Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD.
(the "APPLICANT")

SUPPLEMENTARY BRIEF OF AUTHORITIES OF ALLEN-VANGUARD CORPORATION

(Motion and Cross-Motion, returnable April 8, 2014)

April 4, 2014

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TO: **THE SERVICE LIST**

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TAB 1

Case Name:

Canwest Global Communications Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, C-36, as amended
AND IN THE MATTER OF a proposed plan of compromise or arrangement of Canwest Global Communications Corp. and the other applicants listed on Schedule "A"

[Editor's note:
Schedule A was not attached to the copy received from the Court and therefore is not included in the judgment.]

[2009] O.J. No. 5379

61 C.B.R. (5th) 200

2009 CarswellOnt 7882

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

Heard: December 8, 2009.
Judgment: December 15, 2009.

(52 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Application in this Companies' Creditors Arrangement Act matter for an order declaring that the relief sought by

the "GS Parties" was subject to an Oct. 6, 2009 stay of proceedings granted -- Cross-motion by the GS Parties for an order lifting the stay so that they could pursue their motion challenging pre-filing conduct of the CMI entities, etc., dismissed -- The substance and subject matter of the motion were certainly encompassed by the stay -- The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion.

Application by the CCAA applicants and the "CMI entities" for an order declaring that the relief sought by the "GS parties" was subject to the stay of proceedings granted on Oct. 6, 2009. Cross-motion by GS Parties for an order lifting the stay so they could pursue their motion challenging pre-filing conduct of the CMI entities, etc. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors supported the position of the CMI Entities. In essence, the GS Parties' motion sought to undo the transfer of the CW Investments Co. shares from 441 to CMI or to require CMI to perform and not disclaim the shareholders agreement as though the shares had not been transferred.

HELD: GS Parties' motions dismissed, save for a portion dealing with para. 59 of the initial order on consent; CMI Entities' motion granted with the exception of a strike portion, which was moot. The first issue was caught by the stay of proceedings and the second was properly addressed if and when CMI sought to disclaim the shareholders agreement. The substance of the GS Parties' motion was a "proceeding" subject to the stay under para. 15 of the initial order prohibiting the commencement of all proceedings against or in respect of the CMI Entitites, or affecting the CMI business or property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI business or the CMI property" which was stayed under para. 16 of the initial order. The substance and subject matter of the motion were certainly encompassed by the stay. The real question was whether the stay ought to be lifted in this case. If the stay were lifted, the prejudice to CMI would be great and the proceedings contemp lated by the GS Parties would be extraordinarily disruptive. The GS Parties were in no worse position than any other stakeholder who was precluded from relying on rights that arise upon an insolvency default. The balance of convenience, the assessment of relative prejudice and the relevant merits favoured the position of the CMI Entities on the lift stay motion. The onus to lift the stay was on the moving party. The stay was performing the essential function of keeping stakeholders at bay in order to give CMI Entities a reasonable opportunity to develop a restructuring plan.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 32, s. 11.02

Counsel:

Lyndon Barnes, Alex Cobb and Shawn Irving for the CMI Entities.

Alan Mark and Alan Merskey for the Special Committee of the Board of Directors of Canwest.

David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.

Benjamin Zarnett and Robert Chadwick for the Ad Hoc Committee of Noteholders.

K. McElcheran and G. Gray for GS Parties.

Hugh O'Reilly and Amanda Darrach for Canwest Retirees and the Canadian Media Guild.

Hilary Clarke for Senior Secured Lenders to LP Entities.

Steve Weisz for CIT Business Credit Canada Inc.

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

1 The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and GS VI AA One Parallel Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

Background Facts

2 Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

3 The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

4 CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

5 According to the GS Parties, the essential elements of the deal were as follows:

(i) GS would acquire at its own expense and at its own risk, the slower growth businesses;
(ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;

(iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;
(iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

6 The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

7 A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

> Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

8 The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

9 On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were

those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

10 For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

11 The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

12 On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

13 The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

> 15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.
>
> 16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor

and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

14 The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

(a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
(b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
(c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
(d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
(e) if necessary, a trial of the issues arising from the foregoing.

15 They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

16 The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

17 In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

Issues

18 The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

Positions of Parties

19 In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by them involves "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI's interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

20 In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

21 Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Re Canadian Airlines Corp.*[1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties' rights would not be lost by the passage of time. The GS Parties' motion is all about leverage and a desire to improve the GS Parties' negotiating position submits counsel for the CMI Entities.

22 The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities' position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441's shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties' claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[2] in support of their position on timing.

23 The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties' motion is premature.

24 The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties' motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI's power to

disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI's intentions.

25 Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court's balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

Discussion

(a) Legal Principles

26 First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

27 The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
> (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Re Stelco Inc*[3] and the key element of the CCAA process: *Re Canadian Airlines Corp.*[4] The

power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Re Lehndorff General Partner Ltd.*[5], the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

> "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed. ... The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors."[6] (Citations omitted)

29 The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[7] in this regard.

30 Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.*[8] was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

31 The decision of *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

32 As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus

if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

33 Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*[14] and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.
9. It is in the interests of justice to do so.

(b) Application

34 Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

35 In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

36 In essence, the GS Parties' motion seeks to:

(i) undo the transfer of the CW Investments Co. shares from 441 to CMI or
(ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

37 It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

38 The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

39 When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

40 Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

41 The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.
- Article 6.1 contains a restriction on the transfer of shares.
- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.
- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.

- Article 6.13 prohibits the liquidation or dissolution of another company[15] without the prior written consent of one of the GS Parties[16].

42 The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

43 The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd.*[17]:

> "The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place."[18]

44 Similarly, in *Norcen Energy Resources Ltd.*[19], one of the debtor's joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

45 If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

> "The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities' restructuring and recapitalization efforts."

46 While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion

would undermine the objective of protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

47 A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

> 32.(1) Subject to subsections (2) and (3), a debtor company may -- on notice given in the prescribed form and manner to the other parties to the agreement and the monitor -- disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.
>
> (2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.
>
> (3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

48 Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

49 In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

50 Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

51 The stay of proceedings in this case is performing the essential function of keeping stake-holders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

52 The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers, advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

S.E. PEPALL J.

1 (2000), 19 C.B.R. (4th) 1.

2 [1990] B.C.J. No. 2384 (C.A.) at p. 4.

3 (2005), 75 O.R. (3d) 5 (C.A.) at para. 36.

4 (2000), 19 C.B.R. (4th) 1.

5 (1993), 17 C.B.R. (3d) 24.

6 Ibid, at p. 32.

7 Supra, note 2

8 (1992) 14 C.B.R. (3d) 303.

9 R.S.O. 1990, c. C.43.

10 Supra, note 6 at paras. 24 and 25.

11 (Aurora: Canada Law Book, looseleaf) at para. 3.3400.

12 (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68.

13 Ibid, at para. 68.

14 Supra, note 3.

15 This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.

16 Specifically, GS Capital Partners VI Fund, L.P.

17 5 C.B.R. (5th) 92 at para. 37.

18 Ibid, at para. 37.

19 (1988), 72 C.B.R. (N.S.) 1.

TAB 2

Case Name:

3S Printers 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 Business Corporations Act, S.B.C. 2002, c. 57
AND IN THE MATTER OF 3S Printers Inc. and Gamma Investments Ltd., Petitioners

[2011] B.C.J. No. 895

2011 BCSC 630

Docket: S110439

Registry: Vancouver

British Columbia Supreme Court
Vancouver, British Columbia

J.C. Grauer J.
(In Chambers)

Heard: May 4, 2011.
Oral judgment: May 4, 2011.

(50 paras.)

Bankruptcy and insolvency law -- Companies' Creditors' Arrangement Act (CCAA) matters -- Monitors -- Reports -- Application by respondent creditors for order terminating CCAA proceedings or lifting stay allowed -- Monitor's report requested $100,000 increased administrative charge and noted petitioners continued to experience extreme cash flow problems and would likely not be able to present comprehensive plan of arrangement by expiry of extended stay -- Deceased cash flow was material change and increased administrative charges would prejudice respondents -- Petitioners had not been forthcoming with information requested by monitor -- Petitioners restructuring efforts appeared doomed to fail -- Stay lifted and administrative charge increased by $25,000.

Bankruptcy and insolvency law -- Proceedings -- Practice and procedure -- Stays -- Pending agreement or settlement -- Application by respondent creditors for order terminating CCAA pro-

ceedings or lifting stay allowed -- Monitor's report requested $100,000 increased administrative charge and noted petitioners continued to experience extreme cash flow problems and would likely not be able to present comprehensive plan of arrangement by expiry of extended stay -- Deceased cash flow was material change and increased administrative charges would prejudice respondents -- Petitioners had not been forthcoming with information requested by monitor -- Petitioners re-structuring efforts appeared doomed to fail -- Stay lifted and administrative charge increased by $25,000.

Application by the respondent creditors for an order terminating the CCAA proceedings or lifting the extended stay. The monitor's report requested an increased administrative charge from $100,000 to $200,000 and noted the petitioners were experiencing extreme cash flow problems and were unlikely to be able to present a comprehensive plan of arrangement by the expiry of the stay. The respondents argued that the stay had to be lifted to stop the haemorrhaging of funds. The petitioners argued they were taking active steps to achieve their plan.

HELD: Application allowed. The cash flow situation had adversely changed and necessitated increased administrative charges that would prejudice the respondents. When the stay was granted, the monitor was satisfied the petitioners' management was acting in good faith, cash flow was sufficient and the business was valuable. Now, despite relief from creditors, the cash flow had decreased and restructuring efforts appeared hopeless. It was difficult to maintain confidence in the petitioners' good faith when they had not been forthcoming with information requested by the monitor. There was no realistic prospect of an adequate arrangement being presented by the expiry of the stay. The petitioners' efforts were doomed to fail. The stay was lifted and the administrative charge was increased by $25,000.

Statutes, Regulations and Rules Cited:

Business Corporations Act, SBC 2002, CHAPTER 57,

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 23(1)(d)(1)

Counsel:

Counsel for the Petitioners: John R. Sandrelli, Jordan D. Schultz.

Counsel for Boale Wood & Company, Monitor: Shawn Poisson.

Counsel for CIT Financial Ltd.: Gordon G. Plottel.

Counsel for KBA Canada, Inc.: Brian G. McLean.

Counsel for HSBC Bank Canada: John C.S. Fiddick.

Counsel for Unisource Canada Inc.: H. Lance Williams.

Reasons for Judgment

1 **J.C. GRAUER J.** (orally):-- Judgment. By an initial order pronounced January 24, 2011, I granted to the petitioners a stay of proceedings and certain other relief in order to facilitate the development of a plan of compromise and arrangement with the petitioners' creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

2 Although the petitioners' application had technically been brought on an *ex parte* basis, several of the creditors attended to oppose the granting of the relief requested principally on the basis that in view of the history of this matter, there was no prospect of the petitioners successfully obtaining any financing. In the result, I granted the relief and stay, but reduced the time from 30 days to 25. The comeback hearing accordingly proceeded on February 18, 2011.

3 At the comeback hearing, the petitioners sought an extension of the stay for a further period of 90 days to May 20, 2011. Once again the creditors, led by CIT Financial Ltd. vigorously opposed the application. They asserted that on the evidence, the prospect of the petitioners being able to negotiate further financing was illusory and their efforts doomed to failure.

4 At that time, I was satisfied that the petitioners, who operate a printing business, had taken appropriate steps to stabilize their business in terms of meeting with employees, suppliers and clients and, as reported by the monitor, had improved the company's cash flow beyond what was projected at the time of the initial order. I noted that they sought no debtor-in-possession financing or any further administrative charge beyond the reduced amount of $100,000 I approved at the time of the initial order. The restructuring was expected to be self-financing, in that the professional fees of the monitor and the lawyers would be paid out of the cash flow.

5 The petitioners maintained at that hearing that they were appropriately pursuing different restructuring options, a proposition which the respondents hotly disputed. Although the petitioners disclosed no details of potential refinancing plans or negotiations, the monitor expressed an initial view that the business was more valuable as a going concern and the recovery to the creditors would be higher if the business is carried on, as compared to a liquidation of the business assets.

6 The monitor expressed the further view that the management of the companies had been acting, and would continue to act, in good faith and with due diligence, and that the extension sought was reasonable and would not materially prejudice the stakeholders.

7 In those circumstances, I was satisfied that it was appropriate to extend the protection of the *CCAA* and that the policy objective of avoiding the social and economic losses resulting from the liquidation of an insolvent company was certainly engaged. I observed that the petitioners had had the benefit of *CCAA* protection for only 25 days and could not reasonably be expected to have reorganized their affairs within that time, notwithstanding previous dealings with their creditors. I expressed the view that it was still too early to conclude that the petitioners' efforts were doomed to failure.

8 I therefore granted the relief in the form requested. I warned counsel for the petitioners that should their clients move to extend the relief and stay yet further in 90 days time, they would be well advised to support the application with concrete and detailed evidence of what efforts and progress had been made.

9 That extended stay has yet to expire, but the respondents now apply for an order terminating the *CCAA* proceedings or lifting the stay. The catalyst for these applications was a second report to the court from the monitor dated April 4, 2011, followed by an application from the monitor for an

order amending the administration charge of $100,000 created in my order pronounced January 24, 2011, by increasing it to $200,000.

10 The parties and the monitor are agreed that if I allow the respondents' application terminating these proceedings or lifting the stay, then the increase required by the monitor should be allowed at the reduced amount of $25,000. If, however, I dismiss the respondents' application so that the stay will continue for the 90 days previously ordered, then it is acknowledged that the monitor is entitled to the full increase of $100,000.

11 The purpose of the monitor's report was twofold. The first purpose in compliance with the monitor's obligations under s. 23(1)(d)(1) of the *CCAA* was to report "without delay" on certain material adverse changes in the petitioners' projected cash flow which, in the monitor's view, were to the prejudice of the respondents. The second was to provide an update on the information the monitor received with respect to the petitioners' restructuring efforts.

12 Turning to the first purpose, the monitor commented on actual cash flows versus projected cash flows by noting that actual cash in-flows from sales had been slightly better than projected, material costs were approximately $64,000 higher than projected, while the cash out-flows for payment of restructuring professional fees were $100,000 lower than projected. In other words, the petitioners had been unable to pay those fees from cash flow after the payment of operating costs.

13 This was the case notwithstanding the very substantial reduction in operating costs by reason of the relief from payments due to the creditors effected by the stay. The result was that the monitor and the petitioners' legal counsel were obliged to rely on the initial administrative charge of $100,000 to cover their costs, which was close to being exhausted.

14 The monitor disclosed that he had been advised by the petitioners on March 17, 2011, that an anticipated recovery of significant receivables within one week would rectify the monitor's cash flow concern. That did not occur. On April 1, 2011, the petitioners gave the monitor a cheque for $10,000 towards his outstanding fees, but that cheque was returned NSF.

15 Turning to the second purpose, the monitor was provided with a spreadsheet detailing the terms for real estate financing options and was advised that the petitioners were still considering whether the potential financing offers were workable to form the foundation of a broader restructuring plan. Other proposals provided to the monitor had expired in 2010. No term sheets were provided that would indicate commitment on the part of any proposed lenders.

16 The spreadsheet set out four options from four different lenders for amounts to be secured by the petitioners' land, specifying loan amounts ranging from a low of $2,450,000 to a high of $3,000,000. The amount owed to the respondent CIT, the largest creditor, is approximately $4,000,000 secured by two mortgages on the land. The total secured debt is in the amount of approximately $10,000,000.

17 The monitor noted that because current sales levels do not result in sufficient cash flow to allow for any payments to stakeholders, any restructuring plan must include new working capital that could be used to sustain operations and make payments to stakeholders until break-even sales levels were achieved. The monitor observed, however, that the financing being pursued, while allowing for the refinancing of certain secured creditors, made no provision for additional working capital.

18 In his third affidavit, sworn April 11, 2011, Mr. Sandhu, principal of the petitioners, deposed that in addition to the options set out in the spreadsheet, he had been in discussions with various other parties and had recently met with a group of potential investors who expressed significant interest. In furtherance of this interest, Mr. Sandhu deposed, the investors had entered into a software licensing agreement at a cost of approximately $40,000 with a view to implementing an "online/web printing" business to complement the petitioners' boutique printing business.

19 Mr. Sandhu exhibited to his affidavit a letter dated April 8, 2011, from Sahota Law Office, which acts for 0907548 B.C. Ltd. and its four principals, described as "the investors." The letter referred to an extensive initial discussion between the investors and the petitioners as a result of which the investors were prepared to "entertain" the "contemplation" of a two-phase process with respect to "possible business relations". Phase 1 contemplates the purchase and leaseback of the petitioners' building and land, the subject of the options set out in the earlier spreadsheet. Phase 2 envisions an investment in the printing business, the structure of which has yet to be determined. The letter included the following sentence:

> We realize that time is of the essence as far as the Companies and the CCAA process is concerned however, you must realize that despite the initial steps and investments made by our clients in good faith, further investigation of the affairs of the Companies is warranted.

20 Also exhibited to the affidavit was a Memorandum of Understanding between the petitioners and the investors dated March 31, 2011, which provided in part:

> 1. The investors shall, through their counsel, present to Gamma their terms and conditions for the purchase of the building within 10 (ten) business days of the execution of this MOU.
> 2. Gamma, 3S and Sandhu shall provide to the Investors, through their counsel, all information and disclosure requested in a timely manner.
> 3. Based on Sandhu's representations and subject to further investigation, Investors are willing to purchase the building for $3,000,000 (three million) as phase 1 with a lease back for $20,000 ("Lease").
> 4. The Investors shall forgo the Lease payments for a period of 4 (four) months pending the completion of the due diligence process on 3S.
>
> ...
>
> 6. This MOU is non-binding in that the eventual proposed purchase agreement and the investment agreement if entered into shall be binding and have full contractual force and effect.

21 The ten-day period referred to in article 1 of the MOU expired on April 14, 2011, shortly after this hearing. Accordingly I requested that a copy of the investors' terms and conditions be provided to me by April 15, 2011.

22 The investors' offer was presented through a letter from their counsel, Sahota Law Office, dated April 15, 2011, and proposed the following relevant terms:

2. **Process**.

> The Company intends to engage in a two-stage process in this intended relationship. The latter is made necessary due to the CCAA proceedings and the fact that the Companies are seeking an urgent resolution to the financial predicament it [*sic*] finds itself in. Whilst the matter of the building is a relatively simple matter, the intended relationship with respect to 3S is a [*sic*] rather more complicated and necessitates the appropriate due diligence process.

3. **Building**.

> The Company offers to purchase the building for $3,000,000 (three million). Upon acceptance of the offer price, the Company shall commence the process of arranging finance.

4. **Lease Back**.

> In anticipation of the future intended relations between the Companies and the Company, the Company shall lease the building back to 3S. The Company shall forgo the first 4 (four) months of rent calculated above as a rate of $16,000 per month.

5. **3S**.

> Upon reaching an agreement on the offer on the Building, the Company shall commence a detailed due diligence process on the operations of 3S and the structuring of relations between the parties. As indicated in our preliminary discussions, we are committed in principle to working with 3S and forging a relationship perhaps in the form of a management buyout scenario, however, further investigation must be undertaken.

6. **Equipment**.

> Based on the above, the Company must undertake further investigation on the equipment before it can make an informed offer.

23 When he prepared his second report, the monitor had not had an opportunity to consider this potential investment. Accordingly I asked that the monitor review this memorandum of understanding and the investors' offer and provide the court with any comments or concerns. In response, the monitor provided his third report of April 27, 2011.

24 With respect to Phase 1, the purchase of the property belonging to Gamma Investments, the monitor noted that the proposed purchase price of $3 million is subject to financing, and significantly lower than both the appraised value of the property and the encumbrances. In particular it was lower than the amount owing to the first mortgagee, CIT, who was not the least bit interested in

such a sale, at least in the absence of any indication that significant Phase 2 financing would be forthcoming.

25 The purchase was not, however, tied to any commitment to the Phase 2 investment. Without such an investment, the monitor observed, the petitioners lack adequate funding to carry on the business and make any payments to stakeholders. There is, accordingly, no plan either in place or proposed that would provide the petitioners with the ability to continue operations after the sale and lease back of the land contemplated by Phase 1.

26 In the meantime, the petitioners continue to experience cash flow difficulties and, in the monitor's view, are unlikely to be in a position to present a comprehensive plan of arrangement by the time that the current stay expires on May 20, 2011.

27 Upon receipt of this report, I requested counsel to re-attend before me to make brief supplementary submissions. This took place this morning, May 4, 2011.

28 The respondents continue to assert that it is time to end the stay and stop the hemorrhaging. The petitioners maintain that steps are, in fact, being pursued and they should therefore be permitted the time previously allotted to attempt to achieve an acceptable plan of arrangement.

29 As Mr. Justice Gibbs for the court commented in the case of *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136 (C.A.):

> When a company has recourse to the C.C.A.A., the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

30 Ordinarily the court would not be expected to intervene within the period during which it has already determined that the creditors ought to be held at bay. To do so would only impede the debtor company in its attempt at compromise or arrangement. Here, however, the monitor was obliged to report a material adverse change in the petitioners' cash flow. This change has necessitated an application for an increase in the administrative charge, a need that had not previously been anticipated. Such an increase would necessarily prejudice the respondents. The opportunity for a re-evaluation accordingly presented itself.

31 The parties do not dispute that it would be wrong for me to exercise my discretion by lifting the stay and unleashing the creditors unless I were able to conclude that the petitioners' ongoing attempt at compromise or arrangement is doomed to failure, the onus of demonstrating which is on the respondents: *Chef Ready Foods Ltd.*, *supra* and *Re Philip's Manufacturing Ltd.* (1992), 67 B.C.L.R. (2d) 84, 9 C.B.R. (3d) 25 (C.A.).

32 In *Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200 (On. Sup. Ct. J.), Madam Justice Pepall had this to say:

> [32] As with the imposition of a stay, the lifting of the stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor

> R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy" (Aurora: Canada Law Book, looseleaf, at para. 3.3400), an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 50 (Sask. C.A.) at para. 68. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.

33 Madam Justice Pepall then referred to a list of nine situations enumerated by Professor McLaren in which the courts will lift the stay order. These situations all indicate, in my view, circumstances which tend to demonstrate that the debtor's company plan or attempt to arrange a plan is doomed to failure in the sense that maintaining the protection of its efforts is unlikely to achieve the objectives of the *CCAA*.

34 The respondents here rely on the general principles referred to above as well as Professor McLaren's situation number 6:

> After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

35 In applying these principles to this case, I ask first, what has changed since I granted the stay? Before, the monitor was satisfied that the petitioners' management had been acting and would continue to act in good faith, cash flow was better than expected. Most importantly, the monitor expressed the view that the business was more valuable as a going concern, holding out the hope of a higher recovery to the creditors compared to liquidation. The petitioners maintained that they were appropriately pursuing different restructuring options, and then had the benefit of only a brief period of protection.

36 Since then cash flow difficulties have arisen, increasing the expense to be incurred in priority to the respondents' claims. This is so notwithstanding that the petitioners have been relieved from making payments due to the secured creditors in an amount exceeding $100,000 per month. Moreover, as noted by the monitor in his second report, the petitioners' restructuring efforts have lacked an ingredient essential to any hope of success, the provision of adequate working capital.

37 The petitioners argue that none of this satisfies the heavy onus on the respondents to justify a lifting of the stay. They maintain there has been no real change since the time of the comeback application other than the cash flow problem raised by the monitor. This, they note, arises not from any failure to achieve expected revenue, but rather from increased costs due to suppliers insisting on being paid well in advance.

38 As for the proposed increase in the administrative charge, the petitioners assert that this is relatively minor and causes only minimal prejudice, not enough to justify lifting the stay. Finally the petitioners submit that the prospects for a plan of arrangement remain. Although there is at present no commitment, that is not required at this point given that the stay is set to continue until May 20.

39 What about good faith and due diligence? The monitor has been silent on that point since the first report. On the evidence, it is difficult to maintain full confidence in the petitioners' good faith. In his affidavit filed in support of the comeback application, Mr. Sandhu had deposed as follows:

> 13) With respect to financing options, we are currently engaged in talks with various lenders to arrange a global refinancing of the companies.
> 14) On a narrower basis, the petitioners are working with City Mortgage Investment Corporation to source a financing over particular assets. Through City Mortgage, the petitioners have received several term sheets and other expressions of interest from private investors to provide funding secured over various assets, including offers to finance secured against the property and against the accounts receivable. The petitioners are considering these forms of financing in conjunction with its efforts to obtain overall financing in order to achieve the best possible result and maximize the funds available for a plan of arrangement.

40 The monitor's report on the petitioners' restructuring efforts contained in his second report refers to the monitor's efforts to obtain details of the company's dealings with prospective financiers, investors and strategic partners and all relevant documentation. Very little was forthcoming. It seems that the term sheets referred to in paragraph 14 of Mr. Sandhu's affidavit were proposals that had expired in 2010, as no term sheets had been issued in relation to the four options set out in the spreadsheet referred to above.

41 Counsel for the petitioners argues that there was nothing misleading about that because Mr. Sandhu had received term sheets, even though they had expired, and he had received expressions of interest as set out on the spreadsheet, even though they were not in writing and had not led to the provision of term sheets.

42 Given that it is term sheets that establish some level of commitment, it seems to me that the disclosure set out in Mr. Sandhu's affidavit was less forthcoming than the court is entitled to expect from one who seeks the protection of the *CCAA*.

43 And so we come to the recent proposal that the petitioners depose they are now pursuing. With respect to the purchase of the building, this proposal offers no improvement at all over what had already been deemed unsatisfactory. As to the provision of working capital, it is speculative at best. What is contemplated is the completion of the purchase of the building with a lease back, followed by four months to complete due diligence in relation to the possibility of making an investment in the business.

44 There is not only no commitment from the proposed investors, there is no reasonable prospect of a commitment. The proposal would, in effect, require the secured creditors to approve the sale or the court to order it without any kind of assurance that a viable plan would be forthcoming, leaving the investors in a position of being able to sell the property and profit while the creditors gain nothing. It makes no sense at all and there is no logic to proceeding with Phase 1 before Phase 2 is in place and confirmed.

45 From this it is evident, as noted by the monitor, that there is no realistic prospect that the basis of an adequately comprehensive arrangement will be in place by the end of the current stay. At best, the petitioners would require the creditors to be held at bay for a further 90 to 120 days beyond

that to await the potential investors' completion of due diligence, all without any commitment whatsoever.

46 In the meantime, there are cash flow issues and the continuance of the stay requires an increase in the administrative charge with no sound basis for expecting a change in these circumstances and no prospect at all of any payments to creditors. Instead further administrative charges must be expected.

47 The significant changes then are twofold. The first is the adverse change in cash flow reported by the monitor. This means that not only are the petitioners not paying their creditors, they have been unable to pay the professionals and have had difficulty paying their suppliers.

48 The second, exposed by the first, is the petitioners' failure, again as observed by the monitor, to demonstrate any reasonable prospect of developing a plan that will provide working capital. The result of these changes is that the concept of the business being more valuable as a going concern yielding a higher recovery to the creditors as compared to the liquidation of the business assets, which underlay the extension of the stay, has evaporated. This leaves the equipment creditors, for instance, bereft of any prospect of lease payments being forthcoming while the equipment continues to depreciate with continued use. On the evidence, there is nothing left that can give the court any confidence that continuing to hold off the creditors will promote the objectives of the *CCAA*.

49 I conclude in the unusual circumstances of this case that the petitioners' efforts are doomed to failure. Accordingly it is time to terminate these proceedings and lift the stay. There will, however, be an increase in the administrative charge of $25,000 to cover professional costs incurred since the start of this hearing.

50 Anything further at this point? Thank you very much for your helpful submissions, gentlemen.

J.C. GRAUER J.

cp/e/qllxr/qlvxw

TAB 3

Case Name:

Salah v. Timothy's Coffees of the World Inc.

Between
Abdulhamid Salah and 1470256 Ontario Inc., Plaintiffs (Respondents), and
Timothy's Coffees of the World Inc., Defendant (Appellant)

[2010] O.J. No. 4336

2010 ONCA 673

268 O.A.C. 279

74 B.L.R. (4th) 161

2010 CarswellOnt 7643

Docket: C51317

Ontario Court of Appeal
Toronto, Ontario

W.K. Winkler C.J.O., M. Rosenberg J.A. and R.W.M. Pitt J. (ad hoc)

Heard: September 16, 2010.
Judgment: October 14, 2010.

(33 paras.)

Commercial law -- Franchising -- Franchise agreement -- Renewal -- Termination -- Appeal by franchisor from decision finding it breached franchise agreement dismissed -- Parties entered into franchise agreement with respect to mall location -- Franchisor was lessee under head lease with mall and prior to expiry of lease, it negotiated lease for new location, entered into new franchise agreement with new franchisee and informed respondents that franchise agreement expired when lease expired -- Trial judge made no error in finding that franchisor breached franchise agreement and duty of good faith, or in assessment of damages at $230,358 for future loss of income and $50,000 for breach of duty of good faith and mental distress.

