the Respondent Patrick & Miles Logs Ltd.

CRAIG J.A.:-- Mr. Justice Wallace will give the first judgment.

WALLACE J.A. (for the Court, orally, dismissing the appeal):-- This appeal arises from a transaction in which the plaintiffs (appellants) who were loggers, allege that funds received by their logging broker (the respondent Patrick & Miles Logs Ltd.) from the sale of their logs were subject to an implied trust in their favour. Further, they claimed that the respondent Royal Bank had notice of that trust and that $51,000 of their trust funds could be traced to the Royal Bank since it had received $70,000 by way of reduction of the Patrick & Miles revolving line of credit on the same date that Patrick & Miles had received and deposited a payment of $108,000 for proceeds from logs which it had sold.

The trial Judge, Mr. Justice Toy, concluded that the relationship of the plaintiffs to their logging broker was that of a debtor/creditor and that there was not an implied trust or fiduciary relationship created with respect to the proceeds of the sale of the plaintiffs' logs. Accordingly, he dismissed the plaintiffs' action.

In his carefully reasoned judgment, Mr. Justice Toy reviewed in considerable detail the facts upon which he based his conclusion. It would be redundant to repeat that analysis in these reasons. It is sufficient to note that the findings of fact are well supported by the evidence.

The evidence discloses that Patrick & Miles had been appointed the plaintiffs' broker to sell their logs; that apart from a direction by the plaintiffs that their logs be kept separate from other logs acquired by Patrick & Miles, no direction or control was exercised by the plaintiffs over the manner in which Patrick & Miles performed its function of broker; that apart from expecting and receiving an accounting from Patrick & Miles as to the disposition of the proceeds received and the expenses incurred by it in the sale of the logs, the plaintiffs exercised no direction or control over the manner in which Patrick & Miles dealt with the proceeds received from the sale of the logs; that during the years the plaintiffs dealt with Patrick & Miles they never instructed it to keep the proceeds from the sale of their logs separate from Patrick & Miles' general funds.

Patrick & Miles deposited the proceeds from the sale of the logs of all of their respective clients into a general account from which it made various payments for advances to the clients, payment of disbursements, and payments to the bank on its revolving line of credit.

No interest was paid to the plaintiffs on the proceeds from the sale of their logs by Patrick & Miles, nor was any request made by the plaintiffs for such interest. The bank had no knowledge of the source or ownership of the funds paid into the Patrick & Miles general account - that is, whether they were proceeds from trading accounts or brokerage accounts, or the specific terms of any brokerage arrangement. The payment from Patrick & Miles to the bank on account of its line of credit was made in the normal course of its business practice, and was in accord with the specific arrangements made by Patrick & Miles with the bank.

To this factual background Mr. Justice Toy applied the principles expressed by the Supreme Court of Canada in M.A. Hanna Company v. Provincial Bank of Canada (1935) S.C.R. 144, at pp. 167-168, where Mr. Justice Cannon stated:

> "But, is there evidence of an original trust? Under the agreement, the coal company could and did mix with their own moneys the proceeds of the coal supplied by the appellant and use the proceeds for the purposes of their business, provided they made a payment to the appellant every four weeks. These facts, taken with the provision for the payment of interest on overdue remittances, which was subsequently (Jan. 21, 1932) insisted on by the appellant, and the form of the accounts accompanying the remittances, go far to show that the relation existing after, as well as before, November 11, 1931, was that of debtor

and creditor. See Henry v. Hammond [1913] 2 K.B. 515:

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

Halsbury's Laws of England (2nd Ed.), Vol. 1, p. 247, s. 420, says:

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

Further, Mr. Justice Rinfret at p. 156, stated:

> "I, therefore, come to the conclusion that the agreement of November 11th allowed the Docks Company to deposit the proceeds of the sale of the appellant's coal in the Docks Company's general account and to use the proceeds thereof between the settlement dates, subject only to the obligation of remitting to the appellant a sum of money equivalent to the collections at the end of the remittance period agreed upon between the parties.
>
> As a consequence, the relation of the Docks Company towards the appellant in respect of the funds collected was not that of agent or trustee, but the relation between them was that of debtor and creditor (Henry v. Hammond [1913] 2 K.B. 515). The Docks Company had the use of the funds and could dispose of them as its own; and, in that aspect of the question, it is, of course, immaterial whether they disposed of it in favour of the bank respondent or in favour of other persons."

Both these passages are particularly pertinent to the case at bar where the factual circumstances are unusually similar.