Contracts -- Remedies -- Damages -- Appeal by franchisor from decision finding it breached franchise agreement dismissed -- Parties entered into franchise agreement with respect to mall location -- Franchisor was lessee under head lease with mall and prior to expiry of lease, it negotiated lease for new location, entered into new franchise agreement with new franchisee and informed respondents that franchise agreement expired when lease expired -- Trial judge made no error in finding that franchisor breached franchise agreement and duty of good faith, or in assessment of damages at $230,358 for future loss of income and $50,000 for breach of duty of good faith and mental distress.

Damages -- In contract -- Breach of contract -- Type of contract -- Franchise -- Appeal by franchisor from decision finding it breached franchise agreement dismissed -- Parties entered into franchise agreement with respect to mall location -- Franchisor was lessee under head lease with mall and prior to expiry of lease, it negotiated lease for new location, entered into new franchise agreement with new franchisee and informed respondents that franchise agreement expired when lease expired -- Trial judge made no error in finding that franchisor breached franchise agreement and duty of good faith, or in assessment of damages at $230,358 for future loss of income and $50,000 for breach of duty of good faith and mental distress.

Appeal by the franchisor from a finding that it breached a franchise agreement with the respondents. In the fall of 2001, the individual respondent entered into a franchise agreement with the appellant to operate a franchise store in a mall in Ottawa. The appellant was a lessee under a head lease for a location on the third floor of the mall, and when the respondent entered into the franchise agreement, he became a sublessee under the head lease. There were only four remaining years on the head lease and the term of the franchise agreement was tied to the head lease. As the respondent was concerned about the short length of the lease, the parties included a schedule to the franchise agreement that provided that in the event the appellant entered a new head lease with the mall, the franchise agreement would be renewed with a new sublease. Concurrent with executing the franchise agreement, the individual respondent also executed an assignment, assigning the franchise agreement, the sublease and the general security agreement to his newly incorporated numbered company. Prior to the expiry of the head lease, the appellant entered into a new lease for a location on the second floor of the mall and signed a new agreement with a new franchisee for that location. The respondents were then advised that their franchise agreement would end on the day the lease expired. The trial judge found that both the individual respondent and the numbered company were franchisees of the appellant, that the schedule to the agreement was not related to the entire mall and was not limited to the existing third floor location and that the appellant breached the franchise agreement and breached a duty of good faith contrary to the Arthur Wishart Act. The trial judge awarded damages in the amount of $230,358 for future loss of income flowing from the appellant's breach of contract and an additional $50,000 for the breach of the duty of good faith and mental distress. The franchisor sought to appeal the judgment on the basis that the trial judge erred in failing to distinguish between the individual respondent and the numbered company, in her interpretation of the schedule to the agreement, in her finding that the franchisor owed a duty of care and breached it, and in her assessment and award of damages.

HELD: Appeal dismissed. There was ample evidence to support the trial judge's finding that the appellant maintained a relationship with both the individual franchisee and its assignee corporation. The trial judge engaged in an analysis of the contractual rights between the parties, considered all of

the relevant documents, and there was no error in the approach she adopted. On the facts found by the trial judge, there was no doubt that the conduct at issue fell squarely within the performance or enforcement of the franchise agreement and that the appellant breached the duty of good faith it owed to the franchisee under the Arthur Wishart Act. Finally, there was no basis to interfere with the trial judge's assessment of damages.

Statutes, Regulations and Rules Cited:

Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3, s. 3, s. 3(1), s. 3(2)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 123(4), s. 123(7)

Appeal From:

On appeal from the judgment of Justice Monique Métivier' of the Superior Court of Justice dated October 26, 2009, with amended reasons dated January 21, 2010, and reported at (2010), 65 B.L.R. (4th) 235.

Counsel:

Alan J. Lenczner, Q.C., and Jaan E. Lilles, for the Appellant.

Stephen S. Appotive, for the Respondents.

The judgment of the Court was delivered by

1 W.K. WINKLER C.J.O.:-- Timothy's Coffees of the World Inc. ("Timothy's") appeals a decision of the Superior Court of Justice finding that it breached a franchise agreement with the respondents. The trial judge found that the franchise agreement provided the respondents with a conditional right of renewal and that the appellant denied them this right. She awarded damages for breach of contract, breach of the duty of good faith and mental distress. I agree with the trial judge's reasons and find no error in her decision. I would dismiss the appeal. My reasons follow.

BACKGROUND

2 In the fall of 2001, the respondent Abdulhamid Salah ("Mr. Salah") entered into a franchise agreement with Timothy's to operate a franchise store in the Bayshore Shopping Centre in Ottawa. Timothy's was a lessee under a head lease for a location on the third floor in the shopping centre. When Mr. Salah entered into the franchise agreement, he became a sublessee under the head lease. There were only four years remaining on the head lease, which was set to expire on September 30, 2005. The term of the franchise agreement was tied to the length of the head lease.

3 Mr. Salah was concerned about the short term of the lease and the franchise agreement, given the amount of his investment in purchasing the franchise and setting up operations. In response to Mr. Salah's concerns about the term, Timothy's proposed the inclusion of Schedule "A" in the franchise agreement. Schedule "A" provided that in the event that Timothy's entered into a new head lease with the Bayshore Shopping Centre, Mr. Salah's franchise agreement would be renewed with a new sublease. In the event that the new head lease was to be for a period of less than five years,

there would be no additional franchise fee payable by Mr. Salah. If the new head lease was for a period of more than five years, Mr. Salah would be required to pay an amount equal to 50% of the then current franchise fee.

4 Concurrent with the execution of the franchise agreement, Mr. Salah assigned the agreement, the sublease, and the general security agreement to his newly incorporated company 1470256 Ontario Inc. ("147") by way of an Assignment and Guarantee. This was permitted by Timothy's, but with the condition expressed in the Assignment and Guarantee that Mr. Salah remained personally liable for all franchisee obligations under the franchise agreement.

5 Prior to September 30, 2005, the expiry date of the head lease on the third floor, Timothy's entered into a new lease on the second floor and signed an agreement with a new franchisee for that location. The appellant then advised Mr. Salah that his franchise agreement would come to an end on September 30, 2005. Mr. Salah and 147 commenced proceedings against Timothy's alleging breach of the franchise agreement and seeking damages arising both from the breach and from the appellant's conduct.

6 At trial, Timothy's argued that the respondents had no right of renewal and that the parties had intended the franchise agreement to end with the expiry of the head lease on September 30, 2005. It submitted that any right of renewal provided by Schedule "A" only concerned the original location on the third floor of the shopping centre. Since the appellant could not renew its head lease on the third floor, the provisions of Schedule "A" were inoperative. Timothy's also argued that because Mr. Salah had assigned his franchisee rights to 147, only that corporation could bring a claim against the franchisor.

DECISION OF THE TRIAL JUDGE

7 The trial judge, in a clear and carefully reasoned decision, held as follows:

1. that both Mr. Salah and 147 were franchisees of Timothy's and could be treated as one entity for the purpose of enforcing rights or seeking remedies;
2. the proper interpretation of Schedule "A" is that it related to the Bayshore Shopping Centre in general and was not limited to the existing third floor location;
3. Timothy's breached the franchise agreement by failing to observe the terms of Schedule "A" with respect to the new head lease on the second floor of the Bayshore Shopping Centre;
4. Timothy's breached a duty of good faith, contrary to s. 3 of the *Arthur Wishart Act (Franchise Disclosure), 2000*, S.O. 2000, c. 3 ("*Wishart Act*"); and
5. the breach of the duty of good faith was an independent actionable wrong.

8 The trial judge awarded Mr. Salah damages in the amount of $230,358 for future loss of income flowing from the appellant's breach of contract, and an additional $50,000 for breach of the duty of good faith and mental distress.

ISSUES ON APPEAL

9 Timothy's submits that the trial judge erred in:

i. failing to distinguish between Mr. Salah and 147;
ii. interpreting Schedule "A" as providing an option to amend the franchise agreement;
iii. finding that Timothy's owed a duty of good faith and that Timothy's breached it;
iv. assessing damages for breach of contract at $230,358 and awarding $50,000 for breach of the duty of good faith and mental distress;
v. awarding damages to Mr. Salah for breach of contract when these damages were pleaded only by 147.

ANALYSIS

i. Treating Mr. Salah and 147 as one entity

10 The appellant argues that the trial judge erred in failing to distinguish Mr. Salah from his corporation, 147. Since a corporation is a distinct entity from its owner, and since Mr. Salah assigned the franchise agreement to 147, the appellant submits that only the corporate franchisee could assert contractual rights against the franchisor.

11 I cannot accede to that submission. There was ample evidence to support the trial judge's finding that the appellant "maintained a relationship with both the individual franchisee and its assignee corporation. It never intended to accept the corporation in the place of Mr. Salah for all purposes." While the franchisor allowed Mr. Salah to assign the franchise agreement to 147, one of the main purposes of the Assignment and Guarantee was to ensure that all obligations under the franchise agreement continued to be those of Mr. Salah personally. In addition, as noted by the trial judge, the concluding words of s. 4 of the Assignment and Guarantee state as follows:

> Furthermore and without restricting the generality of the foregoing, the assignor shall continue to be personally bound by any and all provisions of the franchise agreement related to confidentiality and non-competition.

12 Indeed, the business model of Timothy's, as reflected in its franchise agreement, was to treat a corporate franchisee and its personal owner as one and the same. To this effect, clause 19.19 of the agreement provides:

> In the event that there is more than one Franchisee, or if the Franchisee should consist of more than one legal entity, the Franchisee's liability hereunder shall be both joint and several. A breach hereof by one such entity or Franchisee shall be deemed to be a breach by both or all.

13 Moreover, it is revealing and significant that Timothy's June 8, 2005 letter -- in which Timothy's informed the franchisee that the franchise agreement would not be renewed -- was addressed to Mr. Salah personally, and not to the corporate respondent. The *de facto* relationship under the franchise agreement was between Timothy's and Mr. Salah.

14 The trial judge concluded that Mr. Salah and his corporation were one entity for the purposes of the franchise agreement. Accordingly, she held that to deny Mr. Salah a remedy on the basis of separateness would yield a result "too flagrantly opposed to justice": see *Kosmopoulos v. Constitution Insurance Co.*, [1987] 1 S.C.R. 2, at p. 10. I agree with her conclusion. In the context of this dispute between franchisor and franchisee, it would be incongruous, not to mention unfair to Mr.

Salah, if he and his corporation were treated as one entity for the purposes of franchise liabilities, but were treated as separate entities when the question of enforcing franchisee rights under the franchise agreement is at issue.

ii. Interpretation of the franchise agreement

15 Timothy's submission that the trial judge improperly construed Schedule "A" as providing an "option to amend" the franchise agreement is an attempt to ground an appeal on a statement taken out of context in the reasons for the decision. Read as a whole, it is clear that the trial judge was engaged in an analysis of the contract between the parties, and the rights and obligations conferred by its terms. The argument fails on this basis alone. Moreover, there was no error in the approach adopted by the trial judge in construing the agreement before her.

16 The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity. Where a transaction involves the execution of several documents that form parts of a larger composite whole -- like a complex commercial transaction -- and each agreement is entered into on the faith of the others being executed, then assistance in the interpretation of one agreement may be drawn from the related agreements. See *3869130 Canada Inc. v. I.C.B. Distributing Inc.* (2008), 66 C.C.E.L. (3d) 89 (Ont. C.A.), at paras. 30-34; *Drumbrell v. The Regional Group of Companies Inc.* (2007), 85 O.R. (3d) 616 (C.A.), at paras. 47-56; *SimEx Inc. v. IMAX Corp.* (2005), 11 B.L.R. (4th) 214 (Ont. C.A.), at paras. 19-23; *Kentucky Fried Chicken Canada v. Scott's Food Service Inc.* (1998), 41 B.L.R. (2d) 42 (Ont. C.A.), at paras. 24-27; and Professor John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law Inc., 2005), at pp. 705-722.

17 I see no error in the manner in which the trial judge applied the principles of construction of commercial agreements. The trial judge considered all of the relevant documents and found that the seminal document, the franchise agreement, was not ambiguous. All of the documents executed by the parties referred to the premises under the franchise agreement as "Bayshore Shopping Centre, 100 Bayshore Drive, Nepean, Ontario", and not to a specific store on the third floor.

18 Indeed, the only agreement that specifically referred to the third floor was the head lease between the Bayshore Shopping Centre and Timothy's. The appellant contends that the trial judge failed to take the head lease into account in her analysis. I do not agree. A review of her reasons demonstrates otherwise. Moreover, to the extent that any discrepancy exists between the head lease and the franchise agreement, I agree with the trial judge that the franchise agreement should be interpreted *contra proferentem*. The head lease had been negotiated by Timothy's with the landlord, and its terms were obviously known to Timothy's at the time it drafted Schedule "A". Timothy's had the opportunity to limit the scope of Schedule "A" to the third floor premises and either chose not to do so or was aware that Mr. Salah would not have accepted such a limitation. In either event, there

is no basis to find that the trial judge committed a reviewable error. Her conclusions that the franchise agreement and Schedule "A" applied to the whole shopping centre and that Timothy's conduct -- which effectively amounted to a refusal to allow Mr. Salah the option of renewing the franchise agreement -- constituted a breach of contract are unassailable.

iii. Breach of duty of good faith

19 Section 3 of the *Wishart Act* provides:

> **Fair dealing**
>
> **3.(1)** Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.
>
> **Right of action**
>
> **(2)** A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.
>
> **Interpretation**
>
> **(3)** For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.

20 Timothy's argues that its conduct leading up to the expiration of the franchise agreement could not constitute a breach of the duty of good faith because s. 3(1) of the *Wishart Act* only imposes the duty of good faith and fair dealing in the "performance or enforcement" of the existing franchise agreement. In other words, the appellant would have it that a terminated agreement is not caught by the section. In my view, it is unnecessary in this case to consider the full scope of the words "performance or enforcement" as used in the *Wishart Act*. The premise underlying the appellant's submission has been negated by the trial judge's interpretation of the agreement between the parties and the effect of Schedule "A". On the facts as found by the trial judge, there can be no doubt that the conduct at issue arises squarely within the "performance or enforcement" of the franchise agreement.

21 Since I find no error in the trial judge's conclusion that Schedule "A" applies to the whole shopping centre and that the right of renewal was triggered, the appellant's submission on the effect of s. 3(2) of the *Wishart Act* cannot succeed.

22 I turn then to the conduct of the appellant. When Timothy's could no longer renew the head lease of the third floor location and was negotiating a new lease on the second floor, the evidence showed that the franchisor deliberately kept Mr. Salah in the dark about its intentions. The trial judge found that "Mr. Black [the senior vice-president of development at Timothy's] e-mailed Bayshore Shopping Centre representatives asking them to refrain from passing on any information about the second floor location to Mr. Salah". The trial judge made further factual findings that Timothy's "actively sought to keep the franchisee from finding out what was going on with the lease" and that Timothy's deliberately withheld "critical information and did not return calls". These

findings of fact more than support the conclusion that there was a breach of the duty of good faith that franchisors owe franchisees under s. 3(1) of the *Wishart Act*.

iv. Damages

23 The trial judge awarded damages under two heads: (1) damages flowing from the breach of contract, and (2) damages for the breach of the duty of good faith and for mental distress.

24 For past and future losses flowing from the breach of contract, the trial judge had before her both the opinion of the appellant's expert, who calculated the loss of profits only to 147, and the opinion of the respondents' expert, who assessed the losses to Mr. Salah and 147 collectively. As the trial judge decided to treat Mr. Salah and his corporation as one and the same, it was open to her to prefer the evidence of the respondents' expert, which took into account the loss of income to Mr. Salah as a result of the breach. I would not interfere with this decision.

25 The appellant submits that it is not open to the trial judge to award damages under the *Wishart Act* for anything other than compensatory damages relating to pecuniary losses. In other words, it is not open to a trial judge to award damages under the head of compensatory damages relating to non-pecuniary losses, or under exemplary or punitive damages. It argues that any damages flowing from the breach of the duty of good faith is limited to lost profits, and in particular the lost profits, if any, of 147. The latter point is addressed above. The trial judge treated Mr. Salah and 147 as a single entity for the purpose of determining losses flowing from the breach of contract and, on the evidence, she was entitled to do so.

26 In like fashion, the argument advanced by the appellant with respect to the limitations applicable to damage awards under s. 3(2) of the *Wishart Act* is misconceived. The *Wishart Act* is *sui generis* remedial legislation. It deserves a broad and generous interpretation. The purpose of the statute is clear: it is intended to redress the imbalance of power as between franchisor and franchisee; it is also intended to provide a remedy for abuses stemming from this imbalance. An interpretation of the statute which restricts damages to compensatory damages related solely to proven pecuniary losses would fly in the face of this policy initiative.

27 The right of action provided under s. 3(2) of the *Wishart Act* against a party that has breached the duty of good faith and fair dealing is meant to ensure that franchisors observe their obligations in dealing with franchisees. In that regard, the conduct that the trial judge found egregious in the present case is precisely the mischief that this legislation was enacted to remedy.

28 Our courts have given limited recognition to the duty of good faith between contracting parties in general. However, by enacting legislation that addresses the particular relationship between franchisors and franchisees, the legislature has clearly indicated that such relationships give rise to special considerations, both in terms of the duties owed and the remedies that flow from a breach of those duties. This is evident in the wording of s. 3(2), which focuses on the conduct of the breaching party and not injury to the other side. The trial judge's award of damages was informed by these considerations.

29 In summary, I am in agreement with the trial judge that s. 3(2) of the *Wishart Act* permits an award of damages for the breach of the duty of good faith, separate and in addition to any award in compensation of pecuniary losses. I would go further to say that any such award must be commensurate with the degree of the breach or offending conduct in the particular circumstances. Taking the conduct of the appellant as found by the trial judge into account, I see no error in her decision to

award damages on a merged basis for the breach of duty of good faith and mental distress, either in principle or in respect of quantum. In my view, her findings as to the breach of duty of good faith alone would support the amount of the award.

30 Accordingly, I would not interfere with her decision as to damages.

v. The Pleadings Argument

31 I will deal summarily with the pleadings argument advanced by the appellant. The trial judge found that Mr. Salah and 147 should be treated as one entity with regard to the franchise agreement. As noted above, there was ample evidence to support this finding. Having done so, she was entitled thereafter to treat the pleadings of one as the pleadings of the other. This is a complete answer to the appellant's argument. Accordingly, I would not give effect to this ground of appeal.

CONCLUSION

32 I would dismiss the appeal.

33 The respondents shall have their costs in the amount of $32,500, all inclusive.

W.K. WINKLER C.J.O.
M. ROSENBERG J.A.:-- I agree.
R.W.M. PITT J. (ad hoc):-- I agree.

1 The case was tried over a period of 12 days by Justice A. de Lotbinière Panet. However, due to illness, he was unable to deliver judgment. The Chief Justice of the Superior Court of Justice made an order under ss. 123(4) and (7) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, appointing Métivier J. to rehear the matter. On consent, the rehearing was based on a review of all of the transcripts, exhibits, and oral and written submissions from counsel.

TAB 4

Indexed as:

Hill v. Nova Scotia (Attorney General)

Arthur Hill and Angus Hill, appellants;
v.
The Attorney General of Nova Scotia, respondent.

[1997] 1 S.C.R. 69

[1997] S.C.J. No. 7

File No.: 24782.

Supreme Court of Canada

1996: November 27 / 1997: January 30.

Present: L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Contracts -- Writing requirement -- Crown expropriating land and agreeing to right to cross highway as part of compensation package -- Statute requiring Minister to issue written permit -- Crown performing work required to effect and maintain highway crossing -- Crown denying grant of interest in land because writing requirement not met -- Whether Crown can rely on absence of written permit to deny creation of interest to cross the highway -- Public Highways Act, R.S.N.S. 1954, c. 235, s. 21.

Expropriation -- Crown expropriating land and agreeing to right to cross highway as part of compensation package --Statute requiring Minister to issue written permit -- Crown performing work required to effect and maintain highway crossing -- Crown denying grant of interest in land because writing requirement not met -- Whether Crown can rely on absence of written permit to deny creation of interest to cross the highway -- Public Highways Act, R.S.N.S. 1954, c. 235, s. 21.

Nova Scotia expropriated land for construction of a controlled access highway which bisected the Hill farm. Those representing the Department of Transport at the time, by their words and actions, represented that the landowner would receive an interest in the highway lands which would permit him to move people, equipment and cattle back and forth across the highway. The Department of

Transport, in compliance with these representations, constructed necessary fences, gates and ramps and maintained them for over 27 years. The Crown now denies the creation of an interest in the land and alleges that the arrangement contravened s. 21 of the Public Highways Act which provided that no person should construct a private road, entrance way or gate connecting with or opening on a controlled access highway without a written permit from the Minister. At issue here was whether, as part of the consideration for the expropriated lands, the province granted an equitable interest in those lands permitting the movement of cattle and equipment across the highway.

Held: The appeal should be allowed.

The province complied with its promise to provide access across the highway by building fences, gates and ramps and maintaining them for over 27 years. The appellants accordingly acquired an "equitable permission" (or interest) to enter upon and cross the highway. The requirement in s. 21(1)(a) of the Public Highways Act that this permission should be in writing may well be satisfied here, and even assuming that it was not, was merely a reflection of the Statute of Frauds. Where the terms of an agreement have already been carried out, the danger of fraud is reduced or averted. Here, strict adherence to the literal terms of the writing requirement would not serve the purpose of averting a fraud. Fraud would not be prevented; rather the appellants would be defrauded. Neither s. 21(1) nor s. 25 of the Expropriation Act applied. Even if they were applicable, the doctrine of part performance would prevent the Crown from relying on them.

An estoppel cannot be raised against the Crown in the face of a contrary statutory requirement. Yet, a writing requirement cannot circumvent the application of the doctrine of part performance; its purpose is to avoid the inequitable operation of the Statute of Frauds. (It does not matter that one of the parties is the Crown. The writing requirement is no more pressing with respect to the Crown than with private persons.) This reasoning cannot be extended to permit estoppel in the face of statutes other than the Statute of Frauds. The writing requirement must give way in the face of part performance or estoppel by conduct because the part performance or conduct fulfils the very purpose of a written document. Other statutory provisions may so differ in their aim and purpose that their requirements for the execution of written forms or documents will generally be mandatory.

The landowner, in 1967, acquired an equitable permission or right to enter upon and cross the highway which differs from the kind contemplated by s. 21(1)(a) of the Public Highways Act only to the extent that it is not in writing. An equitable permission is a compensable interest in land within the broad meaning of that term found in s. 1(c) of the Expropriation Act.

The release, made on reaching agreement as to compensation and executed pursuant to that agreement, cannot constitute a bar to payment of compensation for the taking of appellants' equitable interest in the land which was an integral part of the consideration. The release did not contemplate or effect the equitable interest in land.

Cases Cited

Not followed: Howell v. Falmouth Boat Construction Co., [1951] A.C. 837; referred to: Steadman v. Steadman, [1976] A.C. 536; Daigle v. Clair (Village of) (1986), 70 N.B.R. (2d) 129; Crabb v. Arun District Council, [1975] 3 All E.R. 865; White v. Central Trust Co. (1984), 54 N.B.R. (2d) 293.

Statutes and Regulations Cited

Expropriation Act, R.S.N.S. 1954, c. 91, ss. 1(c), 21(1), 25.
Public Highways Act, R.S.N.S. 1954, c. 235, s. 21(1)(a).

APPEAL from a judgment of the Nova Scotia Court of Appeal (1995), 140 N.S.R. (2d) 116, 399 A.P.R. 116, 56 L.C.R. 252, 45 R.P.R. (2d) 169, [1995] N.S.J. No. 153, allowing an appeal and dismissing a cross-appeal from a judgment of Scanlan J. (1994), 132 N.S.R. (2d) 265, 376 A.P.R. 265, 54 L.C.R. 96, [1994] N.S.J. No. 303, declaring an equitable easement. Appeal allowed.

Douglas A. Caldwell, Q.C., and Lloyd I. Berliner, for the appellants.
Alexander M. Cameron and Margaret MacInnis, for the respondent.

Solicitors for the appellants: Patterson, Palmer, Hunt, Murphy, Truro.
Solicitor for the respondent: The Attorney General of Nova Scotia, Halifax.

The judgment of the Court was delivered by

1 **CORY J.**:-- In order to build a controlled access highway, the province of Nova Scotia expropriated land which bisected the Hill farm. The issue to be resolved is whether, as part of the consideration for the expropriated lands, the province granted Hill an equitable interest in those lands permitting him to move cattle and equipment back and forth across the highway.

2 On an application brought before him, Scanlan J. (1994), 132 N.S.R. (2d) 265, found that during the expropriation of the Hill property in 1966, the Province had granted an equitable easement across the highway to Ross Hill. The majority of the Court of Appeal, (1995), 140 N.S.R. (2d) 116, Freeman J.A. dissenting, found that no compensable interest in land existed and set aside the order of Scanlan J. For reasons which differ somewhat from those of Freeman J.A., I would allow the appeal and restore the order of Scanlan J.

3 The appellants are the sons of Ross Hill and the successors in title to his farmlands. In 1966 and 1967 the respondent was acquiring land for the construction of the Trans-Canada Highway in Nova Scotia. During that time, discussions were held with Ross Hill relating to the expropriation of his land and the compensation to be paid. The proposed highway bisected the Hill farm dividing the northern portion from the southern.

4 The actions and words both oral and written of those representing the Department of Transport clearly demonstrate that a representation was made that Hill, as part of the compensation, would receive an interest in the highway lands which would permit the moving of people, equipment and cattle back and forth across the highway.

5 In compliance with their representations the Department of Transport constructed fences, gates and ramps which would permit and facilitate the movement of people, equipment and cattle between the two segments of the Hill farm. For over 27 years the Department of Transport maintained and on occasion improved the ramps. During this period they were used by Hill and his sons in the course of their farming operations. These actions serve to confirm and entrench the represen-

tation that Hill was to have an interest in land which would permit him to move equipment and cattle across the highway between the bisected portions of his farm. The actions of the province speak louder than any written document.

6 The representation that he had an interest in land, which closely resembles an easement, was relied upon by Ross Hill. It can and should be inferred that the interest in land formed a part of the consideration ultimately accepted by Ross Hill for the expropriation of his property. Thus it is apparent that he relied to his detriment upon the representation made to him by the Department of Transport. Without the representation the consideration for the taking would have been higher to compensate Hill for the injurious affection suffered as a result of the highway's dividing his property. The Department of Transport by its actions in constructing fences, gates and ramps and maintaining them over 27 years and recognized and confirmed its representation that Hill had an interest in land that enabled him to move cattle and equipment across the highway.

7 The representation as to the interest in land formed an integral and essential part of the overall agreement between the parties most particularly as to the consideration to be paid for the expropriated land. The Department of Transport through the actions of its authorized agents confirmed their representation to Hill that he would have a permanent right of way over the highway.

8 The province promised Mr. Hill access to the highway. It complied with and carried out that promise by building and maintaining for 27 years ramps giving access to the highway from Mr. Hill's land. Accordingly, Mr. Hill acquired what could be called an "equitable permission" (or interest) to enter upon and cross the highway. It is true that s. 21(1)(a) of the Public Highways Act, R.S.N.S. 1954, c. 235, requires that such permission be in writing and it may well be that this requirement was satisfied in this case. However assuming it was not, the writing requirement is merely a reflection of the Statute of Frauds, whose purpose is to prevent "many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury". See Steadman v. Steadman, [1976] A.C. 536 (H.L.), at p. 558, quoting the preamble to the Statute of Frauds, 1677 (Eng.).

9 Where the terms of an agreement have already been carried out, the danger of fraud is averted or at least greatly reduced. To borrow a phrase from the law of tort, the thing speaks for itself. In the present case, for example, it does not matter so much what was said. What is critical is what was done; and what was done was the construction and maintenance of access ramps. There is no mistaking the purpose for which those ramps were constructed: it was to allow Mr. Hill a way of reaching and crossing the highway. Accordingly, in this instance strict adherence to the literal terms of the writing requirement would not serve the purpose for which it was devised. Fraud would not be prevented; rather, the appellants would be defrauded.

10 It is for this reason that equity evolved the doctrine of part performance:

> [This doctrine] was evoked when, almost from the moment of passing of the Statute of Frauds, it was appreciated that it was being used for a variant of unconscionable dealing, which the statute itself was designed to remedy. A party to an oral contract for the disposition of an interest in land could, despite performance of the reciprocal terms by the other party, by virtue of the statute disclaim liability for his own performance on the ground that the contract had not been in writing. Common Law was helpless. But Equity, with its purpose of vindicating

> good faith and with its remedies of injunction and specific performance, could deal with the situation. The Statute of Frauds did not make such contracts void but merely unenforceable; and, if the statute was to be relied on as a defence, it had to be specifically pleaded. Where, therefore, a party to a contract unenforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable, from performance of his reciprocal obligations; and the court would, if required, decree specific performance of the contract. Equity would not, as it was put, allow the Statute of Frauds "to be used as an engine of fraud." This became known as the doctrine of part performance -- the "part" performance being that of the party who had, to the knowledge of the other party, acted to his detriment in carrying out irremediably his own obligations (or some significant part of them) under the otherwise unenforceable contract. [Steadman v. Steadman, supra, at p. 558.]

11 Quite simply equity recognizes as done that which ought to have been done. A verbal agreement which has been partly performed will be enforced. See Daigle v. Clair (Village of) (1986), 70 N.B.R. (2d) 129 (Q.B.), and Crabb v. Arun District Council, [1975] 3 All E.R. 865 (C.A.), per Lord Denning, at p. 872. That should be the result in this case.