Despite the very able submissions of counsel for the appellants, I am of the view that the findings of fact of Mr. Justice Toy were well supported by the evidence and he correctly applied the appropriate principles. Accordingly, I would dismiss the appeal.

WALLACE J.A.
CRAIG J.A.:-- I agree.
MACFARLANE J.A.:-- I agree.
CRAIG J.A.:-- The appeal is dismissed.

TAB 16

Case Name:

Technicore Underground Inc. v. Toronto (City)

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

[2012] O.J. No. 4235

2012 ONCA 597

296 O.A.C. 218

14 C.L.R. (4th) 169

2 M.P.L.R. (5th) 1

220 A.C.W.S. (3d) 333

354 D.L.R. (4th) 516

2012 CarswellOnt 11173

Docket: C54801

Ontario Court of Appeal
Toronto, Ontario

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

Heard: June 20, 2012.
Judgment: September 12, 2012.

(71 paras.)

Civil litigation -- Civil procedure -- Judgments and orders -- Summary judgments -- To dismiss action -- Appeal by contractor from summary dismissal of bulk of its claims against City dismissed -- Parties' contract, pursuant to which contractor was to build water main for City, contained notice provision specifying time frame for bringing claims for additional payment, relative to completion

of work giving rise to claim -- Contractor's claim in subsequent court proceedings was limited to claim it previously brought within mandated time frame in contract.

Construction law -- Contracts -- Miscellaneous issues -- Appeal by contractor from summary dismissal of bulk of its claims against City dismissed -- Parties' contract, pursuant to which contractor was to build water main for City, contained notice provision specifying time frame for bringing claims for additional payment, relative to completion of work giving rise to claim -- Contractor's claim in subsequent court proceedings was limited to claim it previously brought within mandated time frame in contract.

Appeal by Clearway from the summary dismissal of the bulk of its multimillion dollar construction claim against the City of Toronto. Clearway contracted to construct a water main six kilometres long under a number of City roads. The contract provided that claims for additional payment needed to be provided within seven days of commencing that part of the work forming the claim. Clearway subcontracted Technicore to do the underground tunneling, using a tunnel boring machine. Technicore excavated a tunnel under Leslie Street. A flood resulted on August 2, 2006. Technicore's boring machine was trapped under Leslie Street by the flood. After rescuing the machine, Technicore completed the work by December 22, 2006. Technicore claimed $800,000 against Clearway for damages arising from the flood. In March 2007, Clearway submitted a claim to the City for an additional payment under the contract of $1,270,000 to cover costs incurred as a result of the flood. The City denied Clearway's claim. Technicore commenced the main action in these proceedings, against the City, in July 2008. The City defended and third partied Clearway. Clearway defended and counterclaimed against the City in March 2010. Clearway amended its counterclaim to increase its damages to $3,400,000 in June 2011. The City was successful on its summary judgment application to dismiss those parts of Clearway's claim in excess of its March 2007 claim directly to the City.

HELD: Appeal dismissed. The City was entitled to rely on the notice provision in the parties' contract. The City was under no obligation to lead evidence of prejudice. Prejudice could be presumed where Clearway was attempting to make a multimillion dollar claim years after the contract permitted. There was no course of conduct between the City and Clearway indicating that they did not intend to be bound by the notice provision in their contract.

Appeal From:

On appeal from the judgment of Justice Beth Allen of the Superior Court of Justice, dated December 5, 2011.

Counsel:

Christos Papadopoulos, for the appellant.

Darrel A. Smith, for the respondent.

The judgment of the Court was delivered by

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

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

OVERVIEW

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

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

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

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

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

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

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

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

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

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

13 Clearway defended the City's third party claim and counterclaimed against the City. In its initial defence and counterclaim, served on the City in March 2010, Clearway sought indemnity for the Technicore claim, plus damages of $1,000,000.

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

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

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

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

> The Contractor shall submit detailed claims as soon as reasonably possible and in any event no later than 30 Days after completion of the work affected by the situation. The detailed claim shall:
>
> a) identify the item or items in respect of which the claim arises;
> b) state the grounds, contractual or otherwise, upon which the claim is made; and
> c) include the Records maintained by the Contractor supporting such claim.