12 This doctrine of part performance operates in this case to prevent the Crown from relying on the writing requirement in s. 21(1)(a) of the Public Highways Act. That section provides:

> 21 (1) Where a highway or portion thereof has been designated as a controlled access highway, no person shall, without a written permit from the Minister,
>
> > (a) construct, use or allow the use of, any private road, entrance way or gate which or part of which is connected with or opens upon the controlled access highway; . . .

13 I do not believe either s. 21(1) or s. 25 of the Expropriation Act, R.S.N.S. 1954, c. 91 (later R.S.N.S. 1967, c. 96, ss. 22(1), 26), are applicable to the facts of this case. They provide:

> 21 (1) Where at any time before the compensation has been actually ascertained or determined, land taken or expropriated under the provisions of this Act, or any part of such land, is found to be unnecessary for the purpose for which the same was taken or expropriated, or if it is found that a more limited estate or interest therein only is required, the Minister may by writing under his hand, registered in the proper registry office, declare that the land or such part thereof is not required and is abandoned by the Crown, or that it is intended to retain only such limited estate or interest as is mentioned in such writing. . . .
>
> . . .

> 25 If the injury to any land or property alleged to be injuriously affected by the exercise of any of the powers conferred by this Act may be removed wholly or in part by any alteration in, or addition to, any public work, or by the construction of any additional work, or by the abandonment of any part of the land taken from the claimant, or by the grant to him of any land or easement, and if the Crown, before an award is made, undertakes to make such alteration or addition, or to construct such additional work, or to abandon such portion of the land taken or to grant such land or easement, the damages shall be determined in view of such undertaking and the judge shall declare that, in addition to any damages awarded, the claimant is entitled to have such alteration or addition made, or such additional work constructed or such part of land abandoned or such grant made to him. [Emphasis added.]

14 Even if they were applicable, the doctrine of part performance would prevent the Crown from relying upon them. Quite simply the written and spoken words of the Crown and its actions demonstrate that Hill was to have an equitable interest in the expropriated lands as an integral and essential part of the compensation paid for those lands.

15 The result is that Mr. Hill acquired in 1967 an equitable permission or right to enter upon and cross the highway -- a permission that differs from the kind that s. 21(1)(a) contemplates only to the extent that it is not in writing. An equitable permission is a compensable interest in land within the broad meaning of that term found in s. 1(c) of the Expropriation Act. That section provides that "'land' includes any estate, term, easement, right or interest to, over, or affecting land". It follows that as a general rule compensation should be paid for the expropriation of such an interest.

16 To the extent that the decision of the House of Lords in Howell v. Falmouth Boat Construction Co., [1951] A.C. 837, is to the contrary, I would not follow it. It is true that an estoppel cannot be raised against the Crown in the face of a contrary statutory requirement. Yet, a writing requirement cannot circumvent the application of the doctrine of part performance. As the decision of the House of Lords in Steadman, supra, makes clear, the very purpose of the doctrine of part performance is to avoid the inequitable operation of the Statute of Frauds. Nor does it matter that in this case one of the parties is the Crown. The requirement of writing is not more pressing with respect to the Crown than it is with respect to private persons. However, it must be said that this reasoning cannot be extended to permit estoppel in the face of statutes other than the Statute of Frauds (and its equivalents). The writing requirement is specifically required to give way in the face of part performance or estoppel by conduct, because the part performance or conduct fulfils the very purpose of a written document. Yet other statutory provisions may so differ in their aim and purpose that their requirements for the execution of written forms or document will generally be mandatory.

17 How very unfair it would be to permit the Crown, 27 years after obtaining the benefit of a lower price for the land expropriated to allege that the very arrangement it made and carried out was prohibited by the provisions of s. 21 of the Public Highways Act. For the reasons set out earlier that position is untenable. Indeed, to accept it would make a mockery of equitable fairness and to permit, indeed encourage, governmental misrepresentation.

18 In summary, there was then a representation made by authorized representatives of the Crown that Hill would have an interest orally and by letters in land permitting him to cross the highway with cattle and equipment. There was the compliance by the Crown with its representations by means of both construction and maintenance. It was contemplated that Hill would, as he

did, rely upon them. He did so to his detriment. The words and actions of the Crown created an equitable interest in the land in the form of a right of way over the highway. The Crown intended it to be used and it was for over 27 years. It would be unjust not to recognize the representations and actions of the Crown which created the equitable interest in land when they were relied upon by Hill. That equitable interest in the land comes within the definition of land in the Expropriation Act and damages arising from its taking should as a general rule be compensable. It remains only to determine if the release signed by Ross Hill stands as a bar to recovery.

19 In my opinion the release cannot and should not constitute a bar. The release specifically indicates that the parties have reached an agreement regarding compensation under the Expropriation Act and that the release is executed pursuant to this agreement. It goes on to provide that the consideration was $1.00 and "other good and valuable consideration".

20 In White v. Central Trust Co. (1984), 54 N.B.R. (2d) 293 (C.A.), La Forest J.A., as he then was, sagely observed at pp. 310-11:

> As Lord Westbury stated in the House of Lord's case of London and South Western Railway Co. v. Blackmore (1870), L.R. 4 H.L. 610, at p. 263: "the general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given".
>
> . . .
>
> What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about. [Emphasis added.]

21 Considering this release in the context of the expropriations proceedings it becomes clear that an essential and integral element of the consideration was the equitable interest in land which provided the right of way over the highway. The release did not contemplate or affect the equitable interest in land. It follows that the release cannot constitute a bar to payment to the appellants of compensation for the taking of their equitable interest in the land.

22 In the result I would allow the appeal, set aside the order of the Court of Appeal and restore the order of Scanlan J. The appellants should have their costs of these proceedings throughout. If the parties are not in agreement as to the appropriate scale of costs the issue can be raised with this Court.

cp/d/hbb/DRS/DRS

TAB 5

Case Name:

WHITE, FLUHMAN and EDDY v. CENTRAL TRUST COMPANY and SMITH ESTATE

[1984] N.B.J. No. 147

[1984] A.N.-B. no 147

7 D.L.R. (4th) 236

54 N.B.R. (2d) 293

54 R.N.B.(2e) 293

17 E.T.R. 78

140 A.P.R. 293*

25 A.C.W.S. (2d) 258

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No. 42/83/CA

New Brunswick Court of Appeal

Stratton, La Forest and Angers, JJ.A.

April 6, 1984

(26 pages) (48 paras.)

CASES NOTICED:

Royal Bank of Canada v. R. (1913), 9 D.L.R. 337, refd to. [para. 14].
Moses v. Macferlan (1760), 2 Burr. 1005; 97 E.R. 676, refd to. [para. 18].
Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ld., [1943] A.C. 32, refd to. [para. 19].

B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2), [1979] 1 W.L.R. 783, revsd., [1981] 1 W.L.R. 232, refd to. [para. 20].
Deglman v. Guaranty Trust Co. of Canada and Constantineau, [1954] S.C.R. 725, refd to. [para. 22].
County of Carleton v. City of Ottawa, [1965] S.C.R. 663, refd to. [para. 24].
Brook's Wharf and Bull Wharf Ltd. v. Goodman Brothers, [1937] 1 K.B. 534, refd to. [para. 24].
Mobil Oil Canada Ltd. v. Rural Municipality of Storthoaks, [1976] 2 S.C.R. 147; 5 N.R. 23, refd to. [para. 24].
Becker v. Pettkus, [1980] 2 S.C.R. 834; 34 N.R. 384, refd to. [para. 25].
Laureat Giguère Inc. v. Cie Immobilière Viger, [1977] 2 S.C.R. 67; 10 N.R. 277, refd to. [para. 26].
London and South Western Railway Co. v. Blackmore (1870), L.R. 4 H.L. 610, refd to. [para. 32].
Richmond v. Savill, [1926] 2 K.B. 530, refd to. [para. 38].
Re Perkins. Poyser v. Beyfus, [1898] 2 Ch. 182 (C.A.), refd to. [para. 38].
Smith v. Lucas (1881), 18 Ch. 531, refd to. [para. 40].
[*page294]

AUTHORS AND WORKS NOTICED:

Klippert, George B., Unjust Enrichment, c. 1 [para. 16]; pp. 18-19 [para. 22].
Fridman and McLeod, Restitution [para. 16].
Goff and Jones, The Law of Restitution (2nd Ed.), pp. 13-14 [para. 20].
Halsbury's Laws of England (4th Ed.), vol. 9, pp. 412-3; vol. 12, p. 642 [para. 33].
Odgers, C.E., The Construction of Deeds and Statutes (4th Ed.), pp. 22-23 [para. 39].

COUNSEL:

Deno P. Pappas, Q.C., for the appellant
Duncan Young, for the respondent

This appeal was heard before Stratton, La Forest and Angers, JJ.A., of the New Brunswick Court of Appeal on September 28, 1983. The decision of the Court of Appeal was delivered on April 6, 1984, when the following opinions were filed:

La Forest, J.A. - see paragraphs 1 to 43;

Angers, J.A. - see paragraphs 44 to 48.

Stratton, J.A., concurred with Angers, J.A.

[French language version available at 54 R.N.B.(2e) 293; 140 A.P.R. 293.]

1 La Forest, J.A.:-- This action is based on a claim for money paid by the appellants, Jean White, Norma Fluhman and Douglas B. Eddy, to their stepfather, the late A.R. Mearle Smith, under an alleged contract by which he was to provide for them in his will, or alternatively as money had and received to the appellants' use, in other words, a claim for restitution on the basis of unjust enrichment.

BACKGROUND

2 Mr. Smith married the appellants' mother, Doris Smith, in 1956. Mrs. Smith had been previously married and the appellants are the children of the earlier marriage. The Smiths were a devoted couple and a close relationship developed between Mr. Smith and his step-children as well. As the appellant Jean White stated, "I can't ever remember Mearle not being in my house... as far as I was concerned he was the only father I ever had. We were very close". All acknowledged that he had been very kind to their mother and to them all during the marriage.

3 This close relationship with the children continued after Mrs. Smith's death in 1976. In the fall of 1976, for example, he gave them a cottage [*page295] their mother had left him in her will. That he then considered them as his own family is also evident from the proposed disposition of his estate in a will dated September 26, 1977. Not only did he thereby propose to give them substantial specific bequests; he left each of them a quarter share of his estate, estimated to be in excess of $ 700,000.00, the appellant Eddy to share his interest jointly with his wife, of whom Mr. Smith was also fond.

4 The claim arises out of certain transactions relating to the division of Mrs. Smith's estate following her death in 1976. the value of her estate, after providing for specific bequests, was $ 65,868.51, the principal beneficiaries being the appellants. Her executors were Mr. Smith and a niece Mary Stratton, who had been brought up by Mrs. Smith and in Jean White's words "was almost like a sister to us".

5 During the course of the administration of Mrs. Smith's estate, Mr. Smith spoke to Jean White, who lived in the area, and to Mary Stratton about certain securities, which he told them he had given to his wife so that "she could have the fun of clipping the coupons". He claimed they were really his and he wanted them back. When he informed Jean White of this in January 1977 he told her they were worth in the neighbourhood of $ 2,000.00. Her reply to his request was simply: "Well, Mearle, if they're yours, you know, you're entitled to them. Take them back.".

6 To Mary Stratton, to whom he spoke about the same time, his claim was somewhat different: "There's about $ 4,000.00 in Doris's safety box that belongs to me", to which she responded that "Well, if the judge or the law says you can have it that's it". When Mary Stratton spoke to Norma Fluhman [*page296] about it in February, 1977 her response was rather different from that of Jean White. Mrs. Fluhman can remember saying: "Well, he can't have that money, they were in mother's safety deposit box". Douglas Eddy's attitude was that since Mr. Smith thought he was the owner and would treat them right if they didn't fight the issue, he would go along with it.

7 No serious discussion took place about the matter, however, until Mary Stratton was called up to attend a final meeting before closing the estate between Mr. Smith, Mrs. Stratton and an accountant hired by Mr. Smith. At this meeting it was revealed to her that the securities were evaluated at $ 15,569.55. Mrs. Stratton's response to this information was that the children would have to sign a release. She repeated this when Mr. Smith called her later that day, to which he replied: "Well, they better sign it or I know who my beneficiaries will be and they're going to get it back anyway".

8 This information was communicated to the appellants. Mrs. Stratton advised them that by signing they would do better in the end because Mr. Smith told her "they're going to get it back anyway". In fact, Mr. Smith called Jean White himself and told her they had all better sign the release or "I know who my beneficiaries will be". This, too, was communicated to the others. Mr.

Smith had discussed his will with Jean White and they all knew they were to obtain substantial benefits under it. So they each signed a release. Jean White testified she did so because she felt under a threat that Smith would disinherit her. Norma Fluhman testified she signed becsause "I was told by both my sister Jean, who had conversations with Mearle, and Mary that we would eventually get that money back"; otherwise he would cut them out of the will. Douglas Eddy was [*page297] affected by similar considerations. In signing these releases, however, it should be noted that the trial judge concluded that they were fully aware of their contents and import. As a result of these releases the proceeds of the securities were paid to Mr. Smith.

9 The next significant event occurred in 1978. Mrs. Smith had in her will left all her household furniture and personal effects to Mr. Smith for life or until he remarried; after that they were to belong to the children. In 1978, Smith called Jean White about the furniture. He was planning to give his house to his housekeeper, a Mrs. Salesse, and so as to avoid any fights after his death, he wanted the furniture and was willing to pay for it. The children, however, did not want to give up their mother's furniture. So he told them to take it out of the house.

10 This created a rift between Mr. Smith and his step-children, or at least it contributed to it; there was some evidence that Mr. Smith, who had suffered a number of strokes, had changed. On the day the furniture was taken out of the house the atmosphere, as Mr. Smith's lawyer put it, "was charged". In fact, even before that day, Jean White testified she knew she was out of the will. The others testified they did not share this view, but the trial judge was of the opinion that they should have known they were no longer to be beneficiaries under his will. Following the removal of the furniture, the children signed a release of all claims against Mr. Smith arising out of his wife's estate, with the exception of title to some figurines which has not yet been resolved. [*page298]

11 Mr. Smith died in 1979. Under his will he left nothing to his step-children.

THE TRIAL JUDGMENT

12 The appellants then brought action as previously described. By this action, they raised the following issues as put by the trial judge:

(1) the ownership of the securities, the proceeds from which were paid by the estate of Doris Smith to Mearle Smith;
(2) whether the plaintiffs released their clim to the securities on the basis of Smith's promise to benefit them by his will;
(3) the effect of the release executed by the plaintiffs April 15, 1978.

13 The trial judge had no difficulty in deciding that the securities were the property of Doris Smith and not that of her husband at her death. I accept this finding and it was not questioned on appeal.

14 To the argument on the second issue, that the consideration upon which the appellants transferred the proceeds had failed through Mr. Smith's failure to fulfill his promise to benefit them by his will, the trial judge concluded that "consideration" presupposes a contract and he could not see that there was any contract of any kind. There was no evidence, he stated, that Mr. Smith had ever promised to make them beneficiaries under his will. All they had was a hope or anticipation of becoming his beneficiaries. Moreover, since they had signed releases of their claims in full knowledge of what they were doing, they could not rely on the principle set forth by Lord Haldane in Royal Bank of Canada v. R. (1913), 9 D.L.R. 337, at p. 344 (P.C.), that when money has been

received by one person which in justice and equity [*page299] belongs to another under circumstances that render the receipt one for the use of that other person, then the latter may recover as for money had and received.

15 The trial judge, therefore, decided against the appellants' claim, whence this appeal.

THE CONTRACT ISSUE

16 I am by no means as certain as the trial judge that there was no evidence of a contract. Mr. Smith's statement to Mrs. Stratton that the appellants should convey the proceeds of the securities to him and that they would get them back in his will anyway might well be construed as a contract that he would by will leave them at least the amount of these proceeds. If it were necessary to consider this issue, however, one would have to weigh whether the parties were really contemplating a legal contract. But I think the appellants' claim can more appropriately be dealt with on the basis of unjust enrichment and, in the light of the authorities I will discuss later, I do not think the existence or non-existence of a contract would bar the appellants from obtaining restitution on the basis of the unjust enrichment flowing to Smith and his estate out of this transaction. For the principle of unjust enrichment was created by the law to meet situations of obvious injustice and it is not to be frustrated by the technicalities of whether a particular transaction calling for restitution arises out of a contract or not. It transcends such distinctions. Indeed the technical antecedents of restitution found in early common law causes of action straddled later classifications such as contract; for an account, see George B. Klippert, Unjust Enrichment, c. 1; G.H.L. Fridman and [*page300] James G. McLeod, Restitution, from both of which texts I have derived considerable assistance. Specifically, the claim for money had and received which is involved here was one of the so-called "common counts" falling within indebitatus assumpsit, a cause of action based on a fictional promise inferred by the courts, not a real contract. I turn now to a more detailed discussion of restitution.

RESTITUTION

17 For many years restitutionary claims had to be accommodated within the confines of well-known common law classifications such as "money had and received", "quantum meruit", duress and so on, as well as a number of equitable remedies such as undue influence, unconscionable transactions, constructive trusts and others. However, the courts would stretch these remedies to enable them to order restitution by persons who had been enriched in circumstances for which justice clearly called for restitution to those from whom the enrichment had been obtained. This mode of approach continues to this day. Courts will not venture far onto an uncharted sea when they can administer justice from a safe berth.

18 But as early as 1760, Lord Mansfield characteristically attempted to reframe the particularized approaches of the common law into a universal principle in Moses v. Macferlan (1760), 2 Burr. 1005, at p. 1112; 97 E.R. 676, at p. 678 when he stated:

"If the defendant be under an obligation, from the ties of natural [*page301] justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('quasi ex contractu,' as the Roman law expresses it).

"This species of assumpsit, ('for money had and received to the plaintiff's use') lies in numberless instances, for money the defendant has received from a third person; which he claims title to, in opposition to the plaintiff's right; and which he had, by law, authority to receive from such third person.

. . . .

"This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex aequo et bono, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law;

. . . .

"In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

19 But even a Mansfield could not shake the common lawyer's attachment to technical formulation and for close to two hundred years little was heard in the English courts about Lord Mansfield's principle, save for a brief revival in Chancery in the early part of this century. It was left to Lord Wright (probably influenced by the American Restatement on Restitution in 1936) to resuscitate Lord Mansfield's principle in a statement in Fibrosa Spolka Akcyjna v. Fairbairn Lawson [*page302] Combe Barbour Ld., [1943] A.C. 32, at p. 61 that forms the cornerstone of the modern law of restitution. He said:

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

Then, having cited the passage from Lord Mansfield quoted above, he continued, at p. 62:

"Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort."

20 The reception of this restatement of the principle has been somewhat cautious in England and restitution there has advanced in rather a piecemeal fashion. Nonetheless considerable strides have been taken towards a more general elaboration of the principle. [*page303] Thus Robert Goff and Gareth Jones in The Law of Restitution (2nd Ed.), pp. 13-14 (in a passage not surprisingly repeated in substance by Goff, J., in B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2), [1979] 1 W.L.R. 783, at p. 839 (reversed [1981] 1 W.L.R. 232) have this to say:

"The principle of unjust enrichment is capable of elaboration. It presupposes three things: first, that the defendant has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would be unjust to allow him to retain that benefit. These three subordinate principles are closely interrelated."

21 As in Canada, it is obvious that among the factors that come into play in determining whether it would be unjust to retain a benefit is the interrelationship of the parties, including for example whether the person receiving the benefit requested it, and whether he exercised undue pressure on the person who conferred it upon him.

22 In Canada, where Lord Mansfield's statement appears to have received a more favourable reception than in England even before the Fibrosa case (see Klippert, supra, pp. 18-19), Lord Wright's statement was to have a pronounced effect. This development began with Deglman v. Guaranty Trust Co. of Canada and Constantineau, [1954] S.C.R. 725. The facts may conveniently be gleaned from the headnote:

"The respondent sought to recover from the estate of his deceased aunt under an oral agreement whereby the aunt, on condition that the respondent perform such services as she might request during her lifetime, undertook to make adequate provision for him in her will and in particular to leave him a certain piece of land. The respondent fully performed [*page304] his part of the agreement. The aunt, who owned other land as well, dies intestate.

"Held: that the acts relied upon were not unequivocally and of their own nature referable to any dealing with the land in question so as to take the case out of s. 4 of the Statute of Frauds; but that the deceased having had the benefits of full performance by the respondent of an existing although unenforceable contract, the law imposed upon her, and so upon her estate, the obligation to pay the fair value of the services rendered. The cause of action did not accrue until the death of the deceased intestate and the statutory period only then began to run. Wilson v. Cameron, 30 O.L.R. 486 and Fox v. White, [1935] O.W.N. 316 overruled. The rule in Maddison v. Alderson, 8 app. Cas. 467, as adopted in McNeil v. Corbett, 39 Can. S.C.R. 608, followed."

23 In coming to this conclusion Cartwright, J., speaking for himself, Estey, Locke and Fauteux, JJ., squarely relied on the statements of Lord Wright previously quoted. The remaining judge, Rand, J., gave a separate judgment but it is in no way at odds with the views of his brethren.

24 The facts in Deglman it will be observed bear a close resemblance to those in the present case apart from the immaterial difference that the benefits there conferred were services rather than money. It is true that the unjust enrichment flowed from a contract, even though it was unenforceable, but this, as I have already mentioned, is by no means necessary. This was made clear by the Supreme Court of Canada in County of Carleton v. City of Ottawa, [1965] S.C.R. 663, where [*page305] Hall, J., at p. 668-9, giving the judgment of the court allowing a restitutionary action, squarely relied on a pre-Fibrosa statement of Lord Wright, in Brook's Wharf and Bull Wharf Ltd. v. Goodman Brothers, [1937] 1 K.B. 534, at pp. 544-5. The statement quoted reads in part as follows:

"The principle [of unjust enrichment] has been applied in a great variety of circumstances. Its application does not depend on privity of contract.

. . . .

"These statements of the principle do not put the obligation on any ground of implied contract or of constructive or national contract. The obligation is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract."

I have, for brevity, omitted a portion of the statement where reliance is placed on decisions in different circumstances and under other specific legal principles, which tends to show that these principles are subsidiary to the major theme and are not to be looked upon as isolated instances. Reference should also be made to Mobil Oil Canada, Ltd. v. Rural Municipality of Storthoaks, [1976] 2 S.C.R. 147; 5 N.R. 23.

25 Not surprisingly, of course, where possible courts will rely on established categories to meet restitutionary claims. Thus in Becker v. Pettkus, [1980] 2 S.C.R. 834; 34 N.R. [*page306] 384, Martland, Ritchie and Beetz, JJ., relied on the concept of resulting trust, but Dickson, J., (Laskin, C.J., Estey, McIntyre, Chouinard and Lamer, JJ., concurring), after rejecting the applicability of a resulting trust in the circumstances, used the concept of a constructive trust as a tool to effect restitution where an unjust enrichment had occurred. At least in the context of matrimonial causes, Dickson, J., was willing to suggest a wide application for the principle of unjust enrichment. He stated at pp. 847-8:

"'Unjust enrichment' has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of Moses v. Macferlan put the matter in these words: '... the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money'. It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise... The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury."

26 This would appear to mean that the law will afford a remedy for unjust enrichment in the absence of valid judicial policy militating against it. The real challenge for the courts, therefore, appears to be the definition of the outward limits of restitutionary remedies. As Beetz, J., put it in Laureat Giguère Inc. v. Cie Immobilière Viger, [1977] 2 S.C.R. 67; 10 N.R. 277, at p. 76, "The theory of unjustified enrichment is no longer [*page307] open to debate; discussion relates only... to the conditions of application.". Pending broad conceptual clarification as experience develops, the limits of the application of the principle can perhaps most easily be drawn by applying to new situations policies developed in closely related areas about which well established criteria have developed. Sometimes this will be done in the traditional manner by stretching existing categories to encompass closely related situations. Thus considerations similar to those applying to duress have been extended to other cases where there has been undue or illegitimate pressure exercised by one person on another and concepts like "practical compulsion" have been adopted.

27 Apart from this, conceptual definition of the principle has already begun. In the Cie Immobilière case, supra, Beetz, J., set forth the following conditions at p. 77:

"Most authorities, but not all, recognized that an action for unjustified enrichment is subject to the existence of the following conditions:

"1. an enrichment;

"2. an impoverishment;

"3. a correlation between the enrichment and the impoverishment;

"4. the absence of justification;

"5. the absence of evasion of the law;

"6. the absence of any other remedy."

This, as I mentioned, was a civil law case but a universal principle such as we are dealing with here affords an excellent opportunity for cross-fertilization between Canada's two legal [*page308] sys-

tems. Indeed, there is a considerable measure of agreement with Beetz, J.'s, formulation in the following statement of Dickson, J., in Pettkus, at p. 852:

"For the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. The indirect contribution of money and the direct contribution of labour is clearly linked to the acquisition of property, the beneficial ownership of which is in dispute."

28 Let us now look at the present situation in the light of the above principles. There is little doubt that Mr. Smith obtained a benefit from the transaction and that the appellants were thereby deprived of their property with no reasonable justification. While the case does not appear to fall squarely under pre-existing rubrics it bears a considerable affinity to many of them. It resembles the situation where money has been paid under a contract and there is a total failure of consideration. Again it is not unlike promissory estoppel. There may not be a clear promise but there is something much like what occurs under these categories of remedies in that the appellants transferred the money to the deceased at his request and under circumstances where, not only having regard to their filial situation, but also with his active encouragement, they had justified expectations that they would get their money back. Anyone who lets it be known to persons under circumstances such as existed here that if they allow him to receive $ 15,000.00, they will get it back under his will surely thinks they will take it seriously, and if they do he, or rather his estate, cannot complain if the law also takes it seriously. [*page309]

29 The case also has an affinity to cases where the courts have ordered restitution on the basis of economic or practical compulsion. It is also closely related to unconscionable transactions, though in those cases there is usually a greater disparity of power between the parties than exists here. What all these cases share with the present is that the person conferring the benefit has acted under pressure created by the person who obtained it.

30 Other analogies might be found with other established heads of unjust enrichment but enough has been said to show that the present case falls within the same type of categories. As I have tried to indicate the well recognized categories of unjust enrichment must be regarded as clear examples of the more general principle that transcends them. We are currently in a similar position with regard to unjust enrichment as we are in relation to negligence where we have for some time been abandoning recourse to particularized duties in favour of a generalized duty to one's neighbour, although the process has not yet proceeded as far in the case of restitution. In any event, I am convinced that, in a case like the present where one person conveys a benefit on another at that other's request under circumstances where the former has reasonable expectations both from their general relationship and the specific actions of the person benefitted in creating the expectation that the person who conveys the benefit will ultimately receive benefits at least equal to those conferred, then, particularly when this is accompanied by representations that such expectations will not be forthcoming unless the request is fulfilled, the retention of the benefit accompanied by a failure to fulfill the expectations constitutes an unjust enrichment for which the law will afford restitution. [*page310] The claim for money had and received appears to be an apt tool to achieve this result.

THE RELEASES

31 Counsel for the respondents heavily relied on the releases signed by the appellants at the time the proceeds of the securities were transferred and at the time the furniture was moved out of Mr. Smith's house. The trial judge had also placed considerable emphasis on these documents. At

one stage he appears to have been prepared to accept that a restitutionary remedy would lie were it not for the releases which, he believed, precluded such a course. As he put it: "The element in the present case which, in my opinion, ... creates a very different situation is the fact that the [appellants] executed two releases".

32 Before entering into an examination of the particular releases involved in this case and the circumstances under which they were executed, it may be useful to make some general remarks regarding the manner in which releases are to be construed. Like other written documents, one must seek the meaning of a release from the words used by the parties. Though the context in which it was executed may be useful in interpreting the words, it must be remembered that the words used govern. As in other cases, too, the document must be read as a whole. This is particularly important to bear in mind in construing releases, the operative parts of which are often written in the broadest of terms. Thus reference is frequently made to recitals to determine the specific matters upon which the parties have obviously focused to confine the operation of general words. As Lord Westbury stated in the House of Lord's case of London and South Western Railway Co. v. Blackmore (1870), L.R. 4 H.L. 610, at p. 623: "The general [*page311] words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given".

33 By referring to what was in the contemplation of the parties, Lord Westbury was, of course, not opening the door to adducing evidence of what was actually going on in their minds, still less to making inferences about it. Such considerations are relevant solely to issues such as undue influence, mistake, fraud and the like which have no application here. What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about. For authority for the foregoing propositions, see in addition to the cases to which I expressly refer, those cited in Halsbury's Laws of England (4th Ed.), Vol. 9, pp. 412-3, and Vol. 12, p. 642.

34 In the light of these principles, let us now examine the first set of releases, those drawn up when Doris Smith's estate was being closed in early 1977. They were obviously made to Mearle Smith and Mary Stratton as executors. They bear the title "Release to Executors by Residuary Legatees", and one of the recitals expressly states that the appellants "at the request of A.R. Mearle Smith and Mary C. Stratton agreed to release them as such executors and trustes". The operative part of the release, in fact, releases them from claims "in relation to the estate of the said [*page312] Doris B. Smith", and from anything done by Mearle Smith and Mary Stratton "in or about the administration of the said estate, or in anywise relating to the premises". These words would, of course, operate to release Mearle Smith, and Mary Stratton for that matter, from liability as executors to repay the appellants the value of the securities that had been transferred to Mr. Smith, and protect them from being sued for anything done in the administration of the estate.

35 But these releases have obviously nothing to do with transactions between the legatees and the executors in their personal capacities. Suppose, for example, that the appellants by written contract with Mr. Smith had agreed that he should be paid the value of the securities in Doris Smith's estate in return for Mr. Smith's promise to bequeath them an amount at least equal to the value of these securities, would anyone consider Mr. Smith or his estate to be free of the obligation under that promise because of the release? Surely the release would be seen as being merely part and par-

cel of the transaction. Along with the immediate transfer of the value of the securities, it would be looked upon as supporting his promise that they would get it back later.

36 The situation is no different here. Mr. Smith's estate is not being sued in relation to anything he did as executor. Rather it is being sued on an obligation imposed by law for unjust enrichment arising from the circumstances under which Mr. Smith was paid the value of the securities out of Mrs. Smith's estate. The situation becomes even clearer if one considers the earlier technique by which the [*page313] courts would have justified restitution. Mr. Smith's estate would have been found liable, in effect, on an implied contract arising from his having been paid the value of the goods under those circumstances; and the release, as I noted before, would be viewed as machinery for the effectual transfer of the securities that constitute the consideration supporting his implied promise to repay.

37 The release regarding the furniture poses somewhat different issues. Unlike the first series of releases, it is not expressed to be to Mr. Smith as executor. It releases him from "any and all claims and demands whatsoever pertaining to the estate of Doris B. Smith". Even in the abstract, I would have some difficulty in interpreting the restitutionary obligation imposed on Mr. Smith as pertaining to Mrs. Smith's estate, particularly having regard to the restrictive approach to releases that appears in the cases. That obligation was imposed by law owing to the nature of transactions that I would have thought could fairly be argued not to appertain to Mrs. Smith's estate. The obligation on Mr. Smith (or the implied promise to repay as it would have been categorized in earlier days) could well be looked upon as arising out of the appellant's expectation, or reliance, that they would be paid at least as much out of his estate, an expectation to which he contributed.

38 We need not, however, speculate further about what the release might mean in the abstract. The words not being clear our attention must, in determining what the release means, be focused on what Bankes, L.J. has described as "the necessity of ascertaining what the parties were contracting about before the court can determine [*page314] the true meaning" of a release; see Richmond v. Savill, [1926] 2 K.B. 530, at p. 544. Now there is no doubt what the parties were contracting about; they were concerned with Mrs. Smith's furniture. Not only does the context make this clear; the introductory words (or recitals) of the release acknowledge the removal of the furniture and thereby direct us to what the general words of the release are intended to apply. As Lindley, M.R., observed in In Re Perkins. Poyser v. Beyfus, [1898] 2 Ch. 182 (C.A.), at p. 190, "General words of release are always controlled by recitals and context", otherwise "the object and purpose of the document in which they appear must necessarily be frustrated". Here, as I have already stated, there is no doubt what the parties were engaged in when the release was executed. At Mr. Smith's request, they were effecting a settlement of any claims that might arise regarding the furniture that had belonged to Mrs. Smith.

39 I have not overlooked the remarks of the trial judge in which he stated of the first release that the appellants knew they were relinquishing all rights to the securities. Even if this were relevant it would at best amount to an inference which on a review of the evidence I would not be prepared to make. But the inference is, in fact, of no relevance. Though one may look at the context to assist in interpreting the words used in an instrument, absent fraud, mistake or other such matter, what the parties may have thought was the effect of an instrument cannot be considered; see C.E. Odgers, The Construction of Deeds and Statutes (4th Ed.), pp. 22-23. The law is, as I noted earlier, that the words of the instrument govern and in the present case the words expressly limit the releases to the liability of the executors as such. And even though the appellants may have released all

[*page315] their rights to the securities, this would not affect their rights to recover from Smith arising out of the unjust enrichment, or as it was once categorized the implied promise to repay their value.

40 Similar considerations apply to the judge's remarks about the second release to the effect that he believed the appellants were fully aware they were releasing Mr. Smith of their claims to any portion of their mother's estate. We are not concerned with their claim to the mother's estate; we are concerned with the unjust enrichment. And the judge's task was to interpret the words of the document; with the help of the recitals and context no doubt, but not by means of conjectures about what went on in the appellants' minds. And here again, if this were relevant, I would be inclined to come to a different inference. This merely serves to underline the danger of acting on the basis of such inferences. This danger undoubtedly constitutes one of the reasons why in interpreting a written instrument the law requires that "One must consider the meaning of the words used, not what one may guess to be the intention of the parties" as Jessell, M.R., expressed it in Smith v. Lucas (1881), 18 Ch. 531, at p. 539.

41 For these reasons, I do not think the estate of Mr. Smith can rely on the releases.

THE COTTAGE

42 Finally respondents' counsel laid emphasis, as did the trial judge, on the fact that Mr. Smith had transferred a cottage gratuitously to the appellants. But this occurred earlier. [*page316] I cannot see that the fact that I have conferred a benefit to a person gives me free rein subsequently to obtain a benefit from that person by inducements and other circumstances that give rise to an unjust enrichment.

CONCLUSION

43 I would therefore allow the appeal and set aside the judgment of the trial judge. Judgment should be entered for the appellants in the amount of $ 15,569.55. The appellants should have their costs both at trial and on appeal, which together I would fix at $ 3,000.00. They should also have interest on the amount of the judgment from February 8, 1979, the date of Mr. Smith's death when the cause of action arose, to the date hereof. I have examined the material supplied to the court respecting the applicable interest on the basis of which I would fix it at the rate of 10% per annum.

44 Angers, J.A.: I have had the benefit of reading the reasons for judgment prepared by my brother La Forest and I agree that this is a proper case for the application of the doctrine of restitution. The action for restitution is based on the failure of the late Mr. Smith to fulfill the reasonable expectations of the appellants of better things to come, as beneficiaries under his will, which he created in their minds and which was the inducement to release the securities to him. In my opinion, the late Mr. Smith was enriched at the expense of the appellants when he obtained the disputed securities or their value from Mrs. Smith's estate and it would be unjust to allow his estate to retain this benefit. [*page317]

45 As I read the reasons for judgment of the trial judge, it seems he might well have allowed the action on the basis claimed were it not for the releases. He found, with respect to the first release signed by the appellants that they "were relinguishing all rights to those particular securities" and, with respect to the second release, that "they released Smith of any and all claims they had to any portion of their mother's estate". I am in agreement with those findings.

46 However, the present action, as indicated, is not to recover the securities but to enforce the obligation arising out of the reasonable expectations of the appellants resulting from Mr. Smith's representations. The cause of action did not exist at the time of signing either release, and it was not as beneficiaries of their mother's estate that the appellants acquired their right of action. It came about upon the death of Mr. Smith when the appellants learned that he had failed to provide for them in his will. It was for this failure that they brought this restitutionary action, not for the return of the securities. The amount of the expected inheritance is difficult to determine but the unjust enrichment is of an amount equivalent to the value of the securities.

47 By executing the releases, and this is confirmed by the words that appear in them, the appellants relinguished all the rights which they had as beneficiaries of their mother's estate, - with respect to the securities, as direct beneficiaries, and with respect to the furniture, as beneficiaries subject to Mr. Smith's life interest. I cannot, however, extend the effect of those releases, either by the words used or by the surrounding circumstances, to include their right of action against the estate of Mr. Smith which came into [*page318] existence only at his death when the appellants were disinherited.

48 For these reasons, I would allow the appeal and dispose of the case as proposed by my brother La Forest.

Appeal allowed.

TAB 6

Indexed as:

Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.

Consolidated-Bathurst Export Limited (Plaintiff), Appellant;
and
Mutual Boiler and Machinery Insurance Company (Defendant), Respondent.

[1980] 1 S.C.R. 888

Supreme Court of Canada

1979: March 13 / 1979: December 21.

Present: Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, and McIntyre JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Insurance -- Interpretation of insurance contracts -- Definition of accident -- Direct and consequential damages.

The appellant, a manufacturer of paper products, was required to shut down part of its facilities because of the failure of three heat exchangers and thereby suffered a loss of $158,289.24 of which $15,604.44 was direct damage to the tubes in the heaters. The respondent is the insurer under a policy issued in respect of certain property of the appellant including these heat exchangers. The respondent resists the appellant's claim for the above mentioned loss on the basis that the damage was caused by corrosion of the tubes inside the heat exchangers and this risk was specifically excluded from the coverage provided by the policy of insurance. This position was adopted in both the Superior Court and the Court of Appeal. Hence the appeal of the plaintiff to this Court.

Held (Martland, Ritchie and McIntyre JJ. dissenting): The appeal should be allowed.

Per Pigeon, Dickson, Beetz and Estey JJ.: The issue is whether the loss occasioned by the corrosion of the heat exchangers is recoverable under the terms of the policy. The heart of the argument is that while the definition of accident in the policy does not include the event of corrosion or similar events such as "wear and tear, deterioration, depletion, or erosion of material" the definition does include, in the appellant's submission, events which succeed and which may be due to the event of corrosion.

In interpreting an insurance contract, effect must first be given to the intention of the parties, to be gathered from the words they have used, just as in any other contract. Step two is the application, when ambiguity is found, of the contra proferentem doctrine by which any doubt as to the meaning and scope of the excluding or limiting term is to be resolved against the party who has inserted it and who is now relying on it. Even apart from this doctrine the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. There is no dispute that the heat exchangers were covered by the insurance contract. There is also no serious dispute that corrosion of the tubes inside the heat exchanger, probably caused by the presence of sea water, was the effective cause of the breakdown of the heat exchanger. The insurer, as was its right, sought in the terms of the contract to limit its exposure to accidental loss and did so by seeking to confine the definition of accident. To interpret "corrosion" as that word is employed in the definition of accident in the manner sought by the respondent would be to eliminate from the insurance coverage any and all loss suffered by the insured mill operator by reason of the intervention of the condition of corrosion. Such an interpretation would necessarily result in a substantial nullification of coverage under the contract.

Per Martland, Ritchie and McIntyre JJ., dissenting: While the policy here covers damage to property other than the object itself, the coverage is limited to indemnity in respect of loss or damage to property of the insured directly caused to an object by an accident as that word is defined in the policy. Therefore an interpretation which would result in affording coverage to the insured for consequential damages whether it was due to corrosion or otherwise cannot be adopted. The only "direct" damage to any object in the appellant's plant was the damage to the tubes themselves and the plain language of the insuring agreement in defining "accident" appears to contemplate and exclude from coverage the very event which happened here, namely, damage being caused to an object which was the property of the insured as a result of "corrosion of ... material".

Cases Cited

[Indemnity Insurance Company of North America v. Excel Cleaning Service, [1954] S.C.R. 169, followed; Pense v. Northern Life Assurance Co. (1907), 15 O.L.R. 131, aff'd (1908), 42 S.C.R. 246; Stevenson v. Reliance Petroleum Ltd.; Reliance Petroleum Ltd. v. Canadian General Insurance Co., [1956] S.C.R. 936; Cornish v. Accident Insurance Co. (1889), 23 Q.B. 453 (C.A.) referred to.]

APPEAL from a judgment of the Court of Appeal of Quebec affirming a judgment of the Superior Court. Appeal allowed, Martland, Ritchie and McIntyre JJ. dissenting.

Guy Desjardins, Q.C., for the appellant.
Marcel Cinq-Mars, Q.C., for the respondent.

Solicitors for the appellant: Desjardins, Ducharme, Desjardins & Bourque, Montreal.
Solicitors for the respondent: Martineau, Walker, Allison, Beaulieu, MacKell & Clermont, Montreal.

The reasons of Martland, Ritchie and McIntyre JJ. were delivered by

RITCHIE J. (dissenting):-- This is an appeal from a judgment of the Court of Appeal of the Province of Quebec affirming the judgment rendered at trial by Mr. Justice Bisson and dismissing the claim of the appellant against its insurer for damage sustained to its property located at a plant which it operated at New Richmond in the Province of Quebec, where it was engaged in the manufacture of paper and paper and wood products.

By reason of their malfunction, direct damage was caused to several tubes in the heaters employed for the heating of bunker "C" fuel with the consequence that temporary closing of the plant became necessary. The appellant's claim in this action encompasses not only the direct damage done to the tubes, but the consequential loss allegedly sustained because of the breakdown of the tubes.

I have had the privilege of reading the reasons for judgment prepared for delivery by my brother Estey in this case, but as I reach a different conclusion concerning the risk insured against by the policy in question, I have found it necessary to express my views separately.

The appellant's claim is made pursuant to the terms of an insurance agreement with the respondent which was in force at the time of the events above referred to whereby the respondent agreed

> In consideration of the Premium the Company does hereby agree with the named Insured respecting loss from an Accident, as defined herein, as follows:
>
> ...
>
> 1. ... To pay the Insured for loss or damage to property of the Insured directly caused by such Accident to an Object, or if the Company so elects, to repair or replace such damaged property; ...

(The italics are my own.)

The objects covered by the policy are defined in the 1st Schedule thereof as follows:

> The Objects covered under this Schedule are of the type designated as follows:
>
> 1. Any metal fired or metal unfired pressure valve; and
>
> 2. Any piping, on or between premises of the Insured, connected with such vessel and which contains steam or other heat transfer medium or condensate thereof, air, refrigerant, or boiler feedwater between the feed pump or injector and a boiler, together with the valves, fittings, separators and traps on all such piping.

What is insured against by this agreement in my opinion is damage to the property of the insured "directly caused to an "object" by an "accident" as that word is defined in the policy. While the policy covers damage to property other than the object itself, it only covers that damage when it has been directly caused by "accident" to an "object". I am satisfied that the tubes were "objects" within the meaning of the above definition and that damage directly caused to the tubes would have

been covered by the insurance agreement had it not been for the terms of the definition of "accident" contained therein which reads as follows:

> C. Definition of Accident--As respects any Object covered under this Schedule, 'Accident' shall mean any sudden and accidental occurrence to the Object, or a part thereof, which results in damage to the Object and necessitates repair or replacement of the Object or part thereof; but Accident shall not mean (a) depletion, deterioration, corrosion, or erosion of material, (b) wear and tear (c) leakage at any valve, fitting, shaft seal, gland packing, joint or connection, (d) the breakdown of any vacuum tube, gas tube or brush, (e) the breakdown of any structure or foundation supporting the Object or any part thereof, nor (f) the functioning of any safety device or protection device.
>
> (The italics are my own.)

Both the trial judge and the Court of Appeal were satisfied that the damage to the tubes was occasioned by corrosion and this conclusion is supported by the fact that quantities of salt water did flow through the pipes. Expert evidence was called on behalf of the appellant directed to supporting the submission that the damage was caused by an hydraulic hammer effect of sudden origin which placed an inordinate strain on the pipes and tubes causing them to break. This evidence was, however, not accepted either at trial or in the Court of Appeal and I do not find it necessary to discuss it. In the result it has been concurrently found at trial and on appeal that corrosion was the cause of the damage to the tubes and pipes and it follows from the terms of the "definition of accident" that this damage is not insured against by the policy in question.

It was contended also that even if the coverage afforded by the policy did not include damage by "depletion, deterioration, corrosion" or "wear and tear" within the meaning of the definition of "accident", it was nevertheless effective to make the insurer responsible for consequential loss suffered by the insured as a result of a sudden rupture of the heat exchanger, whether due to corrosion or not. In view of the fact that the coverage is limited to indemnity in respect of loss or "damage to property of the insured directly caused by such accident to an Object", I cannot adopt an interpretation which would result in affording coverage to the insured for consequential damage whether it was due to "corrosion" or otherwise. In my opinion, the only "direct" damage to any object in the appellant's plant was the damage to the tubes themselves and the plain language of the insuring agreement in defining "accident" appears to me to contemplate and exclude from coverage the very event which happened here, namely, damage being caused to an object which was the property of the insured as a result of "corrosion of ... material".

It has been suggested that the language employed in the policy should be construed against the insurance company which was the author of it in accordance with the contra proferentem rule which is frequently invoked in the construction of insurance contracts when it is found that all other rules of construction fail to assist the Court in determining the true meaning of the policy.

In this regard my brother Estey has made reference to the reasons for judgment of Cartwright J., as he then was, in Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company [[1956] S.C.R. 936] where he said at p. 953:

> The rule expressed in the maxim, verba fortius accipiuntur contra proferentem, was pressed upon us in argument, but resort is to be had to this rule only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document.

It will however be seen from what I have said that I do not find it necessary to resort to this rule in the interpretation of the policy here at issue.

My brother Estey has, however, adopted the view that in construing the policy and particularly the definition of accident contained therein in the manner adopted in these reasons and in those of the majority of the Court of Appeal, the result is to "largely, if not completely, nullify the purpose for which the insurance was sold" which is "a circumstances to be avoided so far as the language used will permit". In this regard reliance is placed on the judgment of this Court in Indemnity Insurance Company of North America v. Excel Cleaning Service [[1954] S.C.R. 169], at pp. 177-178, but with the greatest respect I am unable to relate the circumstances of that case to those with which we are here concerned.

The Excel Cleaning Service case was one in which an "on location cleaning service" business was covered by a property damage liability policy insuring it for damage to property caused by accident arising out of its work. This policy however contained an exclusion relating "to damage to or destruction of property owned, rented, occupied or used by or in the care, custody and control of the insured", and the insurer contended that a wall to wall carpet fixed to the floor of a house where the insured was employed which was damaged was "in the care, custody and control of the insured" and therefore excluded from the coverage. Consistent with this reasoning all of the customer's belongings on which the insured was working were similarly exclusions which would have meant that the policy afforded no coverage whatever for the business of the insured. It was in this connection that this Court said, at pp. 177-178:

> Such a construction [as advanced by the insurer] would largely, if not completely, nullify the purpose for which the insurance was sold--a circumstance to be avoided, so far as the language used will permit.

I am respectfully of the opinion that this case involves a very different situation from the one with which we are here concerned. The construction sought to be placed on the Excel Cleaning Service Policy would have meant that although it purported to be a property damage liability policy covering the insured's business, it in fact insured nothing whereas the present policy affords insurance "for loss or damage to property of the insured" directly caused by an accident as defined therein. The meaning assigned to the word "accident" in the policy does not constitute an exclusion from the coverage but is rather a part of the definition of the risk insured against.

For all these reasons, as well as for those stated by Mr. Justice Turgeon, I would dismiss this appeal with costs.

The judgment of Pigeon, Dickson, Beetz and Estey JJ. was delivered by

ESTEY J.:-- The appellant operates a manufacturing facility for the production of paper products, including paper boxes, at New Richmond, Quebec, and the respondent is the insurer under a policy of insurance issued in respect of certain property of the appellant including the property with which this action is concerned, being three heat exchangers. The heat exchangers in question are described by the trial judge as follows:

> [TRANSLATION] The parts of this system with which we are particularly concerned are three heat exchangers, a type of pipe measuring fifteen feet long with an interior diameter of ten inches.
>
> Within each of these three exchangers there are 102 tubes thirteen feet long, with an exterior diameter of 5/8 inch and a metal casing measuring 1/16 inch, or .065 inch.
>
> Inside each exchanger at the ends the 102 pipes pass through a tubular metal plate one inch thick.
>
> Further, the 102 tubes of each exchanger are themselves divided into three groups of 34 tubes each, so that oil flowing in the tubes passes around the exchanger three times and is heated to the right level before emerging and being directed towards the boilers as a fuel.
>
> Steam circulates in the exchangers, passing in through the left end immediately to the right of the tubular plate and emerging at the right end, just as it strikes the other tubular plate.
>
> Each exchanger is sealed at each end by a lid.
>
> As the exchanger measures fifteen feet and the tubes thirteen feet, it follows that a space of one foot remains at each end between the tubular plate and the lid closing the exchanger.
>
> The whole apparatus forms a sealed unit, which it was established cannot be opened without causing a breakdown and considerable damage.

Due to the failure of these heat exchangers, the appellant was required to shut down part of their facilities and thereby suffered a loss which the parties have agreed amounted to $158,289.24. This sum is set out in the Plaintiff's Declaration and includes "Direct Damage Loss" of $15,604.44. The insurer resists the appellant's claim on the basis that the damage was caused by corrosion of the tubes inside the heat exchanger and this risk was specifically excluded from the coverage provided by the policy of insurance. The material provisions of the policy of insurance issued by the respondent are as follows:

INSURING AGREEMENT

> In consideration of the Premium the Company does hereby agree with the named Insured respecting loss from an Accident, as defined herein, as follows:

COVERAGE A--PROPERTY OF THE INSURED

1. ACTUAL CASH VALUE--To pay the Insured for loss of or damage to property of the Insured directly caused by such Accident to an Object, or if the Company so elects, to repair or replace such damaged property; and

The definition of accident as employed in the above excerpt is as follows:

> As respects any Object covered under this Schedule, "Accident" shall mean any sudden and accidental occurrence to the Object, or a part thereof, which results in damage to the Object and necessitates repair or replacement of the Object or part thereof; but Accident shall not mean (a) depletion, deterioration, corrosion, or erosion of material, (b) wear and tear, (c) leakage at any valve, fitting, shaft seal, gland packing, joint or connection, (d) the breakdown of any vacuum tube, gas tube or brush, (e) the breakdown of any structure or foundation supporting the Object or any part thereof, nor (f) the functioning of any safety device or protective device.

The employees of the appellant became aware of the failure of the heat exchangers when small fuel oil spots were noticed on linerboard being produced in the mill. The source of the oil was traced to the boiler and hence to the heat exchangers where a number of ruptured tubes were discovered.

The appellant advanced two main submissions:

(a) that the damage was caused by hydraulic hammer effect; and,
(b) alternatively, that the damage was caused by corrosion and that the terms of the policy do not exclude damage thus occasioned.

The learned trial judge found that the damage was caused by corrosion and discusses the contribution of pressure changes as follows:

> [TRANSLATION] There is no doubt that the damage occurred suddenly, but the phenomenon which led up to it, namely the chemical process of corrosion, was not of a sudden and accidental nature, so that it could not be
>
> regarded as an "accident".
>
> On December 4, 1968 some occurrence, probably a fall in the steam pressure in the heat exchanger, caused a failure in certain oil tubes, which moreover apparently broke in a relatively short space of time.
>
> The fact remains, however, that corrosion was the cause of the damage.

The majority of the Court of Appeal found the damage was the result of corrosion and thereby excluded from policy coverage. Turgeon J.A. dealt with the hydraulic hammer theory as follows:

> [TRANSLATION] This was a possibility, not a probability, mentioned by appellant's expert witness Mahoney in his examination in chief. However, when he was cross-examined, he admitted that he could not provide any direct evidence that a "hydraulic hammer" effect was produced, or that there was excessive pressure, or that the safety valves did not operate effectively.

Dissenting from the majority, Kaufman J.A. appears to have adopted in part the hydraulic hammer theory as being a "trigger" which precipitated the leaks in the tubes. The learned justice went on to state:

> But where, as here, the pressure suddenly increased, it will not do for the insurer to point to the corrosion and say that, sooner or later, the tubes would have burst anyway.

Thus it will be seen that in both courts below the cause of the damage was found to be corrosion of the tubes which both courts went on to conclude was a risk or peril not covered by the insurance contract.

The issue is simply, therefore, whether the admitted loss suffered by the appellant and which was occasioned by the corrosion of the heat exchangers is a loss recoverable under the above-quoted terms of the policy of insurance issued by the respondent to the appellant. This leaves the alternative submission advanced by the appellant, namely that the term of the contract of insurance covers the damages suffered by the appellant. The heart of this argument is that while the definition of accident does not include the event of corrosion or similar events such as "wear and tear, deterioration, depletion, or erosion of material", the definition does include, in the appellant's submission, events which succeed and which may be due to the event of corrosion. Thus the insurer would not be liable under the contract for the cost of repairing or replacing any insured property damaged by "depletion, deterioration, corrosion, wear and tear, etc.", but would be responsible for any consequential loss to the insured following the sudden rupture of the heat exchanger whether or not it be due to "corrosion" or "wear and tear", etc.

In the preliminary provisions setting up the coverage under the policy of insurance, the definition of accident is, of course, fundamental, and stripping out the words not here relevant, the definition reads as follows:

> Accident shall mean a sudden and accidental occurrence to the object ... but accident shall not mean ... corrosion...

Some light may be thrown on this interpretation difficulty by reference to a latter portion of the policy of insurance headed "Exclusions". The following excerpts illustrate the drafting technique employed in the policy where risks are to be excluded from its coverage:

EXCLUSIONS

> This policy does not apply to
>
> 1. WAR DAMAGE--Loss from an Accident caused directly or indirectly by

(a) Hostile or warlike action, including action in hindering, combating or defending against an actual, impending or expected attack, by

...

2. NUCLEAR HAZARDS--Loss, whether it be direct or indirect, proximate or remote,

(a) From an Accident caused directly or indirectly by nuclear reaction ...
(b) From nuclear reaction, nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, caused directly or indirectly by, contributed to or aggravated by an Accident;

...

3. MISCELLANEOUS PERILS--Loss under Coverages A and B from

...

(b) An Accident caused directly or indirectly by fire or from the use of water or other means to extinguish fire;

...

(d) Flood unless an Accident ensues and the Company shall then be liable only for loss from such ensuing Accident;

...

(Emphasis added.)

Thus it may be argued that when the draftsman wished to exclude consequences from an event, the words "directly or indirectly" were employed. Had this technique been adopted in the primary coverage provisions excerpted above, it would have read;

Accident does not mean that which directly or indirectly results from corrosion.

Alternatively, if the consequences of corrosion were intended by the parties to be beyond the protection of the contract, such circumstances would have been included under the heading "Exclusions" as a subparagraph comparable to one of those set out above.

At best, one must conclude that the definition of accident, including as it does the reference to corrosion, leaves two clear alternative interpretations open. Firstly, the definition may not include an event relating to corrosion. Secondly, the definition may exclude only the cost of making good the corrosion itself.

Insurance contracts and the interpretative difficulties arising therein have been before courts for at least two centuries, and it is trite to say that where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author, or at least the party in control of the contents of the contract. This is, of course, not entirely true because of statutory modifications to the contract, but we are not here concerned

with any such mandated provisions. Meredith J.A. put the proposition in Pense v. Northern Life Assurance Co. [(1907), 15 O.L.R. 131] at p. 137:

> There is no just reason for applying any different rule of construction to a contract of insurance from that of a contract of any other kind; and there can be no sort of excuse for casting a doubt upon the meaning of such a contract with a view to solving it against the insurer, however much the claim against him may play upon the chords of sympathy, or touch a natural bias. In such a contract, just as in all other contracts, effect must be given to the intention of the parties, to be gathered from the words they have used. A plaintiff must make out from the terms of the contract a right to recover; a defendant must likewise make out any defence based upon the agreement. The onus of proof, if I may use such a term in reference to the interpretation of a writing, is, upon each party respectively, precisely the same. We are all, doubtless, insured, and none insurers, and so, doubtless, all more or less affected by the natural bias arising from such a position; and so ought to beware lest that bias be not counteracted by a full apprehension of its existence.
>
> (Adopted in this Court in 1908 [(1908), 42 S.C.R. 246].)

Such a proposition may be referred to as Step one in the interpretative process. Step two is the application, when ambiguity is found, of the contra proferentem doctrine. This doctrine finds much expression in our law, and one example which may be referred to is found in Cheshire and Fifoot's Law of Contract (9th ed.), at pp. 152-3:

> If there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted it and who is now relying on it. As he seeks to protect himself against liability to which he would otherwise be subject, it is for him to prove that his words clearly and aptly describe the contingency that has in fact arisen.

This Court applied the doctrine in Indemnity Insurance Company of North America v. Excel Cleaning Service [[1954] S.C.R. 169] where at pp. 179-180 it was stated:

> It is, in such a case, a general rule to construe the language used in a manner favourable to the insured. The basis for such being that the insurer, by such clauses, seeks to impose exceptions and limitations to the coverage he has already described and, therefore, should use language that clearly expresses the extent and scope of these exceptions and limitations and, in so far as he fails to do so, the language of the coverage should obtain ... Furthermore, the language of Lord Greene in Woolfall & Rimmer, Ltd. v. Moyle, [1942] 1 K.B. 66 at 73, is appropriate. He there states:
>
> > I cannot help thinking that, if underwriters wish to limit by some qualification a risk which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is.

As has already been stated, this is, of course, the second phase of interpretation of such a contract. Cartwright J., as he then was, stated in Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company [[1956] S.C.R. 936] at p. 953:

> The rule expressed in the maxim, verba fortius accipiuntur contra proferentem, was pressed upon us in argument, but resort is to be had to this rule only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document.

Lindley L.J. put it this way:

> In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.
>
> Cornish v. Accident Insurance Company [(1889), 23 Q.B. 453 (C.A.)], at p. 456.