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

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

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

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

A PRELIMINARY MATTER

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

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

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

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

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

THE ISSUES

27 Clearway submits that the motion judge erred in:

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

ANALYSIS

Issue 1: *Interpreting the Notice Provision*

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

29 I do not accept this submission. The Notice Provision sets out a mandatory procedure for the filing of claims under the Contract, including the requirement that detailed claims are to be submitted no later than 30 days after completion of the work affected by the situation.[1] The Notice Provision need not include a "failing which" clause in order for it to bar the August 2010 Claim. This conclusion flows inexorably from the decision of the Supreme Court of Canada in *Corpex (1977) Inc. v. Canada*, [1982] 2 S.C.R. 643.

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

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

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

> work site, or a reasonable assumption of fact based thereon, in the plans and specifications or other documents or material communicated by Her Majesty to the Contractor for his use in preparing his bid and the actual soil conditions encountered at the work site by the Contractor when performing the work, ...
>
> ...
>
> in which case, **if the Contractor has given the Engineer written notice of his claim before the expiry of thirty days after encountering the soil conditions giving rise to the claim [...] Her Majesty shall pay** to the Contractor in respect of the additional expense, loss or damage incurred or sustained by reason of that difference [...] an amount equal to the cost, calculated in accordance with clauses 44 to 47 of the General Conditions, of the additional plant, labour and materials necessarily involved. [Emphasis added.]

32 Corpex sued the government for, among other things, the additional costs arising from the mistake as to the soil conditions. The trial judge allowed this part of Corpex's claim based on considerations of equity rather than on a "technical application of certain clauses in the General Conditions".[2]

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

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

> The contractor is practically certain of being compensated for additional costs either during the work or later, if he complies with the provisions of clause 12, and in particular, if he gives the notice provided for in that clause. ...
>
> An owner who is thus informed of a mistake as to the nature of the soil knows that the contractor will probably not drop his claim, and he is enabled to reconsider his position. He can in practice be assured that the work will go forward if he wishes ... . He may conclude another agreement with the same contractor or some other. If he prefers for the work to continue under the new circumstances, he may make arrangements to monitor quantities and costs of additional work so that the payments due the contractor ... can be made.

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

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

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

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

38 The trial judge, [1987] B.C.J. No. 65, held that the defendant had not breached the contract but, in any event, the contractor's claim could not proceed because the contractor had failed to give notice as required by the contract. He noted that had the contractor given proper notice, the defendant could have addressed cost reduction measures, insisted on the institution of a cost control system and taken steps to see that all records were preserved. The contractor's failure to comply with the notice provisions deprived the defendant of these rights.

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

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

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

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

> I approach the construction of art. 36 with the proposition established by the decided cases in mind: if a party to a building contract is to be deprived of a

cause of action, this is only to be done by clear words.

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

44 Two additional points must be made in respect of the decision in *First City*. First, the court makes no mention of *Corpex* in its judgment. Second, *Doyle* was decided after *First City*. The British Columbia Court of Appeal was fully aware of its decision in *First City* when it rendered its decision in *Doyle*.[3] Nonetheless, and in the absence of a "failing which" clause, the court clearly and emphatically concluded that compliance with a notice provision is a condition precedent to maintaining a claim in the courts.

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

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

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

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

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

49 At para. 21 of *Doyle*, the trial judge is quoted as stating that had the contractor given proper notice, the defendant "could have addressed cost reduction measures, could have insisted upon the institution of a cost control system, and could have taken steps to see that all records, including site

diaries, were preserved". Similarly, had Clearway given proper notice in this case, the City could have chosen whether to permit Clearway to continue with the work occasioned by the flood and, if so, it could have instituted cost control mechanisms. The fact that the trial judge in *Doyle* made those findings does not make it a requirement in law.

50 *Bemar* does not elevate this aspect of *Doyle* to a requirement of law. It is true that *Doyle* is quoted at length and relied on by the trial judge in *Bemar*, and that the findings of prejudice in *Doyle* set out in the preceding paragraph are quoted. But, Fragomeni J. does not suggest that prejudice must be established before non-compliance with notice provisions will bar a claim. At para. 194 of the *Bemar* trial decision, Fragomeni J. concludes that the contractor did not properly comply with the notice provisions in the contract and, therefore, it could not advance its claims. He made no finding of prejudice on the part of the city in reaching that conclusion.

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

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

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

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

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

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

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

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

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

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

59 *Corpex* dictates that this ground of appeal must fail. It will be recalled that in para. 62 of *Corpex*, the Supreme Court stated:

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

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

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

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

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

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

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

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

66 *Colautti Construction* is a very different case from the present one. In *Colautti Construction*, the plaintiff contractor entered into a contract with the defendant city for the construction of a sanitary sewer. The contract stipulated that written authorization was required for additional charges. Nonetheless, at various different times over the course of the project, the contractor billed the city for significant extra charges and the city paid them, despite the absence of written authorization. This court held that the parties had varied the terms of the contract by their conduct and the city could not rely on the strict provisions of the contract to escape liability for further additional costs.