Even apart from the doctrine of contra proferentem as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

The Cornish case, supra, illustrates a course generally taken when such contracts reach the courts. There the court was interpreting an insurance contract in the light of the death of the insured while crossing a railway track. The policy included an exception from insured risks resulting from "exposure of the insured to obvious risk of injury". Lindley L.J., in the course of judgment, stated:

> The words are "exposure of the insured to obvious risk of injury." These words suggest the following questions: Exposure by whom? Obvious when? Obvious to whom? It is to be observed that the words are very general. There is no such word as "wilful," or "reckless," or "careless"; and to ascertain the true meaning of the exception the whole document must be studied and the object of the parties to it must be steadily borne in mind. The object of the contract is to insure against accidental death and injuries, and the contract must not be construed so as to de-

> feat that object, nor so as to render it practically illusory. A man who crosses an ordinary crowded street is exposed to obvious risk of injury; and, if the words in question are construed literally, the defendants would not be liable in the event of an insured being killed or injured in so crossing, even if he was taking reasonable care of himself. Such a result is so manifestly contrary to the real intention of the parties that a construction which leads to it ought to be rejected. But, if this be true, a literal construction is inadmissible, and some qualification must be put on the words used. (at p. 456)

An example of the application of the same principles is found in the Indemnity Insurance Company of North America v. Excel Cleaning Service, supra, where, at pp. 177-8, it was concluded:

> Such a construction [as advanced by the insurer] would largely, if not completely, nullify the purpose for which the insurance was sold--a circumstance to be avoided, so far as the language used will permit.

The appellant, as the owner and operator of a large forest products facility, sought insurance protection of the machinery employed in the plant in its industrial processes. There is no dispute that the heat exchangers in question were covered by the insurance contract. There is also no serious dispute, at least by the time the litigation had reached this Court, that corrosion of the tubes inside the heat exchanger, probably caused by the presence of sea water, was the effective cause of the breakdown of the heat exchanger, and the consequential release of oil into the processed steam. The insurer, as was its right, sought in the terms of the contract to limit its exposure to accidental loss and did so by seeking to confine the definition of accident. If a court were to accept the submissions of the respondent, that loss suffered by the insured by reason of the failure of a machine due to wear and tear and the consequential downtime of the plant was excluded by the definition of accident, then the insured would have purchased, by its premiums, no coverage for what may well be the most likely source of loss, or certainly a risk pervasive through much of the plant. Similarly, to interpret corrosion as that word is employed in the definition of accident in the manner sought by the respondent would be to eliminate from the insurance coverage any and all loss suffered by the insured mill operator by reason of the intervention of the condition of corrosion. Such an interpretation would necessarily result in a substantial nullification of coverage under the contract. It may well be argued by insurers that the premium will reflect such a narrowed coverage. There is no evidence that such is the case here.

It may also be argued by the insurance industry that applying the more favourable construction to this ambiguous provision will be to unnecessarily and unfairly burden the carrier. The carrier under this policy has at least two defensive mechanisms which it can readily call to its aid: firstly, the right of inspection which was exercised here both before and during the contract; and secondly, the right to terminate in the event the insurance carrier determines that the condition of the insured machinery is such as to make it impractical to extend coverage in the manner required by the contract.

I therefore would allow the appeal, set aside the judgment at trial and of the Court of Appeal and direct the entry of judgment in favour of the appellant in the amount of $158,289.24 with interest from the 1st of April, 1969, as claimed (it being the date of submission of claim and which date has not been contested in any court in these proceedings), together with costs throughout. In the event the parties are in disagreement as to whether the "Direct Damage" in the amount of

$15,604.44 mentioned above is, in fact, repairs of the actual corrosion damage and should not therefore, on the basis of these reasons be included in judgment granted, the matter shall be determined on application to a Judge of the Superior Court.

Appeal allowed with costs, MARTLAND, RITCHIE and McINTYRE JJ. dissenting.

TAB 7

Indexed as:

Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)

Tercon Contractors Ltd. Appellant;
v.
Her Majesty The Queen in Right of the Province of British Columbia, by her Ministry of Transportation and Highways Respondent, and
Attorney General of Ontario Intervener

[2010] 1 S.C.R. 69

[2010] 1 R.C.S. 69

[2010] S.C.J. No. 4

[2010] A.C.S. no 4

2010 SCC 4

File No.: 32460.

Supreme Court of Canada

Heard: March 23, 2009;
Judgment: February 12, 2010.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

(142 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Contracts -- Breach of terms -- Tender -- Ineligible bidder -- Exclusion of liability clause -- Doctrine of fundamental breach -- Province issuing tender call for construction of highway -- Request for proposals restricting qualified bidders to six proponents -- Province accepting bid from ineligible bidder -- Exclusion clause protecting Province from liability arising from participation in tendering process -- Whether Province breached terms of tendering contract in entertaining bid from ineligible bidder -- If so, whether Province's conduct fell within terms of exclusion clause -- If so, whether court should nevertheless refuse to enforce the exclusion clause because of unconscionability or some other contravention of public policy.

Summary:

The Province of British Columbia issued a request for expressions of interest ("RFEI") for the design and construction of a highway. Six teams responded with submissions including Tercon and Brentwood. A few months later, the Province informed the six proponents [page70] that it now intended to design the highway itself and issued a request for proposals ("RFP") for its construction. The RFP set out a specifically defined project and contemplated that proposals would be evaluated according to specific criteria. Under its terms, only the six original proponents were eligible to submit a proposal; those received from any other party would not be considered. The RFP also included an exclusion of liability clause which provided: "Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim." As it lacked expertise in drilling and blasting, Brentwood entered into a pre-bidding agreement with another construction company ("EAC"), which was not a qualified bidder, to undertake the work as a joint venture. This arrangement allowed Brentwood to prepare a more competitive proposal. Ultimately, Brentwood submitted a bid in its own name with EAC listed as a "major member" of the team. Brentwood and Tercon were the two short-listed proponents and the Province selected Brentwood for the project. Tercon successfully brought an action in damages against the Province. The trial judge found that the Brentwood bid was, in fact, submitted by a joint venture of Brentwood and EAC and that the Province, which was aware of the situation, breached the express provisions of the tendering contract with Tercon by considering a bid from an ineligible bidder and by awarding it the work. She also held that, as a matter of construction, the exclusion clause did not bar recovery for the breaches she had found. The clause was ambiguous and she resolved this ambiguity in Tercon's favour. She held that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the Province's breach. The Court of Appeal set aside the decision, holding that the exclusion clause was clear and unambiguous and barred compensation for all defaults.

Held (McLachlin C.J. and Binnie, Abella and Rothstein JJ. dissenting): The appeal should be allowed. The Court agreed on the appropriate framework of analysis but divided on the applicability of the exclusion clause to the facts.

The Court: With respect to the appropriate framework of analysis the doctrine of fundamental breach [page71] should be "laid to rest". The following analysis should be applied when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed. The first issue is whether, as a matter of interpretation, the exclusion clause even applies to the circumstances established in evidence. This will depend on the court's interpretation of the intention of the parties as expressed in the contract. If the exclusion clause applies, the second

issue is whether the exclusion clause was unconscionable and thus invalid at the time the contract was made. If the exclusion clause is held to be valid at the time of contract formation and applicable to the facts of the case, a third enquiry may be raised as to whether the court should nevertheless refuse to enforce the exclusion clause because of an overriding public policy. The burden of persuasion lies on the party seeking to avoid enforcement of the clause to demonstrate an abuse of the freedom of contract that outweighs the very strong public interest in their enforcement. Conduct approaching serious criminality or egregious fraud are but examples of well-accepted considerations of public policy that are substantially incontestable and may override the public policy of freedom to contract and disable the defendant from relying upon the exclusion clause. Despite agreement on the appropriate framework of analysis, the court divided on the applicability of the exclusion clause to the facts of this case as set out below.

Per LeBel, Deschamps, Fish, Charron and Cromwell JJ.: The Province breached the express provisions of the tendering contract with Tercon by accepting a bid from a party who should not even have been permitted to participate in the tender process and by ultimately awarding the work to that ineligible bidder. This egregious conduct by the Province also breached the implied duty of fairness to bidders. The exclusion clause, which barred claims for compensation "as a result of participating" in the tendering process, did not, when properly interpreted, exclude Tercon's claim for damages. By considering a bid from an ineligible bidder, the Province not only acted in a way that breached the express and implied terms of the contract, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process.

Submitting a compliant bid in response to a tender call may give rise to "Contract A" between the bidder and the owner. Whether a Contract A arises and what its terms are depends on the express and implied terms and conditions of the tender call and the legal consequences of the parties' actual dealings in each case. [page72] Here, there is no basis to interfere with the trial judge's findings that there was an intent to create contractual obligations upon submission of a compliant bid and that only the six original proponents that qualified through the RFEI process were eligible to submit a response to the RFP. The tender documents and the required ministerial approval of the process stated expressly that the Province was contractually bound to accept bids only from eligible bidders. Contract A therefore could not arise by the submission of a bid from any other party. The trial judge found that the joint venture of Brentwood and EAC was not eligible to bid as they had not simply changed the composition of their team but, in effect, had created a new bidder. The Province fully understood this and would not consider a bid from or award the work to that joint venture. The trial judge did not err in finding that in fact, if not in form, Brentwood's bid was on behalf of a joint venture between itself and EAC. The joint venture provided Brentwood with a competitive advantage in the bidding process and was a material consideration in favour of the Brentwood bid during the Province's evaluation process. Moreover, the Province took active steps to obfuscate the reality of the true nature of the Brentwood bid. The bid by the joint venture constituted "material non-compliance" with the tendering contract and breached both the express eligibility provisions of the tender documents, and the implied duty to act fairly towards all bidders.

When the exclusion clause is interpreted in harmony with the rest of the RFP and in light of the commercial context of the tendering process, it did not exclude a damages claim resulting from the Province unfairly permitting an ineligible bidder to participate in the tendering process. The closed list of bidders was the foundation of this RFP and the parties should, at the very least, be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred only upon one potential bidder. The requirement that only compliant bids be con-

sidered and the implied obligation to treat bidders fairly are factors that contribute to the integrity and business efficacy of the tendering process. The parties did not intend, through the words found in this exclusion clause, to waive compensation for conduct, like that of the Province in this case, that strikes at the heart of the tendering process. Clear language would be necessary to exclude liability for breach of the implied obligation, particularly in the case of public procurement where [page73] transparency is essential. Furthermore, the restriction on eligibility of bidders was a key element of the alternative process approved by the Minister. When the statutory provisions which governed the tendering process in this case are considered, it seems unlikely that the parties intended through this exclusion clause to effectively gut a key aspect of the approved process. The text of the exclusion clause in the RFP addresses claims that result from "participating in this RFP". Central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders -- the process followed by the Province -- is not the process called for by "this RFP" and being part of that other process is not in any meaningful sense "participating in this RFP".

Per McLachlin C.J. and Binnie, Abella and Rothstein JJ. (dissenting): The Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion compensation clause. The clause is clear and unambiguous and no legal ground or rule of law permits a court to override the freedom of the parties to contract with respect to this particular term, or to relieve Tercon against its operation in this case. A court has no discretion to refuse to enforce a valid and applicable contractual term unless the plaintiff can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. The public interest in the transparency and integrity of the government tendering process, while important, did not render unenforceable the terms of the contract Tercon agreed to.

Brentwood was a legitimate competitor in the RFP process and all bidders knew that the road contract would not be performed by the proponent alone and required a large "team" of different trades and personnel to perform. The issue was whether EAC would be on the job as a major sub-contractor or identified with Brentwood as a joint venture "proponent" with EAC. Tercon has legitimate reason to complain about the Ministry's conduct, but its misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

[page74]

Contract A is based not on some abstract externally imposed rule of law but on the presumed (and occasionally implied) intent of the parties. At issue is the intention of the actual parties not what the court may project in hindsight would have been the intention of reasonable parties. Only in rare circumstances will a court relieve a party from the bargain it has made.

The exclusion clause did not run afoul of the statutory requirements. While the *Ministry of Transportation and Highways Act* favours "the integrity of the tendering process", it nowhere prohibits the parties from negotiating a "no claims" clause as part of their commercial agreement and cannot plausibly be interpreted to have that effect. Tercon -- a sophisticated and experienced contractor -- chose to bid on the project, including the risk posed by an exclusion of compensation clause, on the

terms proposed by the Ministry. That was its prerogative and nothing in the "policy of the Act" barred the parties' agreement on that point.

The trial judge found that Contract A was breached when the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. The Ministry was at fault in its performance of the RFP, but the process did not thereby cease to be the RFP process in which Tercon had elected to participate.

The interpretation of the majority on this point is disagreed with. "[P]articipating in this RFP" began with "submitting a Proposal" for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon participated in it. Tercon's bid was considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (an ineligible bidder) instead of Brentwood itself (an eligible bidder) would be to give the clause a strained and artificial interpretation in order, indirectly and obliquely, to avoid the impact of what may seem to the majority *ex post facto* to have been an unfair and unreasonable clause.

Moreover, the exclusion clause was not unconscionable. While the Ministry and Tercon do not exercise the same level of power and authority, Tercon is a major contractor and is well able to look after itself in a commercial context so there is no relevant imbalance of bargaining power. Further, the clause is not as draconian as Tercon portrays it. Other remedies for breach of Contract A were available. The parties expected, even if they did not like it, that the "no claims" clause would [page75] operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

Finally, the Ministry's misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

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By Cromwell J.

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By Binnie J. (dissenting)

Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426; *The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116; *Tercon Contractors Ltd. v. British Columbia* (1993), 9 C.L.R. (2d) 197, aff'd [1994]

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Donald, MacKenzie and Lowry JJ.A.), 2007 BCCA 592, 73 B.C.L.R. (4) 201, 40 B.L.R. (4) 26, 289 D.L.R. (4) 647, [2008] 2 W.W.R. 410, 249 B.C.A.C. 103, 414 W.A.C. 103, 66 C.L.R. (3d) 1, [2007] B.C.J. No. 2558 (QL), 2007 CarswellBC 2880, setting aside a decision of Dillon J., 2006 BCSC 499, 53 B.C.L.R. (4) 138, [2006] 6 W.W.R. 275, 18 B.L.R. (4) 88, 51 C.L.R. (3d) 227, [2006] B.C.J. No. 657 (QL), 2006 CarswellBC 730. Appeal allowed, McLachlin C.J. and Binnie, Abella and Rothstein JJ. dissenting.

Counsel:

Chris R. Armstrong, *Brian G. McLean*, *William S. McLean* and *Marie-France Major*, for the appellant.

J. Edward Gouge, Q.C., *Jonathan Eades* and *Kate Hamm*, for the respondent.

Malliha Wilson and *Lucy McSweeney*, for the intervener.

The judgment of LeBel, Deschamps, Fish, Charron and Cromwell JJ. was delivered by

CROMWELL J.:--

I. Introduction

1 The Province accepted a bid from a bidder who was not eligible to participate in the tender and then took steps to ensure that this fact was not disclosed. The main question on appeal, as I see it, is whether the Province succeeded in excluding [page77] its liability for damages flowing from this conduct through an exclusion clause it inserted into the contract. I share the view of the trial judge that it did not.

2 The appeal arises out of a tendering contract between the appellant, Tercon Contractors Ltd., who was the bidder, and the respondent, Her Majesty the Queen in Right of the Province of British Columbia, who issued the tender call. The case turns on the interpretation of provisions in the contract relating to eligibility to bid and exclusion of compensation resulting from participation in the tendering process.

3 The trial judge found that the respondent (which I will refer to as the Province) breached the express provisions of the tendering contract with Tercon by accepting a bid from another party who was not eligible to bid and by ultimately awarding the work to that ineligible bidder. In short, a bid was accepted and the work awarded to a party who should not even have been permitted to participate in the tender process. The judge also found that this and related conduct by the Province breached the implied duty of fairness to bidders, holding that the Province had acted "egregiously" (2006 BCSC 499, 53 B.C.L.R. (4th) 138, at para. 150). The judge then turned to the Province's defence based on an exclusion clause that barred claims for compensation "as a result of participating" in the tendering process. She held that this clause, properly interpreted, did not exclude Tercon's claim for damages. In effect, she held that it was not within the contemplation of the parties that this clause would bar a remedy in damages arising from the Province's unfair dealings with a party who was not entitled to participate in the tender in the first place.

4 The Province appealed and the Court of Appeal reversed (2007 BCCA 592, 73 B.C.L.R. (4th) 201). Dealing only with the exclusion clause issue, it held that the clause was clear and unambiguous and barred compensation for all defaults.

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5 On Tercon's appeal to this Court, the questions for us are whether the successful bidder was eligible to participate in the request for proposals ("RFP") and, if not, whether Tercon's claim for damages is barred by the exclusion clause.

6 In my respectful view, the trial judge reached the right result on both issues. The Province's attempts to persuade us that it did not breach the tendering contract are, in my view, wholly unsuccessful. The foundation of the tendering contract was that only six, pre-selected bidders would be permitted to participate in the bidding. As the trial judge held, the Province not only acted in a way that breached the express and implied terms of the contract by considering a bid from an ineligible bidder, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process. One must not lose sight of the fact that the trial judge found that the Province acted egregiously by "ensuring that [the true bidder] was not disclosed" (para. 150) and that its breach "attacke[d] the underlying premise of the [tendering] process" (para. 146), a process which was set out in detail in the contract and, in addition, had been given ministerial approval as required by statute.

7 As for its reliance on the exclusion clause, the Province submits that the parties were free to agree to limitations of liability and did so. Consideration of this submission requires an interpretation of the words of the clause to which the parties agreed in the context of the contract as a whole. My view is that, properly interpreted, the exclusion clause does not protect the Province from Tercon's damage claim which arises from the Province's dealings with a party not even eligible to bid, let alone from its breach of the implied duty of fairness to bidders. In other words, the Province's liability did not arise from Tercon's participation in the process that the Province established, but from the Province's unfair dealings with a party who was not entitled to participate in that process.

8 I would allow the appeal and restore the judgment of the trial judge.

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II. Brief Overview of the Facts

9 I will have to set out more factual detail as part of my analysis. For now, a very brief summary will suffice. In 2000, the Ministry of Transportation and Highways (also referred to as the "Province") issued a request for expressions of interest ("RFEI") for designing and building a highway in northwestern British Columbia. Six teams made submissions, including Tercon and Brentwood Enterprises Ltd. Later that year, the Province informed the six proponents that it now intended to design the highway itself and would issue a RFP for its construction.

10 The RFP was formally issued on January 15, 2001. Under its terms, only the six original proponents were eligible to submit a proposal. The RFP also included a clause excluding all claims for damages "as a result of participating in this RFP" (s. 2.10).

11 Unable to submit a competitive bid on its own, Brentwood teamed up with Emil Anderson Construction Co. ("EAC"), which was not a qualified bidder, and together they submitted a bid in Brentwood's name. Brentwood and Tercon were the two short-listed proponents and the Ministry ultimately selected Brentwood as the preferred proponent.

12 Tercon brought an action seeking damages, alleging that the Ministry had considered and accepted an ineligible bid and that, but for that breach, it would have been awarded the contract. The trial judge agreed and awarded roughly $3.5 million in damages and prejudgment interest. As noted, the Court of Appeal reversed and Tercon appeals by leave of the Court.

III. Issues

13 The issues for decision are whether the trial judge erred in finding that:

1. the Province breached the tendering contract by entertaining a bid from an ineligible bidder.

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2. the exclusion clause does not bar the appellant's claim for damages for the breaches of the tendering contract found by the trial judge.

IV. Analysis

A. *Was the Brentwood Bid Ineligible?*

14 The first issue is whether the Brentwood bid was from an eligible bidder. The judge found that the bid was in substance, although not in form, from a joint venture of Brentwood and EAC and that it was, therefore, an ineligible bid. The Province attacks this finding on three grounds:

(i) a joint venture is not a legal person and therefore the Province could not and did not contract with a joint venture;
(ii) it did not award the contract to EAC and EAC had no contractual responsibility to the Province for failure to perform the contract;
(iii) there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others; this arrangement merely left Brentwood, the original proponent, in place and allowed it to enhance its ability to perform the work.

15 While these were the Province's main points, its position became more wide-ranging during oral argument, at times suggesting that it had no contractual obligation to deal only with eligible bidders. It is therefore necessary to take a step back and look at that threshold point before turning to the Province's more focussed submissions.

1. The Province's Contractual Obligations in the Bidding Process

16 The judge found, and it was uncontested at trial, that only the six original proponents that [page81] qualified through the RFEI process were eligible to submit a response to the RFP. This finding is not challenged on appeal, although there was a passing suggestion during oral argument that there was no contractual obligation of this sort at all. The trial judge also held, noting that this point was uncontested, that a joint venture between Brentwood and EAC was ineligible to bid. This is also not contested on appeal. These two findings are critical to the case and provide important background for an issue that is in dispute, namely whether the Brentwood bid was ineligible. It is, therefore, worth reviewing the relevant background in detail. I first briefly set out the legal framework and then turn to the trial judge's findings.

2. Legal Principles

17 Submitting a compliant bid in response to a tender call *may* give rise to a contract -- called Contract A -- between the bidder and the owner, the express terms of which are found in the tender documents. The contract may also have implied terms according to the principles set out in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, and *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860. The key word, however, is "may". The Contract A/Contract B framework is one that arises, if at all, from the dealings between the parties. It is not an artificial construct imposed by the courts, but a description of the legal consequences of the parties' actual dealings. The Court emphasized in *M.J.B.* that whether Contract A arises and if it does, what its

terms are, depend on the express and implied terms and conditions of the tender call in each case. As Iacobucci J. put it, at para. 19:

> What is important ... is that the submission of a tender in response to an invitation to tender may give [page82] rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call. [Emphasis added.]

3. The Trial Judge's Findings Concerning the Existence of Contract A

18 The question of whether Tercon's submission of a compliant bid gave rise to contractual relations between it and the Province was contested by the Province at trial. The trial judge gave extensive reasons for finding against the Province on this issue. We are told that the Province did not pursue this point in the Court of Appeal but instead premised its submissions on the existence of Contract A. The Province took the same approach in its written submissions in this Court. However, during oral argument, there was some passing reference in response to questions that there was no Contract A. In light of the position taken by the Province on its appeal to the Court of Appeal and in its written submissions in this Court, it is now too late to revisit whether there were contractual duties between Tercon and the Province. Even if it were open to the Province to make this argument now, I can see no error in legal principle or any palpable and overriding error of fact in the trial judge's careful reasons on this point.

19 The trial judge did not mechanically impose the Contract A/Contract B framework, but considered whether Contract A arose in light of her detailed analysis of the dealings between the parties. That was the right approach. She reviewed in detail the provisions of the RFP which supported her conclusion that there was an intent to create contractual relations upon submission of a compliant bid. She noted, for example, that bids were to be irrevocable for 60 days and that security of $50,000 had to be paid by all proponents and was to be increased to $200,000 by the successful proponent. Any revisions to proposals prior to the closing date had to be in writing, properly executed and received before the closing time. The RFP also set [page83] out detailed evaluation criteria and specified that they were to be the only criteria to be used to evaluate proposals. A specific form of alliance agreement was attached. There were detailed provisions about pricing that were fixed and non-negotiable. A proponent was required to accept this form of contract substantially, and security was lost if an agreement was not executed. The Ministry reserved a right to cancel the RFP under s. 2.9 but in such event was obliged to reimburse proponents for costs incurred in preparing their bids up to $15,000 each. Proponents had to submit a signed proposal form, which established that they offered to execute an agreement substantially in the form included in the RFP package. Further, they acknowledged that the security could be forfeited if they were selected as the preferred proponent and failed to enter into good faith discussions with the Ministry to reach an agreement and sign the alliance agreement.

20 In summary, as the trial judge found, the RFP set out a specifically defined project, invited proposals from a closed and specific list of eligible proponents, and contemplated that proposals would be evaluated according to specific criteria. Negotiation of the alliance construction contract

was required, but the negotiation was constrained and did not go to the fundamental details of either the procurement process or the ultimate contract.

21 There is, therefore, no basis to interfere with the judge's finding that there was an intent to create contractual obligations upon submission of a compliant bid. I add, however, that the tender call in this case did not give rise to the classic Contract A/Contract B framework in which the bidder submits an irrevocable bid and undertakes to enter into Contract B on those terms if it is accepted. The alliance model process which was used here was more complicated than that and involved good faith negotiations for a Contract B in the form set out in the tender documents. But in my view, this should not distract us from the main question here. We do not have to spell out all of the terms of Contract A, let alone of Contract B, so as to define all of the duties and obligations of both [page84] the bidders and the Province. The question here is much narrower: did contractual obligations arise as a result of Tercon's compliant bid and, if so, was it a term of that contract that the Province would only entertain bids from eligible bidders? The trial judge found offer, acceptance and consideration in the invitation to tender and Tercon's bid. There is no basis, in my respectful view, to challenge that finding even if it were open to the Province to try to do so at this late stage of the litigation.

4. The Trial Judge's Finding Concerning Eligibility

22 It was not contested at trial that only the six original proponents that qualified through the RFEI process were eligible to bid. This point is not in issue on appeal; the question is what this eligibility requirement means. It will be helpful, therefore, to set out the background about this limited eligibility to bid in this tendering process.

23 To begin, it is worth repeating that there is no doubt that the Province was contractually bound to accept bids only from eligible bidders. This duty may be implied even absent express stipulation. For example, in *M.J.B.*, the Court found that an implied obligation to accept only compliant bids was necessary to give business efficacy to the tendering process, noting, at para. 41, that a bidder must expend effort and incur expense in preparing its bid and must submit bid security and that it is "obvious" that it makes "little sense" for the bidder to comply with these requirements if the owner "is allowed, in effect, to circumscribe this process and accept a non-compliant bid". But again, whether such a duty should be implied in any given case will depend on the dealings between the parties. Here, however, there is no need to rely on implied terms. The obligation to consider only bids from eligible bidders [page85] was stated expressly in the tender documents and in the required ministerial approval of the process which they described.

24 As noted, in early 2000, the Province issued a RFEI based on a design-build model; the contractor would both design and build the highway. The RFEI contemplated that a short list of three qualified contractors, or teams composed of contractors and consultants, would be nominated as proponents. Each was to provide a description of the legal structure of the team and to describe the role of each team member along with the extent of involvement of each team member as a percentage of the total scope of the project and an organization chart showing each team member's role. Any change in team management or key positions required notice in writing to the Province which reserved the right to disqualify the proponent if the change materially and negatively affected the ability of the team to carry out the project.

25 Expressions of interest ("EOI") were received from six teams including Tercon and Brentwood. The evaluation panel and independent review panel recommended a short list of three pro-

ponents with Tercon topping the evaluation. Brentwood was evaluated fifth and was not on the short list. Brentwood was known to lack expertise in drilling and blasting and so its EOI had included an outline of the key team members with that experience. EAC did not participate and had no role in the Brentwood submission. The results of this evaluation were not communicated and the process did not proceed because the Province decided to design the project itself and issue an RFP for an alliance model contract to construct the highway.

26 It was clear from the outset that only those who had submitted proposals during the RFEI process would be eligible to submit proposals under the RFP. This was specified in the approval of the process by the Minister of Transportation and [page86] Highways ("Minister") before the RFP was issued. It is worth pausing here to briefly look at the Minister's role.

27 Pursuant to s. 23 of the *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311, the legislation in force at the relevant time, the Minister was required to invite public tenders for road construction unless he or she determined that another process would result in competitively established costs for the work. The section provided:

> **23 (1)** The minister must invite tenders by public advertisement, or if that is impracticable, by public notice, for the construction and repair of all government buildings, highways and public works, except for the following:
>
> ...
>
> (c) if the minister determines that an alternative contracting process will result in competitively established costs for the performance of the work.
>
> (2) The minister must cause all tenders received to be opened in public, at a time and place stated in the advertisement or notice.
>
> (3) The prices must be made known at the time the tenders are opened.
>
> (4) In all cases where the minister believes it is not expedient to let the work to the lowest bidder, the minister must report to and obtain the approval of the Lieutenant Governor in Council before passing by the lowest tender, except if delay would be injurious to the public interest.
>
> ...

28 These provisions make clear that the work in this case had to be awarded by public tender, absent the Minister's approval of an alternative process, and had to be awarded to the lowest bidder, absent approval of the Lieutenant Governor in Council. As noted, ministerial approval was given for an alternative process under s. 23(1)(c). The Minister issued [page87] a notice that, pursuant to that section, he approved the process set out in an attached document and had determined it to be an alternative contracting process that would result in competitively established costs for the performance of the work. The attached document outlined in seven numbered paragraphs the process that had been approved.

29 The document described the background of the public RFEI (which I have set out earlier), noting that *only those firms identified through the EOI process would be eligible to submit proposals for the work* and that they would receive invitations to do so. The Minister's approval in fact referred to the firms who had been short-listed from the RFEI process as being eligible. If this were taken to refer only to the three proponents identified by the evaluation process of the RFEI, Tercon would be included but Brentwood would not. However, no one has suggested that anything turns on this and it seems clear that ultimately all six of the RFEI proponents -- including both Tercon and Brentwood -- were intended to be eligible. The ministerial approval then briefly set out the process. Proposals "by short-listed firms" were to be evaluated "using the considerations set out in the RFP".

30 It is clear, therefore, that participation in the RFP process approved by the Minister was limited to those who had participated in the RFEI process.

31 The Province's factum implies that the Minister approved inclusion of the exclusion clause in the RFP. However, there is no evidence of this in the record before the Court. The Minister's approval is before us. It is dated as having been prepared on August 23, 2000 and signed on October 19, 2000, and approves a process outlined in a two-page document attached to it. It says nothing about exclusion of the Province's liability. The RFP, containing the exclusion clause in issue here, is dated January 15, 2001 and was sent out to eligible bidders under cover of a letter of the [page88] same date, some three months after the Minister's approval.