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

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

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

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

70 There has been much speculation, both judicial and academic, on whether waiver and promissory estoppel are essentially the same thing, with the sole or primary difference being that waiver developed as a common law doctrine whereas promissory estoppel arose in equity.[4] That determination awaits the proper case, one in which it is squarely raised and fully argued. Following the lead of the Supreme Court, I would decide this ground of appeal based on waiver and variation, as that is how Clearway framed the issue. I would add, however, that if the doctrine of promissory estoppel is in play, my conclusion that Clearway has failed to establish the necessary evidentiary basis is reinforced because there is no evidence of detrimental reliance.

DISPOSITION

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

E.E. GILLESE J.A.
R.G. JURIANSZ J.A.:-- I agree.
G.J. EPSTEIN J.A.:-- I agree.

* * * * *

Appendix A

GC 3.14 Claims, Negotiations, Mediation

GC 3.14.01 Continuance of the Work

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

GC 3.14.02 Record Keeping

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

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

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

GC 3.14.03 Claims Procedure

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

.02 Not used.

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

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

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

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

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

GC 3.14.04 Negotiations

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

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

GC 3.14.05 Mediation

.01 If a claim is not resolved satisfactorily through the negotiation stage noted in clause GC 3.14.04, Negotiations, within a period of 30 Days following the opinion given in paragraph GC 3.14.03.05, and the Contractor wishes to pursue

the issue further, the parties may, upon mutual agreement, utilize the services of an independent third party mediator.

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

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

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

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

GC 3.14.06 Payment

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

GC 3.14.07 Rights of Both Parties

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

cp/e/qljel/qlpmg/qlced/qlmll/qljxh/qlcas/qlced/qlhcs/qlhcs

1 The Notice Provision allows for time extensions of up to 90 days in "exceptional cases", with approval in writing from the Contract Administrator. As the August 2010 Claim greatly

exceeds either time limit, for ease of reference I refer only to the 30-day limit.

2 *Corpex,* at para. 31.

3 See pp. 101-103.

4 See, for example, *Re Med-Chem Health Care Inc.*, [2000] O.J. No. 4009 (S.C.); *HREIT Holdings 45 Corp. v. R.A.S. Food Services (Kenora) Inc.* (2009), 80 R.P.R. (4th) 64, at paras. 57-61 (Ont. S.C.); *Re Tudale Explorations Ltd. and Bruce et al.* (1978), 20 O.R. (2d) 593, at pp. 595-99 (H. Ct. J.); *Petridis v. Shabinsky* (1982), 35 O.R. (2d) 215 (H. Ct. J.); *Laurie v. Jones*, 2004 NSSC 87, at para. 14, 223 N.S.R. (2d) 129. For academic consideration of this matter see, for example, S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at paras. 195-206; Angela Swan, *Canadian Contract Law*, 2d ed. (Markham, Ont.: LexisNexis, 2009), at paras. 2.198-255; John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at pp. 275ff.

TAB 17

Indexed as:

Blue Range Resource Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended
AND IN THE MATTER OF Blue Range Resource Corporation
AND IN THE MATTER OF the application of CIBC World Markets Inc.

[2000] A.J. No. 1622

290 A.R. 271

12 B.L.R. (3d) 286

102 A.C.W.S. (3d) 17

Action No. 9901-04070

Alberta Court of Queen's Bench
Judicial District of Calgary

LoVecchio J.

Judgment: filed December 22, 2000.

(58 paras.)

Counsel:

P. Pastewka and C.J. Popowich, for the applicant, CIBC World Markets Inc.
G.H. Poelman and W.K. Johnston, for the Creditors' Committee of the respondent, Blue Range Resource Corporation.

REASONS FOR JUDGMENT

LoVECCHIO J.:--

INTRODUCTION

1 This is an application by CIBC World Markets Inc., claiming a fee of approximately $3.5 million pursuant to an agreement with Blue Range Resource Corporation. As Blue Range is under the protection of the Companies Creditors Arrangement Act[1], CIBC seeks an Order that Price Waterhouse Coopers Inc., the Receiver Manager of Blue Range, pay to CIBC a percentage of the judgment or damages equal to the amount payable to the other unsecured creditors of Blue Range.

BACKGROUND

2 CIBC, as a financial advisor to Blue Range, was of the view that Blue Range required additional capital to fund its operations. Blue Range agreed. As a result, on September 18, 1998, CIBC entered into an agreement (Exhibit 6) with Blue Range for CIBC to assist Blue Range in finding additional capital, specifically by finding a joint venture partner.

3 CIBC developed a list of prospective partners, assisted in drafting marketing materials, had meetings with prospective partners, and provided advice on transaction implementation and negotiation.

4 As part of the above, CIBC prepared a document entitled "Summary Blue Range Resource Corporation: 1998-2000 Joint Venture Proposal" (Exhibit 8) which was circulated to a number of parties CIBC thought might be interested. CIBC also met with those that expressed an interest and provided some of them with the more detailed information package, entitled "Blue Range Resource Corporation 1998-2000 Joint Venture Proposal" (Exhibit 9). This information package included a Confidentiality Agreement which was to be signed by the parties receiving the more detailed information.

5 On October 26, 1998, CIBC on their own initiative faxed a document, which CIBC referred to as a "mini-package", to Canadian National Resources Limited. Mr. Korpach, a Managing Director of CIBC and the only person who gave oral evidence during this application, believed this "mini-package" was the "Summary" referred to above. Mr. Korpach also testified that he had a brief conversation with Mr. Murray Edwards, the Chairman of the Board of CNRL, to discuss Blue Range. Mr. Korpach could not remember the date of the call or whether the topic of Blue Range simply arose in the course of a discussion regarding other matters. Regardless, Mr. Edwards expressed no interest in the opportunity. CIBC did not meet with CNRL, nor did CIBC send CNRL the more detailed information package, it being acknowledged their only "contact" with CNRL about a possible joint venture was the unsolicited fax and phone call.

6 On November 13, 1998, Big Bear made an unsolicited offer to purchase all the outstanding common shares of Blue Range. Blue Range sought the assistance of CIBC and Research Capital Corporation in this regard. The parties entered into an agreement on November 13, 1998 whereby

CIBC and Research Capital agreed to provide advice and assistance to Blue Range in finding a bid competitive with Big Bear's offer. The November Agreement outlined a wide range of methods by which Blue Range could respond to the bid including the possibility of asset dispositions.

7 CIBC and Research Capital did not find a competing bid and no other action was taken by Blue Range. The bid was successful and Big Bear ultimately took control of Blue Range on December 11, 1998.

8 On March 2, 1998, Blue Range sought and obtained the protection of the CCAA. Substantially all of its assets were purchased by CNRL in court-supervised proceedings through a Plan of Arrangement dated June 29, 1999. It is because of this transfer of Blue Range assets to CNRL that CIBC claims a percentage of the proceeds through the operation of what is known as a "trailer clause" in the September Agreement.

ISSUES

9 This application raises the following issues:

(1) Was the September Agreement frustrated by the CCAA proceedings?
(2) Can the September Agreement and November agreement co-exist?
(3) If not, was it the intention of the parties to suspend or replace the September Agreement?
(4) If the answer to (2) is yes, or if the answer to (2) is no and the answer to (3) is that the September Agreement was only suspended, was there a sale of properties to a person contacted by CIBC as contemplated by the trailer clause?

DECISION - ISSUE (1)

10 For the reasons that follow, the Court does not find the September Agreement to have been frustrated as a result of the CCAA proceedings.

ANALYSIS

11 Did the CCAA proceedings make performance of the September Agreement impossible or, as the House of Lords suggests in Davis Contractors Ltd. v. Fareham U.D.C.,[2] has "the contractual obligation ...become incapable of being performed because the circumstances in which the performance is called for would render a thing radically different from that which was undertaken by the contract"?[3]

12 The Creditors' Committee argues that the March 2nd Order, which placed Blue Range under the CCAA and restricted Blue Range from disposing of any assets outside the ordinary course of business without approval of the Court, resulted in the frustration of the September Agreement

because an independent sale by Blue Range was made impossible.

13 I do not agree that the restriction on sale contained in the order may, by itself, lead to frustration. The principle purpose of CCAA protection is to provide a stay of proceedings against the company by the creditors of the company. As an adjunct to that protection, the company may also be restrained from disposing of assets pending the development of a plan to reorganize its affairs. This was also done in this case. One of the purposes of such restraint is to preserve the status quo. The enforcement of the September Agreement (assuming it was not rescinded by the November Agreement) simply became subject to the stay. To suggest that CCAA proceedings render contracts frustrated in these circumstances would not only expand the effect of a stay under the CCAA, it would substantially alter the status quo in the very relationships it was intended to preserve. Accordingly, the frustration argument cannot be sustained.