32 The RFP is a lengthy document, containing detailed instructions to proponents, required forms, a time schedule of the work, detailed provisions concerning contract pricing, a draft of the ultimate construction contract and many other things. Most relevant for our purposes are the terms of the instructions to proponents and in particular the eligibility requirements for bidders.

33 The RFP reiterates in unequivocal terms that eligibility to bid was restricted as set out in the ministerial approval. It also underlines the significance of the identity of the proponent. In s. 1.1, the RFP specifies that only the six teams involved in the RFEI would be eligible. The term "proponent", which refers to a bidder, is defined in s. 8 as "a team that has become eligible to respond to the RFP as described in Section 1.1 of the Instructions to Proponents". Section 2.8(a) of the RFP stipulates that *only* the six proponents qualified through the RFEI process were eligible and that *proposals received from any other party would not be considered.* In short, there were potentially only six participants and "Contract A" could not arise by the submission of a bid from any other party.

34 The RFP also addressed material changes to the proponent, including changes in the proponent's team members and its financial ability to undertake and complete the work. Section 2.8(b) of the RFP provided in part as follows:

> If in the opinion of the Ministry a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed ... or if, for financial or other reasons, the Proponent's ability to undertake and complete the Work has changed, then the [page89] Ministry may request the Proponent to submit further supporting information as the Ministry may request in support of the Proponent's qualification to perform the Work. If in the sole discretion of the Ministry as a result of the changes the Proponent is not sufficiently qualified to perform the Work then the Ministry reserves the right to disqualify that Proponent, and reject its Proposal.

35 The proponent was to provide an organization chart outlining the proponent's team members, structure and roles. If the team members were different from the RFEI process submission, an explanation was to be provided for the changes: s. 4.2(b)i). A list of subcontractors and suppliers was also to be provided and the Ministry had to be notified of any changes: s. 4.2(e).

36 The RFP provided proponents with a mechanism to determine whether they remained qualified to submit a proposal. If a proponent was concerned about its eligibility as a result of a material change, it could make a preliminary submission to the Ministry describing the nature of the changes and the Ministry would give a written decision as to whether the proponent was still qualified: s. 2.8(b).

37 Brentwood tried to take advantage of this process. The trial judge thoroughly outlined this, at paras. 17-23 of her reasons. In brief, Brentwood lacked expertise in drilling and blasting and by the time the RFP was issued, it faced limited local bonding capacity due to commitments to other projects, a shorter construction period, the potential unavailability of subcontractors and limited equipment to perform the work. It in fact considered not bidding at all. Instead, however, it entered into a pre-bidding agreement with EAC that the work would be undertaken by a joint venture of Brentwood and EAC and that upon being awarded the work, they would enter into a joint venture agreement and would share 50/50 the costs, expenses, losses and gains. The trial judge noted that it was common in the industry for contractors to agree to a joint venture on the basis of a pre-bid agreement with the specifics of the joint venture to be worked out once the contract was awarded and that Brentwood and EAC [page90] acted consistently throughout in accordance with this industry standard.

38 Brentwood sent the Province's project manager, Mr. Tasaka, a preliminary submission as provided for in s. 2.8(b) of the RFP, advising of a material change in its team's structure in that it wished to form a joint venture with EAC. This was done, the trial judge found, because Brentwood thought it would be disqualified if it submitted a proposal as a joint venture without the Ministry's prior approval under this section of the RFP. The Province never responded in writing as it ought to have according to s. 2.8(b).

39 It seems to have been assumed by everyone that a joint venture of Brentwood and EAC was not eligible because this change would not simply be a change in the composition of the bidder's team, but in effect a new bidder. Without reviewing in detail all of the evidence referred to by the trial judge, it is fair to say that although Brentwood ultimately submitted a proposal in its own name, the proposal in substance was from the Brentwood/EAC joint venture and was evaluated as such. As the trial judge concluded:

> The substance of the proposal was as a joint venture and this must have been apparent to all. The [project evaluation panel] approved Brentwood/EAC as joint venturers as the preferred proponent. The [panel] was satisfied that Tercon had the capacity and commitment to do the job but preferred the joint venture submission of Brentwood/EAC. [para. 53]

40 There was some suggestion by the Province during oral argument that the trial judge had wrongly imposed on it a duty to investigate Brentwood's bid, a duty rejected by the majority of the Court in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116. In my view, the trial judge did no such thing. As her detailed findings make clear, the Province: (1) fully understood that the Brentwood bid was in fact on behalf of a joint venture of Brentwood and EAC;

(2) thought [page91] that a bid from that joint venture was not eligible; and (3) took active steps to obscure the reality of the situation. No investigation was required for the Province to know these things and the judge imposed no duty to engage in one.

5. The Province's Submissions

41 I will address the Province's first two points together:

(i) a joint venture is not a legal person and therefore the Province could not and did not contract with a joint venture; and
(ii) it did not award the contract to EAC and EAC had no contractual responsibility to the Province for failure to perform the contract.

42 I cannot accept these submissions. The issue is not, as these arguments assume, whether the Province contracted with a joint venture or whether EAC had contractual obligations to the Province. The issue is whether the Province considered an ineligible bid; the point of substance is whether the bid was from an eligible bidder.

43 At trial there was no contest that a bid from a joint venture involving an ineligible bidder would be ineligible. The Province's position was that there was no need to look beyond the face of the bid to determine who was bidding: the proposal was in the name of Brentwood and therefore the bid was from a compliant bidder. Respectfully, I see no error in the trial judge's rejection of this position. There was a mountain of evidence to support the judge's conclusions that first, Brentwood's bid, in fact if not in form, was on behalf of a joint venture between itself and EAC; second, the Province knew this and took the position that it could not consider a bid from or award the work to that joint venture; third, the existence of the joint venture was a material consideration in favour of the Brentwood bid during the evaluation process; and finally, that steps were taken by revising and drafting documentation to obfuscate the reality of the situation.

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44 Brentwood was one of the original RFEI proponents and was of course eligible to bid, subject to material changes in the composition of its team. EAC had not submitted a proposal during the RFEI process. It had been involved in advising the Ministry in relation to the project in 1998 and, in the fall of 2000, the Ministry had asked EAC to prepare an internal bid for comparison purposes (although EAC did not do so) as EAC was not entitled to bid on the Project.

45 As noted earlier, after the RFP was issued, Brentwood and EAC entered into a pre-bidding agreement that provided that the work would be undertaken in the name of Brentwood/Anderson, a joint venture, that the work would be sponsored and managed by the joint venture and that upon being awarded the contract, the parties would enter into a joint venture agreement. Brentwood advised the Ministry in writing that it was forming a joint venture with EAC "to submit a more competitive price"; this fax was in effect a preliminary submission contemplated by s. 2.8(b) of the RFP and was written, as the trial judge found, because Brentwood assumed that it could be disqualified if it submitted a proposal as a joint venture unless prior arrangements had been made. The Province never responded in writing to this preliminary submission, as required by s. 2.8(b). There were,

however, discussions with the Province's project manager, Mr. Tasaka who, the trial judge found, understood that a joint venture from Brentwood and EAC would not be eligible. As the judge put it, the Province's position appears to have been that the Brentwood/EAC proposal could proceed as long as the submission was in the name of Brentwood.

46 In the result, EAC was listed in the ultimate submission as a "major member" of the team. The legal relationship with EAC was not specified and EAC was listed as a subcontractor even though, as the trial judge found, their relationship bore no resemblance to a standard subcontractor agreement. The trial judge found as facts -- and these findings are not challenged -- that Brentwood and EAC always intended between themselves to form a joint venture and to formalize that arrangement once the contract was secured, and further, that the [page93] role of EAC was purposefully obfuscated in the bid to avoid an apparent conflict with s. 2.8(a) of the RFP.

47 During the selection process, it became clear that the bid was in reality on behalf of a joint venture. The project evaluation panel ("PEP") requested better information than provided in the bid about the structure of the business arrangements between Brentwood and EAC. Brentwood responded by disclosing the pre-bid agreement between them to form a 50/50 joint venture if successful. The PEP understood from this that Brentwood and EAC had a similar interest in the risk and reward under the contract and that this helped satisfy them that the "risk/reward" aspect of the alliance contract could be negotiated with them flexibly. The PEP clearly did not consider EAC to be a subcontractor although shown as such in the bid. In its step 6 report, the PEP consistently referred to the proponent as being a joint venture of Brentwood and EAC or as "Brentwood/EAC" and the trial judge found that it was on the basis that they were indeed a joint venture that PEP approved Brentwood/EAC as the preferred proponent. This step 6 report was ultimately revised to refer only to the Brentwood team as the official proponent. The trial judge found as a fact that this revision was made because "it was apparent that a joint venture was not eligible to submit a proposal" (para. 56).

48 The findings of the trial judge and the record make it clear that it was no mere question of form rather than a matter of substance whether the bidder was Brentwood with other team members or, as it in fact was, the Brentwood/EAC joint venture. As she noted, at para. 121 of her reasons, the whole purpose of the joint venture was to allow submission of a more competitive price than it would have been able to do as a proponent with a team as allowed under s. 2.8(b) of the RFP. The joint venture permitted a 50/50 sharing of risk and reward and co-management of the project while at the same time avoiding the restrictions on subcontracting in the tendering documents. As the judge put it, the bid by the joint venture constituted "material non-compliance" with the tendering contract: "... [page94] the joint venture with EAC allowed Brentwood to put forward a more competitive price than contemplated under the RFEI proposal. This went to the essence of the tendering process" (para. 126).

49 The Province suggests that the trial judge's reasons allow form to triumph over substance. In my view, it is the Province's position that better deserves that description. It had a bid which it knew to be on behalf of a joint venture, encouraged the bid to proceed and took steps to obfuscate the reality that it was on behalf of a joint venture. Permitting the bid to proceed in this way gave the joint venture a competitive advantage in the bidding process, and the record could not be clearer that the joint venture nature of the bid was one of its attractions during the selection process. The Province nonetheless submits that so long as only the name of Brentwood appears on the bid and ultimate Contract B, all is well. If ever a submission advocated placing form above substance, this is it.

50 It is true that the Province had legal advice and did not proceed in defiance of it. However, the facts as found by the trial judge about this legal advice hardly advance the Province's position. The judge found that the Province's lawyer was not aware of the background relevant to the question of whether the Brentwood bid was eligible, never reviewed the proponent eligibility requirements in the RFP and was not asked to and did not direct his mind to the question of eligibility. As the trial judge put it, the lawyer "appears to have operated on the assumption that Brentwood had been irreversibly selected" (para. 70).

51 The Brentwood/EAC joint venture having been selected as the preferred proponent, negotiations for the alliance contract ensued. The trial judge found that by this time, all agreed that a joint venture [page95] was not an eligible proponent and the Ministry was taking the position that the contract could not be in the name of the joint venture. Brentwood and EAC executed a revised pre-contract agreement that provided, notwithstanding the letter of intent from the Ministry addressed to Brentwood indicating that the legal relationship between them would be contractor/subcontractor, the contract would be performed and the profits shared equally between them. The work was to be managed by a committee with equal representation, the bond required by the owner was to be provided by both parties and EAC indemnified Brentwood against half of any loss or cost incurred as a result of performance of the work. According to schedule B4 of the RFP, all subcontracts were to be attached to the RFP but no contract between Brentwood and EAC was ever provided or attached to the proposal.

52 The Province has identified no palpable and overriding error in these many findings of fact by the trial judge. I conclude, therefore, that we must approach the case on the basis of the judge's finding that the bid was in fact, if not in form, submitted by a joint venture of Brentwood and EAC, that the Ministry was well aware of this, that the existence of the joint venture was a material consideration in favour of the bid during the evaluation process and that by bidding as a joint venture, Brentwood was given a competitive advantage in the bidding process.

53 I reject the Ministry's submissions that all that matters is the form and not the substance of the arrangement. In my view, the trial judge's finding that this bid was in fact on behalf of a joint venture is unassailable.

54 I turn to the Province's third point:

> (iii) there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others; this arrangement merely left Brentwood, the original [page96] proponent in place and allowed it to enhance its ability to perform the work.

55 This submission addresses the question of whether the joint venture was an eligible bidder. The Province submits that it is, arguing that s. 2.8(b) of the RFP shows that the RFP contemplated that each proponent would be supported by a team, that the composition of the team might change and that the Province under that section retained the right to approve or reject changes in the team of any proponent. I cannot accept these submissions.

56 Section 2.8 must be read as a whole and in light of the ministerial approval which I have described earlier. Section 2.8(a), consistent with that approval, stipulates that only the six proponents qualified through the RFEI process were eligible to submit responses and that proposals from any other party "shall not be considered". The word "proponent" is defined in s. 8 as a team that has

become eligible to respond to the RFP. The material change provisions in s. 2.8(b) should not be read as negating the express provisions of the RFP and the ministerial approval of the process. When read as a whole, the provisions about material change do not permit the addition of a new entity as occurred here. The process actually followed was not the one specified in the bidding contract and was not authorized by the statute because it was not the one approved by the Minister.

57 Moreover, even if one were to conclude (and I would not) that this change from the Brentwood team that participated in the RFEI to the Brentwood/EAC joint venture by whom the bid was submitted could fall within the material change provisions of s. 2.8(b), the Province never gave a written decision to permit this change as required by that provision. As the trial judge noted, in fact the Province's position was that such a bid would not be eligible and its agents took steps to obfuscate the true proponent in the relevant documentation.

58 The trial judge also found that there was an implied obligation of good faith in the contract and [page97] that the Province breached this obligation by failing to treat all bidders equally by changing the terms of eligibility to Brentwood's competitive advantage. This conclusion strongly reinforces the trial judge's decision about eligibility. Rather than repeating her detailed findings, I will simply quote her summary at para. 138:

> The whole of [the Province's] conduct leaves me with no doubt that the [Province] breached the duty of fairness to [Tercon] by changing the terms of eligibility to Brentwood's competitive advantage. At best, [the Province] ignored significant information to its [i.e. Tercon's] detriment. At worst, the [Province] covered up its knowledge that the successful proponent was an ineligible joint venture. In the circumstances here, it is not open to the [Province] to say that a joint venture was only proposed. Nor can the [Province] say that it was unaware of the joint venture when it acted deliberately to structure contract B to include EAC as fully responsible within a separate contract with Brentwood, so minimizing the [Province's] risk that the contract would be unenforceable against EAC if arrangements did not work out... . The [Province] was ... prepared to take the risk that unsuccessful bidders would sue: this risk did materialize.

59 To conclude on this point, I find no fault with the trial judge's conclusion that the bid was in fact submitted on behalf of a joint venture of Brentwood and EAC which was an ineligible bidder under the terms of the RFP. This breached not only the express eligibility provisions of the tender documents, but also the implied duty to act fairly towards all bidders.

B. *The Exclusion Clause*

1. Introduction

60 As noted, the RFP includes an exclusion clause which reads as follows:

> **2.10** ...
>
> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall [page98] have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by

> submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim. [Emphasis added.]

61 The trial judge held that as a matter of construction, the clause did not bar recovery for the breaches she had found. The clause, in her view, was ambiguous and, applying the *contra proferentem* principle, she resolved the ambiguity in Tercon's favour. She also found that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the nature of the Province's breach. The Province contends that the judge erred both with respect to the construction of the clause and her application of the doctrine of fundamental breach.

62 On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, as Dickson C.J. was inclined to do more than 20 years ago: *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 462. I agree with the analytical approach that should be followed when tackling an issue relating to the applicability of an exclusion clause set out by my colleague Binnie J. However, I respectfully do not agree with him on the question of the proper interpretation of the clause in issue here. In my view, the clause does not exclude Tercon's claim for damages, and even if I am wrong about that, the clause is at best ambiguous and should be construed *contra proferentem* as the trial judge held. As a result of my conclusion on the interpretation issue, I do not have to go on to apply the rest of the analytical framework set out by Binnie J.

63 In my view, the exclusion clause does not cover the Province's breaches in this case. The RFP process put in place by the Province was premised on a closed list of bidders; a contest with an ineligible bidder was not part of the RFP process and was in fact expressly precluded by its terms. A "Contract A" could not arise as a result of submission of a bid from any other party. However, as [page99] a result of how the Province proceeded, the very premise of its own RFP process was missing, and the work was awarded to a party who could not be a participant in the RFP process. That is what Tercon is complaining about. Tercon's claim is not barred by the exclusion clause because the clause only applies to claims arising "as a result of participating in [the] RFP", not to claims resulting from the participation of other, ineligible parties. Moreover, the words of this exclusion clause, in my view, are not effective to limit liability for breach of the Province's implied duty of fairness to bidders. I will explain my conclusion by turning first to a brief account of the key legal principles and then to the facts of the case.

2. Legal Principles

64 The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. The approach adopted by the Court in *M.J.B.* is instructive. The Court had to interpret a privilege clause, which is somewhat analogous to the exclusion clause in issue here. The privilege clause provided that the lowest or any tender would not necessarily be accepted, and the issue was whether this barred a claim based on breach of an implied term that the owner would accept only compliant bids. In interpreting the privilege clause, the Court looked at its text in light of the contract as a whole, its purposes and commercial context. As Iacobucci J. said, at para. 44, "the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties."

65 In a similar way, it is necessary in the present case to consider the exclusion clause in the RFP in light of its purposes and commercial context as well as of its overall terms. The question is whether the exclusion of compensation for claims resulting [page100] from "participating in this RFP", properly interpreted, excludes liability for the Province having unfairly considered a bid from a bidder who was not supposed to have been participating in the RFP process at all.

3. Application to This Case

66 Having regard to both the text of the clause in its broader context and to the purposes and commercial context of the RFP, my view is that this claim does not fall within the terms of the exclusion clause.

67 To begin, it is helpful to recall that in interpreting tendering contracts, the Court has been careful to consider the special commercial context of tendering. Effective tendering ultimately depends on the integrity and business efficacy of the tendering process: see, e.g., *Martel*, at para. 88; *M.J.B.*, at para. 41; *Double N Earthmovers*, at para. 106. As Iacobucci and Major JJ. put it in *Martel*, at para. 116, "it is imperative that all bidders be treated on an equal footing .... Parties should at the very least be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred upon only one potential bidder."

68 This factor is particularly weighty in the context of public procurement. In that context, in addition to the interests of the parties, there is the need for transparency for the public at large. This consideration is underlined by the statutory provisions which governed the tendering process in this case. Their purpose was to assure transparency and fairness in public tenders. As was said by Orsborn J. (as he then was) in *Cahill (G.J.) & Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145, at para. 35:

> The owner -- in this case the government -- is in control of the tendering process and may define the [page101] parameters for a compliant bid and a compliant bidder. The corollary to this, of course, is that once the owner -- here the government -- sets the rules, it must itself play by those rules in assessing the bids and awarding the main contract.

69 One aspect that is generally seen as contributing to the integrity and business efficacy of the tendering process is the requirement that only compliant bids be considered. As noted earlier, such a requirement has often been implied because, as the Court said in *M.J.B.*, it makes little sense to think that a bidder would comply with the bidding process if the owner could circumscribe it by accepting a non-compliant bid. Respectfully, it seems to me to make even less sense to think that eligible bidders would participate in the RFP if the Province could avoid liability for ignoring an express term concerning eligibility to bid on which the entire RFP was premised and which was mandated by the statutorily approved process.

70 The closed list of bidders was the foundation of this RFP and there were important competitive advantages to a bidder who could side-step that limitation. Thus, it seems to me that both the integrity and the business efficacy of the tendering process support an interpretation that would allow the exclusion clause to operate compatibly with the eligibility limitations that were at the very root of the RFP.

71 The same may be said with respect to the implied duty of fairness. As Iacobucci and Major JJ. wrote for the Court in *Martel*, at para. 88, "[i]mplying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process." It seems to me that clear language is necessary to exclude liability for breach of such a basic requirement of the tendering process, particularly in the case of public procurement.

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72 The proper interpretation of the exclusion clause should also take account of the statutory context which I have reviewed earlier. The restriction on eligibility of bidders was a key element of the alternative process approved by the Minister. It seems unlikely, therefore, that the parties intended through this exclusion clause to effectively gut a key aspect of the approved process. Of course, it is true that the exclusion clause does not bar all remedies, but only claims for compensation. However, the fact remains that as a practical matter, there are unlikely to be other, effective remedies for considering and accepting an ineligible bid and that barring compensation for a breach of that nature in practical terms renders the ministerial approval process virtually meaningless. Whatever administrative law remedies may be available, they are not likely to be effective remedies for awarding a contract to an ineligible bidder. The Province did not submit that injunctive relief would have been an option, and I can, in any event, foresee many practical problems that need not detain us here in seeking such relief in these circumstances.

73 The Province stresses Tercon's commercial sophistication, in effect arguing that it agreed to the exclusion clause and must accept the consequences. This line of argument, however, has two weaknesses. It assumes the answer to the real question before us which is: what does the exclusion clause mean? The consequences of agreeing to the exclusion clause depend on its construction. In addition, the Province's submission overlooks its own commercial sophistication and the fact that sophisticated parties can draft very clear exclusion and limitation clauses when they are minded to do so. Such clauses contrast starkly with the curious clause which the Province inserted into this RFP. The limitation of liability clause in *Hunter*, for example, provided that "[n]otwithstanding any other provision in this contract or any applicable statutory provisions neither the Seller nor the Buyer shall be liable to the other for special or consequential damages or damages for loss of use arising directly or indirectly from any breach of this contract, fundamental or otherwise" (p. 450). The Court found this to be clear and unambiguous. The limitation clause in issue in *Guarantee Co. of North [page103] America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, provided that legal proceedings for the recovery of "any loss hereunder shall not be brought ... after the expiration of 24 months from the discovery of such loss" (para. 5). Once again, the Court found this language clear. The Ontario Court of Appeal similarly found the language of a limitation of liability clause to be clear in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1. The clause provided in part that if the defendant "should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 100% of the annual service charge or $10,000.00, whichever is less, as the agreed upon damages and not as a penalty, as the exclusive remedy" (p. 4). These, and many other cases which might be referred to, demonstrate that sophisticated parties are capable of drafting clear and comprehensive limitation and exclusion provisions.

74 I turn to the text of the clause which the Province inserted in its RFP. It addresses claims that result from "participating in this RFP". As noted, the limitation on who could participate in this RFP was one of its premises. These words must, therefore, be read in light of the limit on who was eligible to participate in this RFP. As noted earlier, both the ministerial approval and the text of the RFP itself were unequivocal: only the six proponents qualified through the earlier RFEI process were eligible and *proposals received from any other party would not be considered.* Thus, central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders, as the trial judge found the process followed by the Province to be, is not the process called for by "this RFP" and being part of that other process is not in any meaningful sense "participating in this RFP".

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75 The Province would have us interpret the phrase excluding compensation "as a result of participating in this RFP" to mean that compensation is excluded that results from "submitting a Proposal". However, that interpretation is not consistent with the wording of the clause as a whole. The clause concludes with the phrase that "by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim". If the phrases "participating in this RFP" and "submitting a Proposal" were intended to mean the same thing, it is hard to understand why different words were used in the same short clause to express the same idea. The fact that the Minister had approved a closed list of participants strengthens the usual inference that the use of different words was deliberate so as not to exclude compensation for a departure from that basic eligibility requirement.

76 This interpretation of the exclusion clause does not rob it of meaning, but makes it compatible with other provisions of the RFP. There is a parallel between this case and the Court's decision in *M.J.B.* There, the Court found that there was compatibility between the privilege clause and the implied term to accept only compliant bids. Similarly, in this case, there is compatibility between the eligibility requirements of the RFP and the exclusion clause. Not any and every claim based on any and every deviation from the RFP provisions would escape the preclusive effect of the exclusion clause. It is only when the defect in the Province's adherence to the RFP process is such that it is completely outside that process that the exclusion clause cannot have been intended to operate. What is important here, in my view, is that the RFP in its conception, in its express provisions and in the statutorily required approval it was given, was premised on limiting eligibility to the six proponents in the RFEI process. Competition among others was not at all contemplated and was not part of the RFP process; in fact, the RFP expressly excluded that possibility. In short, limiting eligibility of bidders to those who had responded to the RFEI was the foundation of the whole RFP. As the judge found, acceptance of [page105] a bid from an ineligible bidder "attacks the underlying premise of the process" established by the RFP: para. 146. Liability for such an attack is not excluded by a clause limiting compensation resulting from participation in this RFP.

77 This interpretation is also supported by another provision of the RFP. Under s. 2.9, as mentioned earlier, the Province reserved to itself the right to unilaterally cancel the RFP and the right to propose a new RFP allowing additional bidders. If the exclusion clause were broad enough to exclude compensation for allowing ineligible bidders to participate, there seems to be little purpose in this reservation of the ability to cancel the RFP and issue a new one to a wider circle of bidders. It is

also significant that the Province did not reserve to itself the right to accept a bid from an ineligible bidder or to unilaterally change the rules of eligibility. The RFP expressly did exactly the opposite. None of this, in my opinion, supports the view that the exclusion clause should be read as applying to the Province's conduct in this case.

78 To hold otherwise seems to me to be inconsistent with the text of the clause read in the context of the RFP as a whole and in light of its purposes and commercial context. In short, I cannot accept the contention that, by agreeing to exclude compensation for participating in this RFP process, the parties could have intended to exclude a damages claim resulting from the Province unfairly permitting a bidder to participate who was not eligible to do so. I cannot conclude that the provision was intended to gut the RFP's eligibility requirements as to who may participate in it, or to render meaningless the Minister's statutorily required approval of the alternative process where this was a key element. The provision, as well, was not intended to allow the Province to escape a damages claim for applying different eligibility criteria, to the competitive disadvantage of other bidders and for taking [page106] steps designed to disguise the true state of affairs. I cannot conclude that the parties, through the words found in this exclusion clause, intended to waive compensation for conduct like that of the Province in this case that strikes at the heart of the integrity and business efficacy of the tendering process which it undertook.

79 If I am wrong about my interpretation of the clause, I would hold, as did the trial judge, that its language is at least ambiguous. If, as the Province contends, the phrase "participating in this RFP" could reasonably mean "submitting a Proposal", that phrase could also reasonably mean "competing against the other eligible participants". Any ambiguity in the context of this contract requires that the clause be interpreted against the Province and in favour of Tercon under the principle *contra proferentem*: see, e.g., *Hillis Oil and Sales Ltd. v. Wynn's Canada, Ltd.*, [1986] 1 S.C.R. 57, at pp. 68-69. Following this approach, the clause would not apply to bar Tercon's damages claim.

V. Disposition

80 I conclude that the judge did not err in finding that the Province breached the tendering contract or in finding that Tercon's remedy in damages for that breach was not precluded by the exclusion clause in the contract. I would therefore allow the appeal, set aside the order of the Court of Appeal and restore the judgment of the trial judge. The parties advise that the question of costs has been resolved between them and that therefore no order in relation to costs is required.

The reasons of McLachlin C.J. and Binnie, Abella and Rothstein JJ. were delivered by

81 BINNIE J. (dissenting):-- The important legal issue raised by this appeal is whether, and in what [page107] circumstances, a court will deny a defendant contract breaker the benefit of an exclusion of liability clause to which the innocent party, not being under any sort of disability, has agreed. Traditionally, this has involved consideration of what is known as the doctrine of fundamental breach, a doctrine which Dickson C.J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, suggested should be laid to rest 21 years ago (p. 462).

82 On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful. Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff (here the appellant Tercon)

can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. Tercon points to the public interest in the transparency and integrity of the government tendering process (in this case, for a highway construction contract) but in my view such a concern, while important, did not render unenforceable the terms of the contract Tercon agreed to. There is nothing inherently unreasonable about exclusion clauses. Tercon is a large and sophisticated corporation. Unlike my colleague Justice Cromwell, I would hold that the respondent Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion clause. In turn, there is no reason why the clause should not be enforced. I would dismiss the appeal.

I. Overview

83 This appeal concerns a contract to build a $35 million road in the remote Nass Valley of British Columbia (the "Kincolith project"). The respondent Ministry accepted a bid from Brentwood [page108] Enterprises Ltd. that did not comply with the terms of tender. Tercon, as the disappointed finalist in the bidding battle, seeks compensation equivalent to the profit it expected to earn had it been awarded the contract.

84 Tercon alleged, and the trial judge found, that although the winning bid was submitted in the name of Brentwood (an eligible bidder), Brentwood in fact intended, with the Ministry's knowledge and encouragement, to do the work in a co-venture with an ineligible bidder, Emil Anderson Construction Co. ("EAC"). The respondent Ministry raised a number of defences including the fact that the formal contract was signed in the name of Brentwood alone. This defence was rejected in the courts below. The Ministry's substantial defence in this Court is that even if it failed to abide by the bidding rules, it is nonetheless protected by an exclusion of compensation clause set out clearly in the request for proposals ("RFP"). The clause provided that "no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP" and that "by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim" (s. 2.10 of the RFP).

85 The appeal thus brings into conflict the public policy that favours a fair, open and transparent bid process, and the freedom of contract of sophisticated and experienced parties in a commercial environment to craft their own contractual relations. I agree with Tercon that the public interest favours an orderly and fair scheme for tendering in the construction industry, but there is also a public interest in leaving knowledgeable parties free to order their own commercial affairs. In my view, on the facts of this case, the Court should not rewrite -- nor should the Court refuse to give effect to -- the terms agreed to by the parties.

86 I accept, as did the courts below, that the respondent Ministry breached the terms of its own RFP when it contracted with Brentwood, knowing the work would be carried out by a co-venture with Brentwood and EAC. The addition of EAC, a [page109] bigger contractor with greater financial resources than Brentwood, created a stronger competitor for Tercon than Brentwood alone. However, I also agree with the B.C. Court of Appeal that the exclusion of compensation clause is clear and unambiguous and that no legal ground or rule of law permits us to override the freedom of the parties to contract (or to decline to contract) with respect to this particular term, or to relieve Tercon against its operation in this case.

II. The Tendering Process

87 For almost three decades, the law governing a structured bidding process has been dominated by the concept of Contract A/Contract B initially formulated in *The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. The analysis advanced by Estey J. in that case was that the bidding process, as defined by the terms of the tender call, may create contractual relations ("Contract A") prior in time and quite independently of the contract that is the actual subject matter of the bid ("Contract B"). Breach of Contract A may, depending on its terms, give rise to contractual remedies for non-performance even if Contract B is never entered into or, as in the present case, it is awarded to a competitor. The result of this legal construct is to provide unsuccessful bidders with a *contractual* remedy against an owner who departs from its own bidding rules. Contract A, however, arises (if at all) as a matter of interpretation. It is not imposed as a rule of law.

88 In *Ron Engineering*, the result of Estey J.'s analysis was that as a matter of contractual interpretation, the Ontario government was allowed to retain a $150,000 bid bond put up by Ron Engineering even though the government was told, a little over an hour after the bids were opened, that Ron Engineering had made a $750,058 error in the calculation of its bid and wished to withdraw it. Estey J. held:

> The contractor was not asked to sign a contract which diverged in any way from its tender but simply to sign a [page110] contract in accordance with the instructions to tenderers and in conformity with its own tender. [p. 127]

In other words, harsh as it may have seemed to Ron Engineering, the parties were held to their bargain. The Court was not prepared to substitute "fair and reasonable" terms for what the parties had actually agreed to.

89 In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, Contract A included a "privilege" clause which stated that the owner was not obliged to accept the lowest or *any* tender. The Court implied a term, based on the presumed intention of the parties, that notwithstanding the privilege clause, only compliant bids were open to acceptance. While the owner was not obliged to accept the lowest compliant bid, the privilege clause did not, as a matter of contractual interpretation, give the owner "the privilege" of accepting a non-compliant bid. *M.J.B.* stops short of the issue in the present appeal because in that case, there was a breach of Contract A but no clause purporting to exclude liability on the part of the owner to pay compensation in the event of a Contract A violation.

90 In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, the Court enforced the rules of the bid depository system against a contractor whose bid was based on what turned out to be a mistaken view of its collective bargaining status with the International Brotherhood of Electrical Workers. The Court again affirmed that "[t]he existence and content of Contract A will depend on the facts of the particular case" (para. 36). Ellis-Don sought relief from its bid on the basis of a labour board decision rendered subsequent to its bid that upheld, to its surprise, the bargaining rights of the union. This Court held that no relief was contemplated in the circumstances under Contract A and none was afforded, even though this was a costly result when viewed from the perspective of Ellis-Don.

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91 In *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, citing *M.J.B.*, the Court implied a term in Contract A obligating the owner to be fair and consistent in the assessment of tender bids. On the facts, the disappointed bidder's claim of unfair treatment was rejected.

92 Finally, in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116, the unsuccessful bidder claimed that Edmonton had accepted, in breach of Contract A, a competitor's non-compliant bid to provide heavy equipment of a certain age to move refuse at a waste disposal site. The Court refused to imply a term "requiring an owner to investigate to see if bidders will really do what they promised in their tender" (para. 50). Accepting the existence of a duty of "fairness and equality", the majority nevertheless held that "[t]he best way to make sure that all bids receive the same treatment is for an owner to weigh bids on the basis of what is actually in the bid, not to weigh them on the basis of subsequently discovered information" (para. 52). In other words, the majority's interpretation of the express terms of Contract A was enforced despite Double N Earthmovers' complaint of double dealing by the owner.

93 On the whole, therefore, while *Ron Engineering* and its progeny have encouraged the establishment of a fair and transparent bidding process, Contract A continues to be based not on some abstract externally imposed rule of law but on the presumed (and occasionally implied) intent of the parties. Only in rare circumstances will the Court relieve a party from the bargain it has made.

94 As to implied terms, *M.J.B.* emphasized (at para. 29) that the focus is "the intentions of the actual parties". A court, when dealing with a claim to an implied term, "must be careful not to slide [page112] into determining the intentions of reasonable parties" (emphasis in original). Thus, "if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis".

95 Tercon is a large and experienced contractor. As noted by Donald J.A. in the B.C. Court of Appeal, it had earlier "successfully recovered damages from the [Ministry] on a bidding default in a previous case" (2007 BCCA 592, 73 B.C.L.R. (4th) 201, at para. 15). See *Tercon Contractors Ltd. v. British Columbia* (1993), 9 C.L.R. (2d) 197 (B.C.S.C.), aff'd [1994] B.C.J. No. 2658 (QL) (C.A.). Thus Tercon would have been more sensitive than most contractors to the risks posed by an exclusion of compensation clause. It nevertheless chose to bid on the project on the terms proposed by the Ministry.

III. Tercon's Claim for Relief From the Exclusionary Clause It Agreed to

96 In these circumstances, the first question is whether there is either a statutory legal obstacle to, or a principled legal argument against, the freedom of these parties to contract out of the obligation that would otherwise exist for the Ministry to pay compensation for a breach of Contract A. If not, the second question is whether there is any other barrier to the court's enforcement of the exclusionary clause in the circumstances that occurred. On the first branch, Tercon relies on the *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311 ("*Transportation Act*" or the "Act"). On the second branch, Tercon relies on the doctrine of fundamental breach.

A. *The Statutory Argument*

97 Section 4 of the *Transportation Act* provides that before awarding a highway contract, "the minister must invite tenders in any manner that will make the invitation for tenders reasonably

available [page113] to the public", but then provides for several exceptions: "The minister need not invite tenders for a project ... if ... (c) the minister believes that an alternative contracting process will result in a competitively established cost for the project". Here the required ministerial authorization was obtained for an "alternative process". The reason is as follows. As noted by Cromwell J., the Ministry's original idea was to use a "design-build" model where a single contractor would design and build the highway for a fixed price. The Ministry issued a request for expressions of interest ("RFEI") which attracted six responses. One was from Tercon. Another was from Brentwood. EAC declined to bid because it did not think the "design-build" concept was appropriate for the job.

98 On further reflection, the Ministry decided not to pursue the design-build approach. It decided to design the highway itself. The contract would be limited to construction, as EAC had earlier advocated. EAC was not allowed to bid despite the Ministry coming around to its point of view on the proper way to tender the project. The Ministry limited bidding on the new contest to the six respondents to the original RFEI, all of whom had been found capable of performing the contract. But to do so, it needed, and did obtain, the Minister's s. 4 approval.

99 A question arose during the hearing of the appeal as to whether the Minister actually approved an "alternative process" that not only restricted eligibility to the six participants in the RFEI process (an advantage to Tercon and the other five participants), but also contained the "no claims" clause excluding compensation for non-observance of its terms (no doubt considered a disadvantage). In its factum, the Ministry states:

> In this case, the Minister approved an alternate process under [s. 4(2) of the B.C. *Transportation Act*]. That process was set out in the Instructions to Proponents, which included the No Claim Clause. Having been approved by the Minister, the package (including the No Claim [page114] Clause) complied with section 4 of the *Transportation Act*. [para. 70]

100 Tercon argued at the hearing of this appeal that as a matter of *law*, Contract A could not have included the exclusion clause because

> [t]he policy of the [*Transportation Act*] is to ensure that the Ministry is accountable; to preserve confidence in the integrity of the tendering process. To ensure that is so and that the Minister is accountable, the Ministry must be held liable for its breach of Contract A in considering and accepting a proposal from the joint venture ... .
>
> ...
>
> **MADAM JUSTICE ABELLA:** Can I just ask you one question. Is it your position, sir, that you can never have -- that a government can never have a no claims clause?
>
> **MR. McLEAN:** Yes. Under this statute because of the policy of the statute. [Transcript, at p. 27]

101 While it is true that the Act favours "the integrity of the tendering process", it nowhere prohibits the parties from negotiating a "no claims" clause as part of their commercial agreement, and cannot plausibly be interpreted to have that effect.

102 In the ordinary world of commerce, as Dickson C.J. commented in *Hunter*, "clauses limiting or excluding liability are negotiated as part of the general contract. As they do with all other contractual terms, the parties bargain for the consequences of deficient performance" (p. 461). Moreover, as Mr. Hall points out, "[t]here are many valid reasons for contracting parties to use exemption clauses, most notably to allocate risks" (G. R. Hall, *Canadian Contractual Interpretation Law* (2007), at p. 243). Tercon, for example, is a sophisticated and experienced contractor and if it decided that it was in its commercial interest to proceed with the bid despite the exclusion of compensation clause, that was its prerogative and nothing in the "policy of the Act" barred the parties' agreement on that point.

[page115]

103 To the extent Tercon is now saying that as a matter of *fact* the Minister, in approving the RFP, did not specifically approve the exclusion clause, and that the contract was thus somehow *ultra vires* the Ministry, this is not an issue that was either pleaded or dealt with in the courts below. The details of the ministerial approval process were not developed in the evidence. It is not at all evident that s. 4 *required* the Minister to approve the actual terms of the RFP. It is an administrative law point that Tercon, if so advised, ought to have pursued at pre-trial discovery and in the trial evidence. We have not been directed to any exploration of the matter in the testimony and it is too late in the proceeding for Tercon to explore it now. Accordingly, I proceed on the basis that the exclusion clause did not run afoul of the statutory requirements.

B. *The Doctrine of the Fundamental Breach*

104 The trial judge considered the applicability of the doctrine of fundamental breach. Tercon argued that the Ministry, by reason of its fundamental breach, had forfeited the protection of the exclusion of compensation clause.

105 The leading case is *Hunter* which also dealt with an exclusion of liability clause. The appellants Hunter Engineering and Allis-Chalmers Canada Ltd. supplied gearboxes used to drive conveyor belts at Syncrude's tar sands operations in Northern Alberta. The gearboxes proved to be defective. At issue was a broad exclusion of warranty clause that limited time for suit and the level of recovery available against Allis-Chalmers (i.e. no recovery beyond the unit price of the defective products). Dickson C.J. observed: "In the face of the contractual provisions, Allis-Chalmers can only be found liable under the doctrine of fundamental breach" (p. 451).

106 This doctrine was largely the creation of Lord Denning in the 1950s (see, e.g., *Karsales* [page116] *(Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936 (C.A.)). It was said to be a rule of law that operated independently of the intention of the parties in circumstances where the defendant had so egregiously breached the contract as to deny the plaintiff substantially the whole of its benefit. In such a case, according to the doctrine, the innocent party was excused from further performance but the defendant could still be held liable for the consequences of its "fundamental" breach even if the parties had excluded liability by clear and express language. See generally S. M. Waddams, *The*

Law of Contracts (5th ed. 2005), at para. 478; J. D. McCamus, *The Law of Contracts* (2005), at pp. 765 *et seq.*

107 The five-judge *Hunter* Court was unanimous in the result and gave effect to the exclusion clause at issue. Dickson C.J. and Wilson J. both emphasized that there is nothing inherently unreasonable about exclusion clauses and that they should be applied unless there is a compelling reason not to give effect to the words selected by the parties. At that point, there was some divergence of opinion.

108 Dickson C.J. (La Forest J. concurring) observed that the doctrine of fundamental breach had "spawned a host of difficulties" (p. 460), the most obvious being the difficulty in determining whether a particular breach is fundamental. The doctrine obliged the parties to engage in "games of characterization" (p. 460) which distracted from the real question of what agreement the parties themselves intended. Accordingly, in his view, the doctrine should be "laid to rest". The situations in which the doctrine is invoked could be addressed more directly and effectively through the doctrine of "unconscionability", as assessed at the time the contract was made:

> It is preferable to interpret the terms of the contract, in an attempt to determine exactly what the parties agreed. If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, [page117] should the courts interfere with agreements the parties have freely concluded. [p. 462]

Dickson C.J. explained that "[t]he courts do not blindly enforce harsh or unconscionable bargains" (p. 462), but "there is much to be gained by addressing directly the protection of the weak from over-reaching by the strong, rather than relying on the artificial legal doctrine of 'fundamental breach'" (p. 462). To enforce an exclusion clause in such circumstances could tarnish the institutional integrity of the court. In that respect, it would be contrary to public policy. However, a *valid* exclusion clause would be enforced according to its terms.

109 Wilson J. (L'Heureux-Dubé J. concurring) disagreed. In her view, the courts retain some residual discretion to refuse to enforce exclusion clauses in cases of fundamental breach where the doctrine of *pre*-breach unconscionability (favoured by Dickson C.J.) did not apply. Importantly, she rejected the imposition of a general standard of reasonableness in the judicial scrutiny of exclusion clauses, affirming that "the courts ... are quite unsuited to assess the fairness or reasonableness of contractual provisions as the parties negotiated them" (p. 508). Wilson J. considered it more desirable to develop through the common law a *post*-breach analysis seeking a "balance between the obvious desirability of allowing the parties to make their own bargains ... and the obvious undesirability of having the courts used to enforce bargains in favour of parties who are totally repudiating such bargains themselves" (p. 510).

110 Wilson J. contemplated a two-stage test, in which the threshold step is the identification of a fundamental breach where "the foundation of the contract has been undermined, where the very thing bargained for has not been provided" (p. 500). Having found a fundamental breach to exist, the exclusion clause would *not* automatically be set [page118] aside, but the court should go on to assess whether, having regard to the circumstances of the breach, the party in fundamental breach should escape liability:

> Exclusion clauses do not automatically lose their validity in the event of a fundamental breach by virtue of some hard and fast rule of law. They should be given their natural and true construction so that the meaning and effect of the exclusion clause the parties agreed to at the time the contract was entered into is fully understood and appreciated. But, in my view, the court must still decide, having ascertained the parties' intention at the time the contract was made, whether or not to give effect to it in the context of subsequent events such as a fundamental breach committed by the party seeking its enforcement through the courts... . [T]he question essentially is: in the circumstances that have happened should the court lend its aid to A to hold B to this clause? [Emphasis added; pp. 510-11.]

111 Wilson J. reiterated that "as a general rule" courts should give effect to exclusion clauses *even in the case of fundamental breach* (p. 515). Nevertheless, a residual discretion to withhold enforcement exists:

> Lord Wilberforce [in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.)] may be right that parties of equal bargaining power should be left to live with their bargains regardless of subsequent events. I believe, however, that there is some virtue in a residual power residing in the court to withhold its assistance on policy grounds in appropriate circumstances. [Emphasis added; p. 517.]

Wilson J. made it clear that such circumstances of disentitlement would be rare. She acknowledged that an exclusion clause might well be accepted with open eyes by a party "very anxious to get" the contract (p. 509). However, Wilson J. did not elaborate further on what such circumstances might be because she found in *Hunter* itself that no reason existed to refuse the defendant Allis-Chalmers the benefit of the exclusion clause.

112 The fifth judge, McIntyre J., in a crisp two-paragraph judgment, agreed with the conclusion of [page119] Wilson J. in respect of the exclusion clause issue but found it "unnecessary to deal further with the concept of fundamental breach in this case" (p. 481).

113 The law was left in this seemingly bifurcated state until *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423. In that case, the Court breathed some life into the dying doctrine of fundamental breach while nevertheless affirming (once again) that whether or not a "fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law" (para. 52). In other words, the question was whether the parties *intended* at the time of contract formation that the exclusion or limitation clause would apply "in circumstances of contractual breach, whether fundamental or otherwise" (para. 63). The Court thus emphasized that what was important was not the label ("fundamental or otherwise") but the intent of the contracting parties when they made their bargain. "The only limitation placed upon enforcing the contract as written in the event of a fundamental breach", the Court in *Guarantee Co.* continued,

> would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or [note the disjunc-

> tive "or"] unfair, unreasonable or otherwise contrary to public policy, according to Wilson J. [Emphasis added; para. 52.]
>
> (See also para. 64.)

What has given rise to some concern is not the reference to "public policy", whose role in the enforcement of contracts has never been doubted, but to the more general ideas of "unfair" and "unreasonable", which seemingly confer on courts a very broad after-the-fact discretion.

114 The Court's subsequent observations in *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461, should be seen in that light. *Domtar* was a products liability case arising under the civil [page120] law of Quebec, but the Court observed with respect to the common law:

> Once the existence of a fundamental breach has been established, the court must still analyse the limitation of liability clause in light of the general rules of contract interpretation. If the words can reasonably be interpreted in only one way, it will not be open to the court, even on grounds of equity or reasonableness, to declare the clause to be unenforceable since this would amount to rewriting the contract negotiated by the parties. [Emphasis added; para. 84.]

While the *Domtar* Court continued to refer to "fundamental breach", it notably repudiated any judicial discretion to depart from the terms of a valid contact upon vague notions of "equity or reasonableness". It did not, however, express any doubt about the residual category mentioned in *Guarantee Co.*, namely a refusal to enforce an exclusion clause on the grounds of public policy.

115 I agree with Professor Waddams when he writes:

> [I]t is surely inevitable that a court must reserve the ultimate power to decide when the values favouring enforceability are outweighed by values that society holds to be more important. [para. 557]

116 While memorably described as an unruly horse, public policy is nevertheless fundamental to contract law, both to contractual formation and enforcement and (occasionally) to the court's relief *against* enforcement. As Duff C.J. observed:

> It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual.
>
> (*Re Millar Estate*, [1938] S.C.R. 1, at p. 4)

See generally B. Kain and D. T. Yoshida, "The Doctrine of Public Policy in Canadian Contract [page121] Law", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2007* (2007), 1.

117 As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised. Duff C.J. adopted the view that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (p. 7). While he was referring to public policy considerations pertaining to the nature of the *entire contract*, I accept that there may be well-accepted public policy considerations that relate directly to the nature of the *breach*, and thus trigger the court's narrow jurisdiction to give relief against an exclusion clause.

118 There are cases where the exercise of what Professor Waddams calls the "ultimate power" to refuse to enforce a contract may be justified, even in the commercial context. Freedom of contract, like any freedom, may be abused. Take the case of the milk supplier who adulterates its baby formula with a toxic compound to increase its profitability at the cost of sick or dead babies. In China, such people were shot. In Canada, should the courts give effect to a contractual clause excluding civil liability in such a situation? I do not think so. Then there are the people, also fortunately resident elsewhere, who recklessly sold toxic cooking oil to unsuspecting consumers, creating a public health crisis of enormous magnitude. Should the courts enforce an exclusion clause to eliminate contractual liability for the resulting losses in such circumstances? The answer is no, but the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse.

[page122]

119 A less extreme example in the commercial context is *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650. The Alberta Court of Appeal refused to enforce an exclusion clause where the defendant Dow knowingly supplied defective plastic resin to a customer who used it to fabricate natural gas pipelines. Instead of disclosing its prior knowledge of the defect to the buyer, Dow chose to try to protect itself by relying upon limitation of liability clauses in its sales contracts. After some years, the pipelines began to degrade, with considerable damage to property and risk to human health from leaks and explosions. The court concluded that "a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause" (para. 53). (See also McCamus, at p. 774, and Hall, at p. 243.) What was demonstrated in *Plas-Tex* was that the defendant Dow was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court. The public policy that favours freedom of contract was outweighed by the public policy that seeks to curb its abuse.

120 Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present

case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement.

[page123]

121 The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.

122 The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.

123 If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

IV. Application to the Facts of This Case

124 I proceed to deal with the issues in the sequence mentioned above.

A. *Did the Ministry Breach Contract A?*

125 The trial judge found that the parties intended to create contractual relations at the bidding stage (i.e. Contract A): 2006 BCSC 499, 53 B.C.L.R. (4th) 138, at para. 88. I agree with that conclusion. If there were no intent to form Contract A, there would be no need to exclude liability for compensation in the event of its breach.

126 The Ministry argued that Contract A was not breached. It was entitled to enter into Contract B [page124] with Brentwood and it did so. There was no privity between the Ministry and EAC. The Ministry would have had no direct claim against EAC in the event of deficient performance. I accept as correct that Brentwood, having obtained Contract B, was in a position of considerable flexibility as to how and with whom it carried out the work. Nevertheless, it was open to the trial judge to conclude, as she did, that the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. At the end of an unfair process, she found, Contract B was not awarded to Brentwood (the eligible bidder) but to what amounted to a joint venture consisting of Brentwood and EAC. I therefore proceed with the rest of the analysis on the basis that Contract A was breached.

B. *What Is the Proper Interpretation of the Exclusion of Compensation Clause and Did the Ministry's Conduct Fall Within Its Terms?*

127 It is at this stage that I part company with my colleague Cromwell J. The exclusion clause is contained in the RFP and provides as follows:

> **2.10**...
>
> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.

In my view, "participating in this RFP" began with "submitting a Proposal" for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon participated in it. Tercon's bid *was* considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (ineligible) instead of Brentwood itself (eligible) would, I believe, take the Court up the dead end identified by Wilson J. in *Hunter*:

> ... exclusion clauses, like all contractual provisions, should be given their natural and true construction. [page125] Great uncertainty and needless complications in the drafting of contracts will obviously result if courts give exclusion clauses strained and artificial interpretations in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause. [p. 509]

Professor McCamus expresses a similar thought:

> ... the law concerning exculpatory clauses is likely to be more rather than less predictable if the underlying concern is openly recognized, as it is in *Hunter*, rather than suppressed and achieved indirectly through the subterfuge of strained interpretation of such terms. [p. 778]

128 I accept the trial judge's view that the Ministry was at fault in its performance of the RFP, but the conclusion that the process thereby ceased to be the RFP process appears to me, with due respect to colleagues of a different view, to be a "strained and artificial interpretatio[n] in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause".

129 As a matter of interpretation, I agree with Donald J.A. speaking for the unanimous court below:

> The [trial] judge said the word "participating" was ambiguous. With deference, I do not find it so. The sense it conveys is the contractor's involvement in the RFP/contract A stage of the process. I fail to see how "participating" could bear any other meaning. [Emphasis added; para. 16.]

Accordingly, I conclude that on the face of it, the exclusion clause applies to the facts described in the evidence before us.

C. *Was the Claim Excluding Compensation Unconscionable at the Time Contract A Was Made?*

130 At this point, the focus turns to contract formation. Tercon advances two arguments: firstly, that it suffered from an inequality of bargaining power and secondly, (as mentioned) that the [page126] exclusion clause violates public policy as reflected in the *Transportation Act*.

(1) Unequal Bargaining Power

131 In *Hunter*, Dickson C.J. stated, at p. 462: "Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded." Applying that test to the case before him, he concluded:

> I have no doubt that unconscionability is not an issue in this case. Both Allis-Chalmers and Syncrude are large and commercially sophisticated companies. Both parties knew or should have known what they were doing and what they had bargained for when they entered into the contract. [p. 464]

While Tercon is not on the same level of power and authority as the Ministry, Tercon is a major contractor and is well able to look after itself in a commercial context. It need not bid if it doesn't like what is proposed. There was no relevant imbalance in bargaining power.

(2) Policy of the *Transportation Act*

132 As mentioned earlier, Tercon cites and relies upon the policy of the Act which undoubtedly favours the transparency and integrity of the bidding process. I have already discussed my reasons for rejecting Tercon's argument that this "policy" operates as a bar to the ability of the parties to agree on such commonplace commercial terms as in the circumstances they think appropriate. In addition, the exclusion clause is not as draconian as Tercon portrays it. Other remedies for breach of Contract A (specific performance or injunctive relief, for example) were available.

133 In this case, injunction relief *was* in fact a live possibility. Although Tercon was not briefed on the negotiations with other bidders, the trial judge found that Glenn Walsh, the owner of Tercon, "had seen representatives of EAC with Brentwood following [the Brentwood/EAC interviews with the [page127] Ministry and Bill Swain of Brentwood]", and when asked whether Tercon was going to sue, Walsh had said "no" without further comment. Had Tercon pushed for more information and sought an injunction (as a matter of private law, not public law), at that stage the exclusion clause would have had no application, but Tercon did not do so. This is not to say that estoppel or waiver applies. Nor is it to say that injunctive relief would be readily available in many bidding situations (although if an injunction had been sought here, the unavailability of the alternative remedy of monetary damages might have assisted Tercon). It is merely to say that the exclusion clause is partial, not exhaustive.

134 The Kincolith road project presented a serious construction challenge on a tight time frame and within a tight budget. Contract A did not involve a bid for a fixed price contract but for the right to negotiate the bid details once the winning proponent was selected. In such a fluid situation, *all* participants could expect difficulties in the contracting process. Members of the construction bar are nothing if not litigious. In the circumstances, the bidders might reasonably have accepted (however reluctantly) the Ministry's need for a bidding process that excluded compensation, and adjusted their

bids accordingly. The taxpayers of British Columbia were not prepared to pay the contractor's profit twice over -- once to Brentwood/EAC for actually building the road, and now to Tercon, even though in Tercon's case the "profit" would be gained without Tercon running the risks associated with the performance of Contract B. The Court should not be quick to declare such a clause, negotiated between savvy participants in the construction business, to be "contrary to the Act".

D. *Assuming the Validity of the Exclusion Clause at the Time the Contract Was Made, Is There Any Overriding Public Policy That Would Justify the Court's Refusal to Enforce It?*

135 If the exclusion clause is not invalid from the outset, I do not believe the Ministry's performance [page128] can be characterized as so aberrant as to forfeit the protection of the contractual exclusion clause on the basis of some overriding public policy. While there is a public interest in a fair and transparent tendering process, it cannot be ratcheted up to defeat the enforcement of Contract A in this case. There *was* an RFP process and Tercon participated in it.

136 Assertions of ineligible bidders and ineligible bids are the bread and butter of construction litigation. If a claim to defeat the exclusion clause succeeds here on the basis that the owner selected a joint venture consisting of an eligible bidder with an ineligible bidder, so also by a parity of reasoning should an exclusion clause be set aside if the owner accepted a bid ineligible on other grounds. There would be little room left for the exclusion clause to operate. A more sensible and realistic view is that the parties here expected, even if they didn't like it, that the exclusion of compensation clause would operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

137 While the Ministry's conduct was in breach of Contract A, that conduct was not so extreme as to engage some overriding and paramount public interest in curbing contractual abuse as in the *Plas-Tex* case. Brentwood was not an outsider to the RFP process. It was a legitimate competitor. All bidders knew that the road contract (i.e. Contract B) would not be performed by the proponent alone. The work required a large "team" of different trades and personnel to perform. The issue was whether EAC would be on the job as a major sub-contractor (to which Tercon could not have objected) or identified with Brentwood as a joint venture "proponent" with EAC. All bidders were made aware of a certain flexibility with respect to the composition of any proponent's "team". Section 2.8(b) of the RFP provided that if "a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed, ... the Ministry may [page129] request [further information and] ... reserves the right to disqualify that Proponent, and reject its Proposal". Equally, "[i]f a qualified Proponent is concerned that it has undergone a material change, the Proponent can, at its election, make a preliminary submission to the Ministry, in advance of the Closing Date, and before submitting a Proposal... . The Ministry will, within three working days of receipt of the preliminary submission give a written decision as to whether the Proponent is still qualified to submit a Proposal."

138 The RFP issued on January 15, 2001. The Ministry was informed by Brentwood of a "proposed material change to our team's structure" in respect of a joint venture with EAC by fax dated January 24, 2001. From the Ministry's perspective, the change was desirable. EAC was a bigger company, had greater expertise in rock drilling and blasting (a major part of the contract) and a stronger balance sheet. EAC was identified in Brentwood's amended proposal as a sub-contractor. In the end, the Ministry did not approve the January 14, 2001 request, presumably because it

doubted that a change in the "composition of the Proponent's team's members" could , according to the terms of the RFP, include a change in the Proponent itself.

139 The Ministry did obtain legal advice and did not proceed in defiance of it. On March 29, 2001, the Ministry noted in an internal e-mail that a Ministry lawyer (identified in the e-mail) had come to the conclusion that the joint venture was not an eligible proponent but advised that Contract B could lawfully be structured in a way so as to satisfy both Brentwood/EAC's concerns and avoid litigation from disappointed proponents.

140 I do not wish to understate the difference between EAC as a sub-contractor and EAC as a joint-venturer. Nor do I discount the trial judge's condemnation of the Ministry's lack of fairness [page130] and transparency in making a Contract B which on its face was at odds with what the trial judge found to be the true state of affairs. Tercon has legitimate reason to complain about the Ministry's conduct. I say only that based on the jurisprudence, the Ministry's misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

141 The construction industry in British Columbia is run by knowledgeable and sophisticated people who bid upon and enter government contracts with eyes wide open. No statute in British Columbia and no principle of the common law override their ability in this case to agree on a tendering process including a limitation or exclusion of remedies for breach of its rules. A contractor who does not think it is in its business interest to bid on the terms offered is free to decline to participate. As Donald J.A. pointed out, if enough contractors refuse to participate, the Ministry would be forced to change its approach. So long as contractors are willing to bid on such terms, I do not think it is the court's job to rescue them from the consequences of their decision to do so. Tercon's loss of anticipated profit is a paper loss. In my view, its claim is barred by the terms of the contract it agreed to.