DECISION -ISSUE (2)

14 For the reasons that follow, I find that the September Agreement and the November Agreement may not co-exist.

ANALYSIS

15 CIBC argues that there is no express provision to replace the September Agreement by the November Agreement and that both agreements are capable of operating contemporaneously.

16 The Creditors' Committee argues that the two agreements cannot co-exist and that the September Agreement was rescinded and replaced by the November Agreement.

17 The Creditors' Committee cites the following principle from Industrial Construction Ltd. v. Lakeview Development Co. Ltd.[4] as the test for implied rescission and replacement:

> It is well settled law that the parties to a contract may by express agreement or by their conduct rescind or vary their contract: see Halsbury's Laws of England, Fourth Edition, volume 9, paragraphs 561 and 570. Whether the parties intend to rescind or to vary must be determined in the light of all of the circumstances of the case; but the parties will be presumed to have intended to rescind the old contract and to have substituted a new one whenever the new agreement is inconsistent with the original contract to an extent which goes to the very root of it: see Morris v. Baron and Company, [1918] A.C. 1; British and Beningtons Limited v. North Western Cachar Tea Company, Limited et al., [1923] A.C. 48.[5]

18 The purpose of the September Agreement was to find new capital for Blue Range through a joint venture partner.

19 The purpose of the November Agreement was to help Blue Range defend Big Bear's takeover

bid.

20 From a business perspective, it is obvious that the mandates of the two agreements are quite different. Does this make them inconsistent, or, perhaps to expand the range of words, does it make them in conflict or incompatible? That really begs the question. The term inconsistent, like conflict or incompatibility, is a relative term. By this I mean, we express the view: "the operation of activity A is inconsistent with (in conflict with or incompatible with) the operation of activity B".

21 The common denominator is the inability to practically carry out the operation of both activities at the same time. For all practical purposes, Blue Range could not be looking for a joint venture partner at the same time its Board of Directors was seeking a competitive offer for the purchase of its shares. The most obvious practical impediment would be the reluctance of any third party to commit while the Big Bear bid was outstanding.

22 Mr. Korpach himself recognized this fact when he testified that the focus of the company and their efforts shifted in November and, as a result, he advised Coastal Oil & Gas Corp., a party interested in the joint venture proposal, that the joint venture proposal was no longer viable given the Big Bear bid.

23 It can be inferred by the conduct of Blue Range and CIBC that they also recognized the mandates could not be pursued simultaneously when they orally agreed to conclude the monthly billings under the September Agreement at the end of November.

24 As a result, I find the two agreements to be inconsistent for the purposes of the test.

25 CIBC argues in the alternative, that if the two agreements are inconsistent, this does not in and of itself mean that replacement must follow. CIBC argues that the parties only intended the September Agreement to be suspended pending resolution of the success or failure of the Big Bear bid.

DECISION - ISSUE (3)

26 For the reasons that follow, it must be inferred that the parties intended to replace the September Agreement in its entirety by the November Agreement.

ANALYSIS

27 There are numerous clauses in the November Agreement that suggest the parties intended it to be an all-inclusive arrangement.

28 First, there is a duplication of roles: CIBC was appointed Blue Range's "exclusive financial adviser" in both agreements.

29 Second, in my view, there is a duplication of fees owing for a sale of Blue Range assets under

the two agreements. As CIBC denies this potential overlap, it is necessary to examine the provisions in greater detail.

30 Clause 3 of the September Agreement, the "trailer" clause, provides for a completion fee (1.5 per cent of net sale proceeds) if Blue Range completes a sale of properties rather than or in addition to a joint venture arrangement during the term of the engagement or within 12 months of its termination.

31 Clause 7 of the November Agreement provides for a success fee based on the difference between the value of the Big Bear bid and the transaction that proceeded. Clause 7 (iv) states:

> iv) a success fee (the "Success Fee") calculated as follows:
>
> (a) With respect to any *Proposed Transaction involving the direct or indirect acquisition or purchase of all the issued and outstanding common shares of Blue Range*, an amount equal to 5% of the difference between:
>
> 1. the Aggregate Consideration (as defined below) offered to holders of Blue Range common shares under the Proposed Transaction; and
> 2. $6.05 multiplied by the number of those Blue Range common shares outstanding on the date such Proposed Transaction is completed.
>
> (b) With respect to a Proposed Transaction that is consummated other than for the acquisition or purchase of all of the issued and outstanding common shares of Blue Range, an amount equal to 5% of the difference between:
>
> the product of the closing trading price of the common shares of Blue Range ....multiplied by the number of common shares of Blue Range (or equivalent) outstanding on a fully diluted basis as at such date; provided if there is no closing trading price on such date for those shares, those shares shall be valued at their bid price or the most recent reported closing price, whichever is greater; and

2. $6.05 multiplied by the same number of those Blue Range common shares (or the equivalent) described in paragraph 7 iv) b) 1 above.

[Emphasis added.]

32 CIBC argues that there is no duplication of fees owing in the event of a sale of assets because the "Success Fee" under clause 7 iv)(b) is payable only where there is a purchase of shares (e.g. anything less than all of the shares), and it is not triggered when there is a sale of assets. They argue that this is so given the problems in calculating the success fee in a transaction other than one involving a sale of shares.

33 The problem with CIBC's interpretation is that they are, in essence, asking the Court to read down the definition of "Proposed Transaction" for the purposes of this clause only. Yet the plain wording of clause 7 includes a success fee based on a "Proposed Transaction" which, by definition, includes a sale of assets over $25 million. As discussed below, CIBC intended to encompass a wide range of transactions in its broad definition of "Proposed Transaction".

34 Moreover, the structure of clause 7 iv) is clearly divided between (a) and (b): a success fee based on a sale of all the shares of Blue Range under (a) and a success fee for the completion of any other "Proposed Transaction" under (b).

35 I therefore find that a sale of assets could trigger a fee owing under each agreement. I appreciate there may be some difficulty in the calculation of the fee under the November Agreement.

36 The definition of "Proposed Transaction" in the November Agreement is also indicative that the parties intended it to be an all-inclusive arrangement. The definition contemplates a wide range of eventualities such as any type of share purchase, restructuring, compensation arrangements, amalgamation, merger, or "any other form of business combination, reorganization or restructuring." Regardless of the outcome of the Big Bear offer, CIBC clearly intended to secure payment.

37 Although the above points all support a reasonable inference that the September Agreement was replaced, they could equally support an inference of suspension.

38 Most compelling, however, for replacement is the duplication of terms and fees owing if the trailer clauses become operative.

39 The trailer clause in the September Agreements states:

> In the event Blue Range completes a sale of properties (rather than or in addition to the Proposed Transaction) during the term of this engagement or during the 12

months following the termination of this engagement (*provided that the purchaser was previously contacted as part of our engagement*), a completion fee payable on closing of such sale of 1.5% of the net sales proceeds, subject to the credit of all fees referred to in subparagraph 2(i).

40 The trailer clause in the November Agreement provides:

> 18. Notwithstanding the foregoing, the services hereunder may be terminated with or without cause by either Blue Range or either of the Advisors with respect to their services at any time and without liability or continuing obligation to Blue Range or to either of the Advisors except for:
>
> ...
>
> ii) in the case of termination by Blue Range, the Advisors' rights to the Base Fee or the Success Fee pursuant to this Agreement for any Proposed Transactions which occur in one year of such termination, and the Advisors' rights to any Independence fee which becomes payable pursuant to 7 vi)...

41 While the wording of the November clause is different from that which appears in the September Agreement, the intended effect of the clause is the same: to ensure payment to CIBC in the event that a "Proposed Transaction" occurs in the year following the termination of the agreement.

42 If both agreements continued and Blue Range terminated each of the agreements, CIBC would be entitled to collect under both trailer clauses for the sale of assets to CNRL-another instance of a double fee. Yet unlike the double fee discussed above, this double fee would survive an implied agreement to suspend the operation of the September agreement. For this reason, suspension would be inappropriate as it would permit CIBC to be paid twice for the same transaction.

43 In my view, such a result would require specific language to this effect.

44 In coming to this conclusion, I am mindful of clause 9 of the September Agreement which states:

> 9. If CIBC Wood Gundy is requested to perform services in addition to those described above, the terms and conditions relating to such services will be outlined in a separate letter of agreement and the fees for such services will be negotiated separately and in good faith and will be consistent with fees paid to investment bankers in North America for similar services.

45 While this clause contemplates the existence of a separate agreement, it is not a true survivorship clause. Moreover, the precise wording of clause 9 contemplates a contract to perform services "in addition to those" in the September Agreement and states that fees are to be "negotiated separately". I do not read this clause as applying to the November Agreement, particularly since there is a duplication of fees owing for the sale of assets and, in both cases, CIBC is acting as a financial adviser. This situation cannot be said to be a contract to perform services "in addition" to those in the September Agreement with fees "negotiated separately".