V. Disposition

142 I would dismiss the appeal without costs.

Appeal allowed, McLACHLIN C.J. *and* BINNIE, ABELLA *and* ROTHSTEIN JJ. *dissenting.*

Solicitors:

Solicitors for the appellant: McLean & Armstrong, West Vancouver.

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

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Solicitor for the intervener: Attorney General of Ontario, Toronto.

TAB 8

Indexed as:

Landreville v. Boucherville (Town)

Lucien Landreville (Expropriated party), Appellant; and Town of Boucherville (Expropriating party), Respondent.

[1978] 2 S.C.R. 801

Supreme Court of Canada

1977: June 9 / 1978: February 7.

Present: Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Expropriation -- Contestation of the right to expropriate -- Bad faith of the expropriating party -- Burden of proof -- Code of Civil Procedure, art. 777.

Municipal law -- Validity of a by-law disputed by incidental arguments -- Statutory right of a municipality to expropriate -- Cities and Towns Act, R.S.Q. 1964, c. 193, ss. 411, 605.

Appellant is contesting the right to expropriate of respondent (the "Town"), which passed a by-law ordering the expropriation of his land for purposes of a municipal park and offering him an indemnity of one dollar. The land is a shale quarry covering forty arpents located approximately three miles from the centre of the Town of Boucherville. On December 7, 1965, the Town issued a permit for appellant to work this quarry but made it subject to a number of conditions, inter alia that the Town could take 10,000 tons of stone free of charge and that appellant would transfer the part of his lot that was used as a quarry to the Town for $1. The Town did in fact take the specified quantity of stone free of charge, but appellant refused to transfer his quarry. On March 1, 1966 the municipal council passed a resolution requiring appellant to sign the contract transferring the quarry to the Town. At the same time counsel for the Town were authorized to take the necessary measures to stop the quarrying of stone until appellant had signed the contract. On April 19, 1966 the municipal council adopted a by-law ordering that part of lot 167, namely appellant's land, be homologated for purposes of a park. On August 9, 1966 the municipal council passed a resolution ordering "that appropriate legal proceedings be taken regarding the operation of a quarry [belonging to appellant] ... and that if existing by-laws are insufficient for this purpose, a recommendation be made to this Council without delay". Finally, on December 6, 1966 the contested expropriation by-law was passed. The Superior Court judge concluded that the Town had expropriated appellant not for the

reason put forward but solely to prevent him from operating his quarry, and had thus acted in bad faith and abused its power: he found in favour of appellant and quashed the by-law. The Court of Appeal reversed the judgment on the ground that the expropriated party, on whom the burden of proof rested, had failed to establish fraud and flagrant injustice. Hence the appeal to this Court.

Held: The appeal should be allowed.

The trial judge made no error of law and drew no incorrect conclusions from the facts when he decided that the resolutions passed by the Town, and the content of these resolutions, showed clearly that the Town's bad faith was such as to be the equivalent of a fraud upon the party concerned. It may be added that while the resolutions and by-laws passed by the municipal council clearly condemn the Town, this condemnation is confirmed by the other circumstances. There is no legislation permitting the Town to make the issuing of a permit to operate the quarry conditional upon appellant's transferring his land to the Town. Since the wrongful and unjust conduct of the Town with regard to appellant prior to the adoption of the expropriation by-law had been proved, it was up to the Town to prove a subsequent change, which it did not do. On the contrary, in its efforts to acquire appellant's property for $1, the Town continued to act in bad faith since its valuation was clearly unfair and disregarded a recognized legal principle that the indemnity must be calculated on the basis of the value to the owner, not the value to the expropriating party. Appellant did not have to demonstrate that the Town did not intend to use the quarry as a park. Once the initial bad faith was proved, it vitiated and nullified the Town's actions regardless of the intentions that the Town may eventually have formed in order to attain its objectives. We are dealing with a cause of nullity that transcends the others and vitiates whatever it produces.

The argument that a municipal by-law can be nullified only by a petition to quash, as provided by s. 411 of the Cities and Towns Act, cannot be allowed. Section 411 creates an additional but not an exclusive remedy. It is also possible to dispute the validity of a municipal by-law on defence or by incidental arguments, such as the contestation of the right to expropriate in the case at bar. Finally, the Town's statutory right to expropriate under s. 605 of the Cities and Towns Act is not an absolute right. It may be contested, as in the case at bar, if the expropriating party commits abuses that vitiate the substance of its decisions.

Cases Cited

Kuchma v. Rural Municipality of Taché, [1945] S.C.R. 234; Lazarus Estates Ltd. v. Beasley, [1956] 1 Q.B. 702; Marquess of Clanricarde v. Congested Districts Board of Ireland (1915), 79 J.P. 481 (H. of L.); Duquet v. The Town of Sainte-Agathe-des-Monts, [1977] 2 S.C.R. 1132, applied; City of Sillery v. Sun Oil Co. and Royal Trust Co., [1964] S.C.R. 552; Cedar Rapids Manufacturing and Power Company v. Lacoste, [1914] A.C. 569; Fraser v. Fraserville, [1917] A.C. 187; The City of Montreal v. McAnulty Realty Co., [1923] S.C.R. 273; Attorney General of Quebec v. Hébert, [1967] S.C.R. 690; Place Versailles Inc. et al. v. Minister of Justice of Quebec, [1977] 2 S.C.R. 1118, referred to; Hamel v. Town of Asbestos, [1967] S.C.R. 534, distinguished.

APPEAL from a decision of the Court of Appeal of Quebec reversing a judgment of the Superior Court. Appeal allowed.

Viateur Bergeron, Q.C., and Richard Gaudreau, for the appellant.
Yvon Denault, for the respondent.

Solicitors for the appellant: Bergeron & Gaudreau, Hull, Quebec.
Solicitors for the respondent: Viau, Bélanger, Hébert, Mailloux, Paquet, Pinard & Denault, Montreal.

The judgment of the Court was delivered by

BEETZ J.:-- The issue is whether respondent committed an abuse of power in expropriating appellant's land. The case also raises both procedural and jurisdictional questions.

By-law No. 533 ordering expropriation of this land for purposes of a municipal park was adopted on December 6, 1966 by resolution No. 66-906 of the municipal council of the Town of Boucherville. The notice of expropriation estimated the value of the expropriated immovable (part of lot 167) at one dollar; this was the amount of the indemnity offered to the expropriated party by the expropriating party.

Lucien Landreville contested "the right to expropriate" under art. 777 C.C.P., pleading inter alia that:

> [TRANSLATION] Under the pretext of exercising a statutory right specifically granted to cities and towns under ss. 605 et seq. of the Cities and Towns Act, namely the right to expropriate for municipal purposes, the expropriating municipality in its notice of expropriation falsely and unlawfully alleged its desire to acquire the property of the expropriated party for purposes of a municipal park, when in fact it wished to acquire the said property not for municipal purposes but solely with the objective of putting an end to the operation of a quarry located on it, more specifically, a shale borrow pit ...

Lucien Landreville also pleaded that the Town:

> [TRANSLATION] falsely and in bad faith alleged the necessity of developing the said lot P-167 for purposes of a municipal park ...

He further pleaded that:

> [TRANSLATION] the expropriating municipality attempted unlawfully and in bad faith to camouflage its true intention, which is to put an end to the operation being carried out on lot P-167 ...

The Superior Court (Nolan J.) held that the expropriation was motivated by a reason other than the reason put forward: the sole aim of the Town was to prevent Lucien Landreville from operating his quarry. The Town had therefore acted in bad faith, treated Landreville unfairly and abused its power. Consequently, the trial judge found in favour of appellant, dismissed the notice of expropriation and quashed the resolution and the by-law ordering the expropriation.

The Court of Appeal (Tremblay C.J.A. and Casey and Turgeon JJ.A.) reversed the judgment of the Superior Court and dismissed Lucien Landreville's contestation. Turgeon J.A., with whom Tremblay C.J.A. concurred, held that:

> [TRANSLATION] the expropriated respondent, on whom the burden of proof rested, failed to establish the fraud and flagrant injustice alleged in his defence. The evidence of the engineer Gilles Chabot and the town planner Victor Lambert convinced me of this.

The Chief Justice and Turgeon J.A. took for granted, without deciding the point, that in its contestation the expropriated party could argue the nullity of the by-law ordering the expropriation. Casey J.A. paid more attention to this latter question, which does not appear to have been raised in Superior Court, but he agreed with the opinion of his colleagues on the main issue:

> The motivation of the Councillors or the suspicion that they do not intend to proceed with the work requires proof far stronger than that contained in this record.

The appeal, filed under the old s. 36 of the Supreme Court Act, asks this Court to set aside the decision of the Court of Appeal and restore the judgment of the Superior Court. (Affidavits attesting that the value of the matter in controversy exceeds ten thousand dollars were filed by appellant. The jurisdiction of this Court was not questioned.)

The evidence consisted mainly of resolutions and by-laws adopted by the Town. The remainder of the evidence included the testimony of Lucien Landreville, Victor Lambert, town planner and witness for Lucien Landreville, Gilles Chabot, engineer and witness for the Town, and Eugene McClish, Town clerk.

The facts are not disputed but the Court of Appeal and the Superior Court did not draw the same conclusions from them.

The land that the Town wished to expropriate is a shale quarry covering forty arpents (1,472,027 sq. ft.) located in an open field approximately three miles from the centre of the Town of Boucherville in the Parish of Sainte-Famille de Boucherville, which was annexed by the Town in 1963. At the time the expropriation was ordered the quarry was approximately twenty-five feet deep and covered forty per cent of the farm belonging to Lucien Landreville. Exploitation began in December 1965 when the owner transferred to contractors the right of quarrying the shale, at first for a one-year period and later for a ten-year period.

Believing he needed a permit, Lucien Landreville sent a written request to the municipal authorities on December 7, 1965, after he had transferred quarrying rights to the first contractor. At first, the Mayor, whom he went to see, told him that the matter was as good "as money in the bank". Later, however, at the Town Hall, the Town's engineer, Gilles Chabot, and the Mayor told him that the Town could not agree to issue him a permit unless he transferred the land to the Town once the quarrying was over. In the application for a permit, dated December 7, 1965, which was dictated to him, Lucien Landreville wrote "that in consideration of this application" he "would undertake" to transfer this part of his lot to the Town "for the sum of $1 plus other consideration and an access to the said land". (The offer was withdrawn on April 11, 1968.)

Pursuant to this application, a resolution of the municipal council dated December 16, 1965 authorized Lucien Landreville to lease part of his lot to Mégantic Construction Inc. for quarrying of the stone, but with a number of conditions, including the following: the excavation was limited to a depth of twenty feet; all excavation or quarrying of stone was to end on May 1, 1967; the earth removed was to be deposited at a place to be specified by the Town and to remain its property; the Town could take 10,000 tons of stone free of charge; Lucien Landreville was to transfer to the Town for $1, by means of a notarized contract, the part of his lot that was used as a quarry; a notary was chosen to prepare the contract, which the Mayor and the Secretary-Treasurer were empowered to sign.

The 10,000 tons of stone, valued at $0.85 a ton, were in fact used for municipal purposes free of charge, but Lucien Landreville did not agree to transfer his quarry to the Town.

On March 1, 1966 the municipal council passed a resolution refusing to grant Paul-Emile Lamontagne and Lucien Landreville permission to use lot 167 as a dump. The same resolution required Lucien Landreville to sign the contract transferring the quarry to the Town. Counsel for the Town were authorized to take the necessary measures to stop the quarrying of stone until Lucien Landreville had signed the contract. If he refused, they were to see that the quarrying was halted indefinitely and sue him for damages.

On March 15, 1966 a proposal was made to the municipal council that a land surveyor [TRANSLATION] "be authorized to prepare plans for the piece of land to be homologated on lot 167 belonging to Mr. Lucien Landreville". (The copy in the record does not mention, however, whether this proposal was adopted.)

On April 19, 1966 the municipal council adopted a by-law ordering that part of lot 167 be homologated for purposes of a park. (The record does not show whether the homologation was actually carried out.)

On August 9, 1966 the municipal council resolved [TRANSLATION] "that appropriate legal proceedings be taken regarding the operation of a quarry known as a borrow pit within our boundaries, namely on lot No. 167 of the official cadastre of the Parish of Ste-Famille, and that if existing by-laws are insufficient for this purpose, a recommendation be made to this Council without delay".

On December 6, 1966 the council adopted the [TRANSLATION] "by-law to provide for the acquisition by mutual consent or by expropriation of part of lot No. 167 of the official cadastre of the Parish of Ste-Famille de Boucherville, registration division of Chambly, for the sum of $1 for purposes of a municipal Park". Counsel for the Town were authorized to take the necessary measures to acquire the land by mutual consent or expropriation with prior taking of possession.

On January 17, 1967, the municipal council adopted construction and zoning by-laws Nos. 545 and 546, covering the entire area of the Town of Boucherville. According to these by-laws and the accompanying plan (D-5), Lucien Landreville's quarry is in a residential development zone. In the middle of this zone quite a large area is zoned as a park (P-48). This is a proposed regional park outlined on the plan by curved or elliptical lines, with the exception of a single rectangular projection. This rectangle represents Lucien Landreville's quarry, which the municipality said it wanted to add to the proposed park.

The notice of expropriation is dated February 21, 1967.

The following are the trial judge's reasons for his conclusions:

If this expropriation were being contested solely on the grounds that the City was wrong or unwise in deciding to add Petitioner's property to the park zone P-48 because of the alleged incongruity of adding to the said park zone 40 arpents of land used as a quarry, the whole superficies of which consists of a hole some 25 feet deep, the undersigned would have no hesitation in dismissing the Contestation as it is not the function of the Court to substitute its views for those of the municipal council.

For the same reason, the Court is of the opinion that the fact that the park P-48 may not be built for fifteen years or more (as was proven) should not be considered per se as a valid ground for invalidating the City's by-law decreeing the expropriation. Nor is it its function to pass judgment on the valuation of $1.00 placed on the Contestant's land in the certificate accompanying the Notice of Expropriation even though the municipal valuation for tax purposes was proven to be $100.00 per arpent.

The Court's decision has been reached on the evidence as a whole. Considered by themselves the complaints of Petitioner on the three points mentioned above are irrelevant. But considered together with the other actions of Petitioner they help to confirm Contestant's contention that Petitioner acted unjustly towards him in this matter.

The undersigned is satisfied from the proof which was adduced in this case that Petitioner had an ulterior motive in decreeing the expropriation of Contestant's land and that this motive was its determination to stop Contestant from exploiting his quarry.

The resolutions which were passed, and the contents of these resolutions, show clearly that Petitioner was determined to prevent Contestant from operating a quarry on his land unless he first deeded the land over to the City; and that when all other threats and manoeuvres failed it was decided to foil Contestant by expropriating his land. In fact, Petitioner was so anxious to teach Contestant a lesson that the by-law decreeing the expropriation of Contestant's land was passed more than a month before petitioner's land was added to the park zone P-48 by the Plan D-5.

In the opinion of the undersigned, Petitioner's bad faith is further evidenced by the fact that when this case was heard in March 1970, more than three years after Petitioner passed the by-law decreeing the expropriation of Contestant's land, Petitioner had taken no steps to expropriate any of the other lots forming part of the park zone P-48 except for one single lot on which a road was built as part of the network of roads in the Petitioner municipality and which the undersigned seriously doubts was in any way, other than accidentally, related to park zone P-48.

> The principle has been clearly laid down in many cases dealing with decisions reached by municipal corporations that the Courts must not interfere unless fraud is established or a violation of the law or an abuse of power, in either case so violent as to be the equivalent of a fraud upon the public or the parties concerned.
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> Corporation de la Ville de Dorval v. Sanguinet Automobile Ltée, [1960] Que. K.B. 706, Roy v. Corporation d'Aubert-Gallion, [1929] 46 Que. K.B. 15--Rivard, J. at pp. 29-30, Sula vs Cité de Duvernay, [1970] Que. K.B. 234.
>
> The undersigned believes this to be a case which falls within the principles laid down in the above cases.
>
> The undersigned therefore has no hesitation in finding that in passing By-law No. 533 on December 6, 1966 decreeing the expropriation of Contestant's property, Petitioner committed an abuse of power, a flagrant injustice equivalent to bad faith towards Contestant.

I find no error of law in the reasons of the trial judge and I cannot say that the conclusions he draws from the facts are manifestly incorrect.

I would, however, add the following reasons to those of the trial judge.

The burden of proof is a heavy one when it involves establishing the commission of an "abuse of power equivalent to fraud" and "resulting in a flagrant injustice": City of Sillery v. Sun Oil Co. and Royal Trust Co. [[1964] S.C.R. 552], at p. 557.

In the case at bar, however, the municipal council is clearly condemned by its own resolutions and by-laws, and this condemnation is confirmed by the other circumstances.

In the resolution of December 16, 1965, far from opposing the operation of a quarry on Lucien Landreville's farm because of existing or expected zoning or a proposed park, the municipal council indicated that it was prepared to allow this operation on the conditions mentioned above: that the earth removed, 10,000 tons of stone and above all the land itself be given to the Town. From the very beginning, therefore, the Town was trying to appropriate the quarry without paying for it.

There is explicit legislation enabling municipalities to require, as a condition precedent to the approval of a subdivision plan, that the owner convey to them free of charge a specified percentage of his land, to be used for parks or playgrounds; or to appropriate without indemnity in specific cases land to be used for streets or lanes or the land necessary for the first public road on a lot. For example, s. 429 of the Cities and Towns Act, R.S.Q. 1964, c. 193, as amended by L.Q. 1975, c. 66, s. 15--a provision subsequent to the facts at issue--states that the municipal council may make by-laws:

> (8) To require, as a condition precedent to the approval of a subdivision plan, whether it provides for streets or not, that the owner convey to the municipal corporation, for park or playground purposes, an area of land not exceeding ten per cent of the land comprised in the plan and situated at a place which, in the opinion of the council, is suitable for the establishment of parks or playgrounds;

> or to exact from the owner, instead of such area of land, the payment of a sum not exceeding ten per cent of the real value of the land comprised in the plan, notwithstanding the application of section 21 of the Real Estate Assessment Act (1971, chapter 50) ...

See also art. 392f(g) of the Municipal Code, ss. 610a, 610b, 610c and 1054 of the Charter of the City of Montreal, S.Q. 1959-60, c. 102, S.Q. 1960-61, c. 97, s. 30, S.Q. 1963, c. 70, s. 21, L.Q. 1969, c. 91, s. 6; s. 336(204) of the Charter of the City of Quebec, L.Q. 1976, c. 54, s. 15. Municipalities may not, however, extend this legislation by using permit-granting powers that they have or think they have to extort from an owner advantages such as those that the Town attempted to obtain from Lucien Landreville on December 16, 1965: such action by a municipality demonstrates bad faith and constitutes an abuse of power.

The Town repeated its conduct five and a half months later with its resolution of March 1, 1966. I am not thinking of its refusal to authorize use of lot 167 as a dump but of the notice to transfer title that was sent to Lucien Landreville with a threat of legal proceedings and prevention of further quarrying. The Town still had no objection in principle, however, to the operation of a quarry on this site provided that Lucien Landreville agreed to relinquish his property; and there was no mention of a park.

The threats became more specific with the resolution or proposal of March 15, 1966 authorizing a surveyor to make plans for homologation which necessarily suggests expropriation. There was still no mention of a park.

The park was mentioned for the first time in the resolution of April 19, 1966, ordering the homologation for purposes of a park of a site that, a month and a half earlier, the Town had been willing in principle to have used as a quarry.

Moreover, the resolution of August 9, 1966 must be interpreted in the light of the resolutions that preceded and followed it: the municipal council was in fact asking for suggestions of how it could attain the objectives that it had been pursuing unlawfully from the beginning.

Finally, there is by-law No. 533, dated December 6, 1966, ordering the expropriation of Lucien Landreville's quarry for purposes of a park. It is this by-law that must be considered, but not in isolation from the events that preceded and culminated in it. If implemented to the letter, this by-law would secure for the Town in substance the very thing it had been wrongfully seeking to obtain by its resolutions of December 16, 1965 and March 1, 1966, namely ownership of Lucien Landreville's land for the sum of $1. What begins and continues in abuse and bad faith remains vitiated to the end, unless there is evidence of a change in circumstances and attitudes that indicates the supervening of good faith. The resolutions leading up to the by-law of December 6, 1966 establish the initially wrongful and unjust conduct of the Town with regard to Lucien Landreville's property. From that moment on, in my view, it was up to the Town to prove a subsequent change. It did not do so.

The Court of Appeal relied on the testimony of Victor Lambert and Gilles Chabot, to which the trial judge did not refer specifically.

Victor Lambert is a town planner and witness for Lucien Landreville. The part of his testimony most favourable to the Town is the part in which he approves the creation of park zone P-48 by means of a by-law dated January 17, 1967. He also says, however, that he found the addition of

the rectangular area representing Lucien Landreville's quarry to be incongruous, and that he could not understand what priorities would lead the Town to acquire this land for a park ten or fifteen years before it was needed for this purpose. Taken as a whole, this testimony does not appear to me to strengthen the Town's position.

Gilles Chabot is the Town's engineer. He stated that the Town's planning board had been studying the construction and zoning by-law adopted on January 17, 1967 since 1962. Though he did not actually say so, he implied that the municipal council may have had this by-law in mind before its adoption. In his view, the Town was faced with a "fait accompli" in the form of the excavation of Lucien Landreville's quarry; it was better to fill in the excavation completely or partially and add it to what would later become a large regional park than to let it remain in an area that had just been designated residential. As for the nominal value of $1 offered to Lucien Landreville for his land, he explained that this was due to the fact that the Town's costs for filling in the excavation would be much greater than the value of the land.

This is the same Gilles Chabot, however, who, along with the Mayor, told Lucien Landreville in December 1965 that the Town would agree to let him operate his quarry provided that he transferred the ownership of it after the excavation was completed. How can this witness later speak of a "fait accompli" when he contributed to bringing it about? If the operation of a quarry on this site was not desirable in view of a proposed zoning by-law then under study, why, in so far as it believed it could do otherwise, did the Town allow the operation and even become involved in it?

The explanation of the nominal value of $1 offered to Lucien Landreville for his land is taken up again by the Town in its factum submitted to this Court. This explanation is unexpected, to say the least: the Town takes 10,000 tons of stone free of charge, thereby helping to transform the expropriated property into a hole, which the expropriated party is then charged for filling in by having the cost of this filling deducted from the expropriation indemnity. From the Town's point of view this hole was indeed a treasure-trove. In my view, the offer of $1 and the explanation seeking to justify it are based on a valuation that is clearly unfair, since it disregards the long-recognized legal principle that the indemnity must be calculated on the basis of the value to the owner, not the value to the expropriating party: Cedar Rapids Manufacturing and Power Company v. Lacoste [[1914] A.C. 569]; Fraser v. Fraserville [[1917] A.C. 187]; The City of Montreal v. McAnulty Realty Co. [[1923] S.C.R. 273], at pp. 278, 281, 282, 290, 297; Attorney General of Quebec v. Hébert [[1967] S.C.R. 690], at p. 695; Place Versailles Inc. et al. v. Minister of Justice of Quebec [[1977] 2 S.C.R. 1118], at pp. 1128, 1129. The Town's bad faith is therefore clear from the actual by-law ordering the expropriation, and not only from the preceding resolutions.

In addition, if Lucien Landreville had not contested the right to expropriate, the deposit of this one dollar, representing an indemnity calculated on the basis of a false principle, would have allowed the Town to obtain prior possession until such time as the Public Service Board determined the true value of a piece of land which, for municipal tax purposes, had already been assessed at $4,000. Furthermore, for the only other expropriation carried out within zone P-48, which took place in 1970 and involved a road, the Town borrowed $1,600 and did not require prior possession in its by-law.

Under these circumstances, it is not surprising that the trial judge, who saw and heard the witnesses and says that he based his conclusions on the evidence as a whole, did not find it necessary to refer specificalLy to the oral evidence.

In the Court of Appeal, Casey J.A. expressed the opinion that in order to succeed Lucien Landreville would have had to prove that the Town did not intend to use the quarry as a park. The key allegation in Lucien Landreville's case, however, is the bad faith of the Town. If bad faith is proved, as I believe it was, it vitiates and nullifies the Town's actions regardless of the intentions that the Town may eventually have formed in order to attain its objectives.

> The appellant here contends that the "by-law is not in the public interest" and further, that the council acted "in bad faith and through fraud and partiality". The authorities are clear that the onus of proving these allegations rests upon the applicant. They are equally clear that if the applicant succeeds in proving these allegations, the by-law is invalid.

Estey J., speaking for the majority of this Court in Kuchma v. Rural Municipality of Taché [[1945] S.C.R. 234], at p. 239.

Fraud, dishonesty, bad faith, extortion and bribery form a special category of causes of nullity, which transcends all others.

> Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever ...

Lord Denning in Lazarus Estates Ltd. v. Beasley [[1956] 1 Q.B. 702] at p. 712.

This was also the opinion of Lord Loreburn in Marquess of Clanricarde v. Congested Districts Board of Ireland [(1915), 79 J.P. 481 (H. of L.)]:

> There is only one point in the case, a short point, whether the Congested Districts Board could be restrained from using its compulsory power to acquire Lord Clanricarde's lands in county Galway. In form their proceedings were regular, but in substance, so the appellant contended, they were proceeding ultra vires. At first there was another contention that they were not proceeding bona fide, and it was explained that this conveyed no sort of reflection upon their honesty or good faith, but merely that there was some by-motive. I think it would be better to select some happier expression. I do not understand an honest dishonesty. ... fraud or dishonesty stands on a different footing. A court will always defeat that under any shape, and quite regardless of all form.

This brings me to the questions of procedure and jurisdiction.

The question of procedure was raised in the Court of Appeal by Casey J.A., who found merit in the argument that a municipal by-law could be nullified only by a petition to quash on the ground of illegality, a direct remedy provided for in s. 411 of the Cities and Towns Act, and not by incidental arguments or on defence, as in the case at bar, where Lucien Landreville is disputing the validity of the by-law ordering the expropriation by contesting the notice of expropriation.

Section 411 of the Cities and Towns Act creates an additional but not an exclusive remedy; it cannot have the effect of depriving a person of other remedies that would normally be available to him. In my view, it is also possible to dispute the validity of a municipal by-law on defence or by incidental arguments. This is the meaning of the rather long-standing line of authority for which this

Court demonstrated its preference in Duquet v. The Town of Ste-Agathe-des-Monts [[1977] 2 S.C.R. 1132].

The Superior Court could not dispose of Lucien Landreville's contestation without ruling on the validity of the resolution and the by-law ordering the expropriation. Having concluded that they were invalid, should the Court have limited itself in the order it made to dismissing the notice of expropriation, without explicitly quashing the resolution and the by-law as requested by the expropriated party? I think not. This would be nothing but formalism, since the resolution and by-law have no purpose other than the expropriation in question. In my view, Lucien Landreville could ask in defence that the resolution and the by-law ordering the expropriation be quashed.

Article 777 C.C.P. provides that:

> the party being expropriated can only contest the right to expropriate.

Article 1066e of the old Code of Civil Procedure provided that:

> No party being expropriated may file any plea against the notice save to contest the right of the expropriating party to have recourse to expropriation.

In Hamel v. Town of Asbestos [[1967] S.C.R. 534], this Court, which was called upon to apply art. 1066e, held (at p. 538):

> [TRANSLATION] in opposition to the notice, the expropriated party may argue that the expropriating party does not have the statutory right to resort to expropriation, but not that there were irregularities or illegalities in the procedure followed in exercising this right.

In the case at bar, however, the Town contends that the statutory right of the municipal council to expropriate for purposes of a park cannot be questioned in view of s. 605(c) of the Cities and Towns Act, which enables it to:

> expropriate any immoveable property, any part thereof or any servitude it may need for any municipal purpose.

Since the Town's statutory right to expropriate is indisputable, Lucien Landreville's defence would appear to contravene art. 777 C.C.P.

This submission by the Town goes beyond procedure and gets into jurisdiction. It cannot be retained, however, since it would enable a town to thwart any efforts to contest its expropriations by wording them in such a way as to give them an appearance of legality.

In Hamel (supra), appellant alleged that the municipality had committed procedural irregularities, and in particular that the by-law ordering the expropriation had been adopted by an illegally convened and improperly held meeting. He did not, however, contest the municipality's right to expropriate his immovable. He did not deny that in his case the expropriating party was entitled to resort to expropriation.

In the case at bar, although in general Lucien Landreville recognized the Town's authority to expropriate immovables, including his own, for municipal purposes, he contested its right to exercise this authority as it had done in the circumstances, by committing not procedural irregularities

but abuses that vitiated the substance of its decision. In so doing and in so far as he is concerned, Lucien Landreville is in my view contesting "the right to expropriate" in the sense in which this phrase from art. 777 C.C.P. must be understood.

The appeal should be allowed, the decision of the Court of Appeal set aside and the judgment of the Superior Court restored, with costs in this Court as in the Court of Appeal.

Appeal allowed with costs.

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

Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

SUPPLEMENTARY BRIEF OF AUTHORITIES OF ALLEN-VANGUARD CORPORATION

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