DECISION -ISSUE 4

46 For the reasons that follow, CIBC did not make contact with CNRL in such a manner as to engage the trailer clause in the September Agreement.

47 CIBC argues that because they previously contacted CNRL in relation to the September Agreement, they are owed 1.5% the net sale proceeds of assets to CNRL. CIBC argues that the unsolicited faxing of the mini-package and the brief telephone conversation of Mr. Korpach with Mr. Edwards constitutes "contact" under the trailer clause.

48 In this regard, Mr. Korpach testified that CIBC typically uses three types of trailer clauses. At the lowest level, the trailer clause is triggered by a sale of assets to any purchaser. The activity or inactivity of CIBC, in such case is irrelevant. At the other extreme, the trailer clause requires proof that the contact made by CIBC with the purchasing party and CIBC's participation in the process was an important part of the purchaser's decision to buy the assets of the company. Mr. Korpach testified that the trailer clause in the September Agreement contained a negotiated addition to CIBC's original proposal. CIBC's original proposal included a trailer clause at the lowest level. The addition was to establish what Mr. Korpach labelled the "mid-range" between the two extremes.

49 This trailer clause provides:

> In the event Blue Range completes a sale of properties (rather than or in addition to the Proposed Transaction) during the term of this engagement or during the 12 months following the termination of this engagement (provided that the purchaser was previously contacted as part of our engagement), a completion fee payable on closing of such sale of 1.5% of the net sales proceeds, subject to the credit of all fees referred to in subparagraph 2(i). [The parenthetical in italics is the negotiated addition.]

50 The term "contacted" does not stand alone and must be interpreted in the context it appears: "previously contacted as part of our engagement". Accordingly, in attaching meaning to the term "contact", one must consider the scope of the engagement.

51 A description of the services encompassed by the engagement is set out in Schedule A of the Agreement. Schedule A includes, among other things, "[p]roviding *contact and liaison* with

prospective partners". [Emphasis added.] Thus, the scope of the engagement creates an obligation on CIBC to find candidates for a joint venture arrangement. As part of its responsibilities, CIBC chose to send an unsolicited fax of the summary to CNRL and also had the unsolicited telephone call with Mr. Edwards. In my view, this level of activity would be encompassed within any minimum level of contact and liaison with prospective purchasers as required by the engagement.

52 I note, at the lowest level, notwithstanding the terms of the engagement, it is arguable that no contact of any nature is required to engage the trailer clause.

53 Does an unsolicited fax of preliminary information and an unsolicited telephone call, neither of which were met with any interest, constitute a sufficient level of activity to engage this trailer clause? In my view, this level of activity, which is required by the engagement in any event, so closely mirrors the lowest standard that such an interpretation would be inconsistent with Mr. Korpach's testimony that the present clause is to be at the "mid-range" of the required activity level.

54 I recognize that trailer clauses are there to protect legitimate interests of parties like CIBC when they have expended efforts and parties then seek to not pay the fees prescribed. However, this clause was added by negotiation to establish the mid-range as the bench mark. It must be given a purposeful meaning and, as I said, the unsolicited faxing of the mini-package and one brief telephone conversation should not be enough to engage this trailer clause.

55 The Creditors' Committee also invites me to conclude that CNRL's purchase of assets is not a "sale" in the ordinary sense of the word because a sale implies action of a voluntary nature on the part of the parties. In this case, they argue the sale of assets to CNRL was not of a voluntary nature by Blue Range because its activities are subject to the supervision of the Court. This approaches the issue of voluntariness through the capacity of a party to the sale.

56 Given my conclusion that CIBC's contact with CNRL was not sufficient to engage the trailer clause, it is not necessary for me to address this issue.

CONCLUSION

57 The application is denied.

COSTS

58 If they wish, Counsel may speak to me in the next 30 days respecting the matter of costs. In the event they do not, I wish to take this opportunity to express my gratitude for their courtesy and their thoughtful and helpful submissions.

LoVECCHIO J.

cp/s/qljpn/qlcas/qlgxc

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

2 [1956] A.C. 696.

3 Ibid. at 728-29.

4 (1976) 16 N.B.R. (2d) 287 (N.B. Q.B.).

5 Ibid. at at 289-90.

IN THE MATTER OF The Cash Store Financial Services Inc., *et al.*

Applicants

Court of Appeal File No: M44123
M44124

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

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